A PROSECUTOR'S GUIDE TO ETHICAL ARGUMENT[1]

William Woods
Assistant Head Deputy District Attorney
Training Division
(213) 974-2187
wwoods@da.lacounty.gov
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ETHICS QUESTIONS

If you have questions concerning ethical issues, Roberta Schwartz, of the Professionbal Responsibility Committee at (213) 974-5811. I can be reached at (213) 974-2187, until September 30, 2016.

The California State Bar's Ethics Hotline provides information concerning ethical issues. The service is open Monday through Friday from 9:00 a.m. to 5:00 p.m. The telephone number is 1-800-238-4427.

Introduction

According to a recent study, from 1997 to 2009, in approximately 4,000 criminal appeals in California, the defendant accused the prosecutor of committing misconduct. (Ridolfi & Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*[2] (2010), Northern California Innocence Project, Santa Clara University School of Law, p. 16.) Of those cases, in "about 3,000 [75%]," the appellate court, "explicitly

[1] This outline was initially prepared for the presentation, "Loose Lips Sink Ships, Careers and Convictions: A Prosecutor's Guide to Ethical Argument," presented at the Los Angeles County District Attorney Saturday Seminar held on January 11, 2012.

[2] The study's authors apparently decided to ignore the California Supreme Court's note in *People v. Hill* (1998) 17 Cal.4th 800, 823, footnote 1, which stated, "We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error."

found no prosecutorial misconduct." (*Ibid*.) As to the remaining 1,000, misconduct occurred, according to the appellate court, in 707, but only 159 were so serious as to warrant a reversal, a mistrial or the barring of evidence. (*Ibid*.) In 444 [63%] of the 707 cases, the error committed by the prosecutor was an improper opening statement or closing argument.[3] (*Id*. at p. 24.)

In the most recent update to the report, of those cases from Los Angeles County, 14 of the 18 (78%), the error committed by the deputy district attorney was in either their opening statement or closing argument. (*Preventable Error: 2011 Annual Report on Prosecutorial Misconduct in California*, Northern California Innocence Project, Santa Clara University School of Law, p. 10.)

WHY BE ETHICAL?

California State Bar Discipline

Appellate courts must notify the State Bar of any "modification or reversal of a judgment in a judicial proceeding...based in whole or in part on the

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[3] There is, of course, a dissenting view to the thought that jury's base their verdicts on what prosecutors tell them. Justice Lynn "Buck" Compton, a former Los Angeles County Chief Deputy District Attorney and recipient of the Silver Star for bravery during the D-Day invasion (Episode 2 of HBO's Band of Brothers), observed in *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727-728 (dis. opn. of Compton):

> I am a firm believer in the jury system and abhor what I perceive to be a tendency of the courts to treat jurors as persons lacking in intelligence or common sense. Anyone with any experience in the trial of criminal cases knows that jurors conscientiously perform their duties and are not prone to convict individuals of crime on the basis of flimsy evidence simply because of statements made by the prosecuting attorney. I submit that the supposed influence on jurors of statements of attorneys or newspaper publicity or the myriad of other things of which jurors are sought to be insulated exists more in the imagination of judges than in reality.

misconduct, incompetent representation, or willful misrepresentation of an attorney." (Bus. & Prof. Code, § 6086.7, subd. (a) (2).);

Attorneys also must self-report to the State Bar, "Reversal 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, § 6068, subd. (o) (7).)

The State Bar may discipline members by public or private reproval, or suspension from practice for up to three years. (Bus. & Prof. Code, § 6077.) The Supreme Court has an inherent authority to suspend or disbar any attorney. (Bus. & Prof. Code, § 6100.)

Reversal

The case in which the misconduct was committed can be reversed with possible irreparable harm. (See, *People v. Woods* (2006) 146 Cal.App.4th 106, 119 [former LADDA's case reversed for "multiple acts of prejudicial misconduct" during closing argument].)

Do not anticipate that the appellate court finding of harmless error will excuse the underlying ethical misconduct. (*People v. Ryner* (1985) 164 Cal.App.3d 1075, 1087, fn. 5 [finding prosecutorial error harmless, but reporting DDA for his "highly improper and extremely serious" misconduct]; see also, *People v. Bolton* (1979) 23 Cal.3d 208, 215 [[T]his court again "[warns] prosecutors that they cannot continue with impunity to engage in [improper] conduct thinking that appellate courts will save them by applying the harmless error rule."].)

Jury Instruction

The Supreme Court has suggested that trial courts counteract prosecutorial error in argument by telling the jury:

> "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 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."

(*People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 5.)

THE BEGINNING -- OPENING STATEMENTS

The purpose of a prosecutor's opening statement:

> [I]s to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. (Citation.) Nothing prevents the statement from being presented in a story-like manner that holds the attention of *lay jurors* and ties the facts and governing law together in an understandable way.

(*People v. Millwee* (1998) 18 Cal.4th 96, 137 (emphasis in original).)

Do's and Don'ts

Do talk about the evidence to be introduced at trial. (*People v. Ryner* (1985) 164 Cal. App. 3d 1075, 1085 ["It is not misconduct merely to postulate what the evidence would arguably prove."]; *People v. Cook* (2006) 39 Cal.4th 566, 606, [prosecutor did not seek to inflame passion in jury by "graphic descriptions of rampant drug dealing, drug use, and witness intimidation" because the prosecutor's opening argument did no more than outline what the evidence would, and did, show]; *People v. Frye* (1998) 18 Cal.4th 894, 974-975. [no error in describing victims as 'kind and trusting people'" as "a prosecutor is free to relate the People's theory of the case and to tie the law and evidence together for the jury in a comprehensible, story-like manner."]; *People v. Ramos* (1982) 30 Cal.3d 553, 574-575 [no error in opening statement where prosecutor said evidence would show defendants "premeditated and planned the execution of " two people, as it was DDA's "theory of the case" in terms of elements of the offense].)

Do not talk about what you cannot present as evidence during the trial. (*People v. Aragon* (1957) 154 Cal.App.2d 646, 654 [prosecutor erred when he implied that defendant failed a lie detector test]; *People v. Kerfoot*

(1960) 184 Cal.App.2d 622, 647 [prosecutor erred by referring to defendant's criminal record].)

Do not talk about what <u>you think</u> a witness might testify about. (*People v. Ryner* (1980) 110 Cal.App.3d 24, 36 [error where prosecutor speculated about witness's mental process, "Leo Rodriguez will come in, and [say] 'Yeah, I saw two people running,' he won't say it quite that positively. He will come in here screaming and kicking, probably unhappy about being here, probably not wanting to get involved."].)

What to Do If the Evidence Does Not Turn Out the Way You Thought It Would

Tell the trial court that things did not work out, and offer the defense an opportunity to call other witnesses. (*People v. Rhinehart* (1973) 9 Cal.3d 139, 154, overruled on other grounds in *People v. Bolton* (1979) 23 Cal.3d 208, 214.) [no error where prosecutor promised jury that witness would testify about incriminating statements, witness recanted and DDA outside presence of jury, explained change to trial court and offered defense an opportunity to call the other witness].)

Three Rules to Avoid Error During an Opening Statement

One treatise recommends "three rules to follow in avoiding misconduct in an opening statement:

1. Obtain pre-trial rulings on the admissibility of questionable evidence.
2. Have the court instruct the jury that statements of counsel are not evidence.
3. Tell the jury only what the admissible evidence will show."

(Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (1998) p. VIII-2.)

THE END -- CLOSING ARGUMENTS

You Can Be a Vigorous Advocate, With Limits

> It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." [Citation] "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets warranted by the evidence.'" [Citations]

(*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.)

> [A prosecutor] may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. U.S.* (1935) 295 U.S. 78, 88 [55 S.Ct. 629; 79 L.Ed. 1314].)

Be Vigorous -- But Your Intent May Not Matter

The California Supreme Court has held that a prosecutor's lack of bad faith is not a factor in determining whether an argument is improper. Instead, the appellate court measures the impact of the action against injury to the defendant's right to a fair trial. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

Defense Misconduct Does Not Excuse Yours

A prosecutor's error is not excused because the defense counsel, "'started it' with similar improprieties." (*People v. Bain* (1971) 5 Cal.3d 839, 849.)

Important: "The proper way for the prosecutor to correct misconduct by defense counsel is to object and have the trial judge reprimand the misbehavior and admonish the jury to disregard such remarks." (*People v. Bain, supra,* 5 Cal. 3d at p. 849.)

Do's and Don'ts

Griffin[4] Error

The Rule: "Under the rule in *Griffin*, error is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Talle* (1952) 111 Cal.App.2d 650, 661-663 [misconduct where prosecutor *called defendant as his first witness* and later argued that his refusal to take the stand supported DDA's claim that the defendant manufactured a defense].)

Do not argue that the evidence is "uncontradicted," if the only person who can contradict it is the defendant, who elected not to testify. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1229 [no error to label evidence "'unrefuted' or 'uncontradicted [,]'" if witnesses, other than defendant, could have contradicted it, but were not called to testify by defense].)

Do not argue that there has been no "denial" of the prosecutions case. (*People v. Vargas* (1973) 9 Cal.3d 470, 476 [only a defendant can deny he was crime scene, therefore, jury may interpret remark as commenting on right not to testify]; but compare, *People v. Bethea* (1971) 18 Cal.App.3d 930, 936 [DDA's comment "that there has been no explanation" to refute People's evidence was proper on "the state of the evidence"].)

Do not get cute with Griffin. In re Rodriguez (1981) 119 Cal.App.3d 457, 460 [conviction reversed where prosecutor argued: "Now, you can't stop and think, you can't say because he didn't testify he must be guilty, you can't do that. You can't hold that against him. And the Judge is going to instruct you to that effect, and it's something that can't enter into your deliberations at all. You can't say, gee, if I were guilty or not guilty, I would

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[4] In *Griffin v. California* (1965) 380 U.S. 609, 611 [14 L.Ed.2d 106, 85 S.Ct. 1229], a Los Angeles County DDA, after discussing the facts of the murder, told the jury:

> "These things [the defendant] has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. [The victim] is dead, she can't tell you her side of the story. The defendant won't."

have testified, I would have done this or that. It's against the law for you to do that."].)

Not *Griffin*: "It is well established, however, that the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses. (*People v. Medina* (1995) 11 Cal.4th 694, 755 [no error where prosecutor asked where defense evidence was to rebut testimony that defendant had gun].)

It is fair to comment on the defendant's failure to call witnesses.

> "But don't you think it's interesting that not one witness was called by two defendants? Not one. [¶] There's not one to say that they were somewhere else. There's not one to say that they weren't thinking about or didn't know about the commission of a robbery. Not one to testify about anything. Not one to say that Richard Leonard's a liar, not a witness as to anything." [] "These two men didn't put on a defense because they don't have one. I'm sure that's occurred to you. They don't have a defense. If they had a defense, you'd hear it. There isn't a defense, and you haven't heard a defense. [¶] They were entitled to their day in court . . . and they've had it. They've had their days in court."

(*People v. Mitcham* (1992) 1 Cal.4th 1027, 1050-1051 [fair comment on "defense's failure to call logically anticipated witnesses or the absence of evidence controverting the prosecution's evidence].)

It is fair to comment on the ability of the defendant to tailor his or her testimony after hearing all the other witnesses testify first.

> Prosecutor argued, "You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. [¶] That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? [¶] He's a smart man. I never said he was stupid . . . . He used everything to his advantage."

(*Portuondo v. Agard* (2000) 529 U.S. 61, 64-65 [120 S. Ct. 1119; 146 L. Ed. 2d 47].)

Doyle Error

The Rule: In *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91, 96 S.Ct. 2240], the Supreme Court held that it was improper, if a defendant invokes his or her *Miranda* rights, to comment on that fact. For example, *Doyle* was violated where prosecutor asked the *Mirandized* defendant, "Why didn't you tell this story to anybody when you got arrested?" (*Greer v. Miller* (1987) 483 U.S. 756, 759 [97 L.Ed.2d 618, 107 S.Ct. 3102].)

Doyle is not violated, if the defendant does not receive Miranda, and the prosecutor comments about the failure to explain his conduct to police. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842-1843, see also *Fletcher v. Weir* (1992) 455 U.S. 603, 607 [71 L.Ed.2d 490, 102 S.Ct. 1309 ["In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."].)

Vouching

The Rule:

- **"**A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to *evidence outside the record*."

- "Nor is a prosecutor permitted to place the *prestige of her office* behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation]"

- "However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are *based on the 'facts of [the] record* and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching. [Citation.]."

(*People v. Frye* (1998)18 Cal.4th 894, 971, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, emphasis added.)

Vouching: "Evidence outside the Record"

Improper: Prosecutor improperly vouched where a key piece of evidence was discovered by prosecutor and police. Officer testified to finding the evidence, the prosecutor did not. However prosecutor subsequently argued that the evidence was not planted and jury should find it to be the smoking gun revealing the defendant's guilt. (*U.S. v. Edwards* (9th Cir. 1998) 154 F.3d 915, 923, see also *People v. Belin* (2010) 2010 Cal.App.Unpub.LEXIS 2941[5] [prosecutor argued, based on his non-testifying brother's mathematical calculations that there was only "a 1 in 7,776 chance that five people would randomly select defendant's photograph" in photo spread].)

Improper: Prosecutor responding to defense argument that the "killings might be accounted for by [defendant's] use of cocaine [,]" responded, "'Those of you who have some medical knowledge know that cocaine is a downer, you get mellow on it. It's not like methedrine which stokes you up and causes you to do irrational acts. Cocaine is a downer. You don't go out and shoot people on cocaine. You make love; you're mellow.'" Besides being inaccurate it was not based on evidence at trial or a matter of common knowledge. (*People v. Bell* (1989) 49 Cal.3d 502, 538-539.)

Proper: No vouching when prosecutor asked jury "Why 'would [a witness] be making this stuff up?'", remark only asked juror's to "draw inferences based on the evidence." (*People v. Frye* (1998)18 Cal.4th 894, 972, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Proper: The Ninth Circuit cautioned that the use of the phrase "we know" in closing argument can be seen as improper vouching unless, "the prosecutor[] used the phrase 'we know' to marshal evidence actually admitted at trial and reasonable inferences from that evidence, not to vouch for witness veracity or suggest that evidence not produced would support a witness's statements." (*U.S. v. Younger* (9th Cir. 2005) 398 F.3d 1179, 1191.)

Officer's Experience: Prosecutor said that officers with 15, 20 and 22 years of experience would not "'jeopardize'" their "reputations by lying on

[5] California Rules of Court, rule 8.1115 (a), prohibits the citation or reliance on unpublished opinions.

the witness stand 'just to convict one defendant.'" This was not vouching because remarks were limited to "*facts of the record*," the number of years of experience and a reasonable inference drawn from that fact. (*People v. Anderson* (1990) 52 Cal.3d 453, emphasis in original.)

Prosecutor said his two ballistic experts "appeared honest, were (as their testimony indicated) public employees, had no reason to lie, were not being paid for testifying, and told the truth to the jury." Not vouching because prosecutor relied on facts in the record and inferences drawn from those facts. (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

> **Compare**: Former LADA DDA argued: "In a day of videotapes and people standing out with video cameras, do you honestly believe that out of 12 officers that went to that location that day they all sat down and got together and cooked up what they are going to say, that they all agreed as to what was going to go into the report, and they allowed that report to be filed with their names in it and their serial numbers in it? They are going to risk their careers and their livelihood for kilos of cocaine? For some heroin? Maybe for some stolen Maserati car parts? No. For five rocks of cocaine? That's what this comes down to, ladies and gentlemen. [the defendant] and his cocaine that he tossed that day. 12 officers, 12 individual careers, pensions, house notes, car notes.'"... [¶] "'... Bank accounts, children's tuition.'" ... [¶] "Are these 12 officers willing to risk those things for [the defendant] and his five rocks of cocaine?"
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> This was vouching as there was both no evidence as to what the non-testifying officers would have said, and that they placed their careers in jeopardy. (*People v. Woods* (2006) 146 Cal.App.4th 106, 114-115.)

Vouching: "Prestige of her Office"

Prosecutor reading of immunity agreement to jury, including provision that witness must testify truthfully, did not portray the DA as privy to undisclosed information about witness. (*People v. Frye* (1998)18 Cal.4th 894, 971, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Prosecutor improperly vouched where defendant contended murdered deputy sheriff was member of rogue officer organization, the Vikings.

Prosecutor countered argument by telling the jury, he was going to do something. "'[I]f I am worthy enough—I actually asked permission before doing this—I am going to become a Viking. [¶] You see what this is? It's just a pin. [¶] … [¶] A triangle and a Viking.'" He then affixed the pin to his suit coat, which the Supreme Court described as "literally 'becom[ing] a Viking" in front of the jury..." This was improper vouching as the prosecutor's words and actions assured the jury that the Vikings were not a rouge organization but, instead, one that he hoped he was "worthy" enough to join. (*People v. Fuiava* (2012) 53 Cal. 4th 622.)

Arguing Facts Outside of the Record
Testimony from Missing Witness

***Rule**: "[A] prosecutor may not go beyond the evidence in his argument to the jury. (Citation omitted) To do so may suggest the existence of 'facts' outside the record -- a suggestion that is hard for a defendant to challenge and hence is unfair." (People v. Benson* (1990) 52 Cal.3d 754, 794-795; see also, Rules of Professional Conduct, rule 5-200 (E)[an attorney, "Shall not assert personal knowledge of the facts at issue, except when testifying as a witness."].)

Improper: Prosecutor responding to defense argument about another officer who did not testify properly argued that defense could have called him as a witness if it really believed he had anything else to offer. (*People v. Hall* (2000) 82 Cal.App.4th 813, 816.) He then said, "You could have heard repetitive testimony from [the other non-testifying officer], basically telling you the same thing, that he was there and recovered the rock, and [the testifying officer] was there and present for it. And if there was anything to his testimony, you would have heard from the defense." (*Ibid.*) The last portion, corroborating the testifying officer was improper. (*Ibid*.)

Improper: It was improper for prosecutor to invite jury to speculate that because of certain court orders he could not disclose defendant's other convictions.[6] (*People v. Bolton* (1979) 23 Cal.3d 208, 212.)

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[6] The prosecutor argued:

> [The victim] was asked about something he did in 1968, and the Court will tell you and the Court has told you that it is for the limited purpose of showing that back in 1968, he threatened somebody [defense counsel had earlier impeached (the victim) by introducing prior felonies]. I objected to that, because I think it is unfair, because I can't do the same thing

Improper: Prosecutor committed misconduct when he argued to the jury the insulting derogatory words said by the gang defendant as he shot the victim. However, there was no evidence to support his argument as to what the defendant may have been saying. (*Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1113.)

See also: *People v. Gaines* (1997) 54 Cal.App.4th 821, 824, where DDA improperly argued that a friend of the defendant, who had been sitting in court, did not testify "because the defendant slipped and he told some untruths [,]" that the friend would have rebutted those statements.

Beware: During cross-examination the defendant claims to have told non-testifying officer exculpatory information. The prosecutor, in presence of jury, says she wants to call that officer in rebuttal, but she will not be available that day. At court's insistence DDA calls witness, and later, in front of jury, says the officer can be there in one hour. The court denies the request for the one hour delay. The prosecutor in argument tells the jury, "'Unfortunately, I was unable to get Officer Nunez here. She is on call, but an hour away. And the court is unwilling to spend your time here, especially when people need to get back to their jobs and I can understand that. So I am stuck, in a way, without being able to rebut the defendant's statements about what he supposedly told Officer Nunez." This was improper. (*People v. Salazar* (2004) 2004 Cal.App.Unpub. LEXIS 4431.[7])

Arguing Facts Outside of the Record
Personal Belief

(Continued)

> to the defendant, and there are certain rules of court that favor one side or the other, and I can't do that. [...] [¶]You people don't know whether or not [the victim] could be afraid of [the defendant]. You don't know, because that's just the way we do things here. For all you know, [the defendant] may be just as bad a guy as [the victim].

(*People v. Bolton, supra,* 23 Cal.3d at p. 212.)

[7] California Rules of Court, rule 8.1115 (a), prohibits the citation or reliance on unpublished opinions.

Rule: *"Nor may a prosecutor express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial"* (*People v. Bain* (1971) 5 Cal.3d 839, 848.)

Improper: Prosecutor erred when he told jury that "he personally believed the defendant not to be innocent." *People v. Bain, supra,* 5 Cal.3d at p. 848.) He also told the jury that he would never have signed the complaint if he believed the defendant was not guilty. (*Ibid*.) He also argued, that, as an African-American, he understood African-American men, like the defendant. (*Id*. at pp. 848-849.)

Improper: Prosecutor improperly placed prestige of his office behind his "automotive expert witness, Russ Butler," when he said, "I submit I would hire Russ Butler to work on my car rather than Forrest Folck [the defendant's expert]. Russ is experienced." (*U.S. v. Flores* (9th Cir. 2015) 802 F.3d 1028, 1040.)

Proper: No error where prosecutor described "the murders 'as senseless and cold-blooded as murders come'..." (*People v. Frye* (1998) 18 Cal.4th 894, 1018., overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) This was because prosecutor may "interject her own view if it is based on facts of record." (*Ibid*.) Nothing showed the statement was based on the personal experience of the prosecutor in other murder cases. (*Ibid*.)

> **By contrast see:** *People v. Bandhauer* (1967) 66 Cal.2d 524, 529, where prosecutor told jury he was running for office and that, "'During the many many years that I have been prosecutor, I have seen some pretty depraved character [sic]. Usually they are kind of old because it takes a little while to become this depraved. But it has seldom been my misfortune to see a more deprave [sic] character than this one.'"

Proper: The prosecutor's use of the personal pronoun, "I" was not an improper statement of personal opinion, as it was her opinion based on the evidence that the aggravating factors outweighed the mitigating one's in determining whether death was the appropriate verdict.[8] (*People v. Frye, supra,* 18 Cal.4that pp. 1018-1019.)

[8] The prosecutor argued:

Attacking the Defense Attorney

Rule: "It is improper for the prosecutor to imply that defense counsel has fabricated evidence or to otherwise malign defense counsel's character" (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075.)

> **Improper:** Misconduct where prosecutor during counsel's argument *verbally responded during counsel's argument* to accusation that he had failed to show a motive for the murder, by saying there was no need to show a motive and, "defense counsel 'knows he's lying to this jury.'" (*People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Then, during his own argument DDA told jury that while he did not think defense counsel was deliberately trying to mislead them, he was not candid about what the law required, which "damaged his credibility..." (*Ibid*.)
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> **Improper: "**[P]rosecutor commented that defense counsel 'and I aren't any different in a couple of respects. I chose this side and he chose that side. My people are victims. His people are rapists, murderers, robbers, child molesters. He has to tell them what to say. He has to help them plan a defense. He does not want you to hear the truth.'" (*People v. Herring, supra,* 20 Cal.App.4th at p. 1073.)
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> **Improper:** Misconduct where prosecutor accused defense counsel of contributing to ruining the victim's life. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 705.)
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> **Improper:** Misconduct to refer to counsel's argument in another case. (*People v. Freeman* (1994) 8 Cal.4th 450, 518

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(Continued)

> "But if you find that the aggravating circumstances substantially outweigh the mitigating circumstances--*and I believe in this case they substantially outweigh* those circumstances--and if you believe the death penalty is what this case calls for, as I do, then I ask you to reflect that judgment in your verdict . . . ."

(*People v. Frye, supra,* 18 Cal.4th at pp. 1018-1019, emphasis added.)

["And then [defendant's attorney] turned to you and told you that [the death penalty] should be reserved for the worst possible people. He begged you for Fred Freeman's life. Yet in 1979, when he represented another guy who was one of the worst possible people, he begged for his life, too. He is just begging for the life of the client in this case."].)

Improper: Misconduct to argue that defense counsel believes his or her client is guilty. (*People v. Bell* (1989) 49 Cal.3d 502, 537.)

Improper: Misconduct to implicate defense attorney, without factual support, in manufacturing a defense. (*People v. Bain* (1971) 5 Cal.3rd 839, 845, 847 ["'You might say to yourself, "The defendant's got a good story."" Did you think he was going to come in here without a good story? He's had how long to prepare. . . . I don't want to imply that my colleague here, that he told him what to say, but he has the assistance of a lawyer.'"].)

Improper: Misconduct to read the following quotation about attorneys, "'You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody.'"[9] (*People v.*

[9] The same prosecutor also read the following quotations to the jury:

- "'[¶] 'Lawyers and painters can soon change white to black.' Danish Proverb."
- "[¶] 'If there were no bad people there would be no good lawyers.' Charles Dickens."
- "[¶] 'There is no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth.' Jean Giraudoux, 1935."
- "Shakespeare: 'In law, what plea so tainted and corrupt but being seasoned with a gracious voice, obscures the show of evil.'

(*People v. Gionis, supra,* 9 Cal.4th at p. 1216.) The Supreme Court found that the reading of these quotations was not misconduct because they "simply pointed out that attorneys are schooled in the art of persuasion; they did not improperly imply that defense counsel was lying." (*Ibid;* see also, *People v. O'Farrell* (1958) 161 Cal.App.2d 13, 19 [prosecutor improperly argued, "For a reasonable fee, [the defense] will give you a

Gionis (1995) 9 Cal.4th 1196, 1216.) It is also improper to quote Justice White's dissent in *United States v. Wade* (1967) 388 U.S. 218, 256-258 [18 L.Ed.2d 1149, 87 S.Ct. 1926.[10] (*People v. Hawthorne* (1992) 4 Cal.4th 43, 59.)

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'reasonable doubt.'"]; *People v. McCracken* (1952) 39 Cal.2d 336, 348 [prosecutor improperly argued, "What some people won't do for a fee!"; *People v. Podwys* (1935) 6 Cal.App.2d 71, 73 [prosecutor improperly called defense counsel, "a clown."].)

[10] Justice White's quotation follows:

> "'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. [¶] To this extent, our so-called adversary system is not adversary at all, nor should it be. [¶] But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but we also insist that he defend his client whether he is innocent or guilty. [¶] The State has the obligation to present the evidence. Defense counsel need present nothing. Even if he knows what the truth is. He need not furnish any witness to the police or reveal any confidences of his client or furnish any other information to help the prosecution's case. [¶] If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or undecisive, that would be his normal course. [¶] Our interest in not convicting the innocent permits counsel to put the State's case in the worse possible light regardless of what he thinks or knows to be the truth. [¶] Undoubtedly, there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. [¶] In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little if any relation to the search for truth.'"

Not Improper: "'To observe that an experienced defense counsel will attempt to "twist" and "poke" at the prosecution's case does not amount to a personal attack on counsel's integrity.[11]'" (*People v. Medina* (1995) 11 Cal.4th 694, 759.)

See also: *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor's comments, that a "'heavy, heavy smokescreen has been laid down [by the defense] to hide the truth from you,'" constituted a proper argument in response to the defense presented]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 [prosecutor's argument accusing the defense of attempting to hide the truth, and his argument employing an "ink from an octopus" metaphor, understood as nothing more than urging the jury not to be misled by the evidence].

Attacking Defense Expert

Rule: *It is not wrong to attack defense expert testimony as long as the criticism is based on in the record.* (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1254.)

Prosecutor's derogatorily calling defense expert's brain mapping device, "'The Marvel Machine[,]'" was proper argument. As the criticism was based on his own expert's testimony regarding the defense's use of the machine. (*People v. Musselwhite, supra,* 17 Cal.4th at p. 1254.)

Do Argue Reasonable Inferences from the Evidence

Rule: *Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial.* (*People v. Lucas* (1995) 12 Cal.4th 415, 473.)

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(Continued)

(*People v. Hawthorne*, supra, 4 Cal.4th 43, 59, fn. 8)

[11] Prosecutor had said, "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something ….'" (*Ibid*.)

No error where prosecutor argued that other than the two victim's and the defendant, no one else's blood was found at the murder scene. (*Id*. at p. 474.)

Beware: **"**Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823.)

Sandbagging

Never reserve the bulk of your argument for rebuttal, so that the defense cannot respond. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 505 [opening argument was "a perfunctory (three and one-half reporter transcript pages)" and rebuttal "designed to preclude effective defense reply"..." was "10 times longer (35 reporter transcript pages)."].)

Calling Juror's By Name or Speaking Directly to Them during Argument or Quoting Their Voir Dire

The practice of addressing juror's by their individual names is improper. (*People v. Wein* (1958) 50 Cal.2d 383 overruled on other grounds in *People v. Daniels* (1969) 71 Cal.2d 1119, 1140.) Prosecutor committed error where he addressed a question to each of 12 jurors during his closing argument. (*People v. Johnson* (2016) 2016 Cal. LEXIS 43; see also *People v. Sawyer* (1967) 256 Cal.App.2d 66, 78 ["Addressing arguments to individual jurors as 'sir' or 'ma'am' was improper…"].) It is also error to quote an individual juror from their voir dire or juror questionnaires during argument. (*People v. Freeman* (1994) 8 Cal.4th 450, 517-518; see also *People v. Riggs* (2000) 44 Cal.4th 248, 325-326 [error to post chart quoting jurors questionnaire responses].)

Commenting on Witness's with Privileges Not to Testify

Rule: *It is improper to comment on either a defendant's or a witness's assertion of his or her 5th Amendment right to remain silent.* (*People v. Padilla* (1995) 11 Cal.4th 891, 948.)

But see: No error where prosecutor commented on defendant's failure to call former co-defendants to support his testimony. (*People v. Ford* (1988) 45 Cal.3d 431, 435-436.) As, "a witness who has not exercised his privilege against

self-incrimination is not an 'unavailable'" witness. Absent a stipulation that the witness would validly assert the privilege comment is permissible. (*Ibid*.)

But see: A defendant's spouse does not have a *privilege not to testify for the defendant*, and the defendant has no privilege to prevent his spouse from testifying for or against him. (Evid. Code, §§ 911, 970, 971.) Comment on a wife's *failure to testify for her defendant-husband* does not, therefore, constitute comment on the exercise of a privilege that defendant has (see Evid. Code, § 913) or on his failure to call a witness that he cannot compel to testify on his behalf. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1167.)

However: **"**The prosecution may not comment upon a defendant's failure to call a witness if the defendant has a privilege to bar disclosure of that witness's testimony. (Evid. Code, § 913; see *People v. Wilkes* (1955) 44 Cal.2d 679, 687 [...] [marital privilege]; *People v. Lathrom* (1961) 192 Cal.App.2d 216, 222 [...] [attorney-client privilege].)" **(***People v. Bittaker* (1989) 48 Cal.3d 1046, 1104.) The Supreme Court explained the difference between this situation and that in *Ford*, as "In [*Ford*] the *witness had a privilege not to testify.* The majority held that since the witness had not actually asserted that privilege, the prosecutor could comment on the defendant's failure to call the witness. [In *Bittaker*] it is the defendant who has a privilege not to call the witness." (*Ibid*.)

Commenting on Non-Testifying Defendant's In Court Demeanor

Rule: *"[P]rosecutorial references to a nontestifying 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."* (*People v. Heishman* (1988) 45 Cal.3d 147, 197.)

Compare: However, during penalty phase trial, where defendant has put his character in issue as a mitigating factor

such comments are permitted. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.)

Compare: Comment on a testifying defendant's demeanor is "clearly proper." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

See also: *It is improper to ask the jury to speculate that the defendant's courtroom behavior is evidence of his or her guilt.* (*People v. Garcia* (1984) 160 Cal.App.3d 82, 93 [improper comment where, after describing brutal crime, prosecutor told jury, "'Why? I can't explain the why of it no more than I can explain why two people could sit in a courtroom and hear [the victim] relate that horrendous experience, how close she came to death and sit here listening to that testimony and snicker and jeer and laugh about it.'"].)

Commenting on Defendant's Custody Status

It is improper to comment on a defendant's custody status. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1201 [Prosecutor erred when she argued, "'One of the things that is extremely deceiving in this courtroom is the defendant's appearance throughout this trial. You see a person sitting in the defendant's chair, *you know he's in custody*, he's rotated possibly you noticed the same couple of shirts and ties, there's a certain amount of empathy. You look at the defense table and the defendant has been sitting there looking like a pitiful excuse for a human being.'"].)

Commenting on Defendant's Failure to Call Character Witnesses

Rule: "W]here the defendant in a criminal proceeding has not put his reputation in issue that it is improper for the prosecuting attorney to argue or infer therefrom that the character of the defendant is not good or argue that the state cannot introduce evidence of bad character until the defendant has introduced evidence of good character." (*People v. Harris* (1926) 80 Cal. App. 328, 334.)

Using an Uncertified Reporter's Transcript

It is improper to quote or use an uncertified reporter's transcript. (Code of Civ. Proc., § 273, subd. (b) ["The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when prepared as a rough draft transcript, shall not be certified and cannot be

used, cited, distributed, or transcribed as the official certified transcript of the proceedings."].)

Appeals to Passions and Prejudices

It is improper to appeal to a jury's passions and prejudices. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

> **Improper:** Prosecutor erred when he said, "'Suppose instead of being Vickie Melander's kid this had happened to one of your children.'" (*Ibid*.) The remark was wrong, but harmless, where prosecutor responded to defense contention that no eye witness saw the crime, "'if the law required an eyewitness in every case, almost all murderers who kill the witnesses "are going to go free."'" He also "asked the jury to 'do the right thing, to do justice, not for our society, necessarily or exclusively, but for Craig Martin, an 18 year-old boy who was just working at a gas station one night.'" (*People v. Medina* (1995) 11 Cal.4th 694, 759.)
>
> **Improper:** Misconduct to tell jury that a not guilty verdict would be equal to forgiving the defendant(s) of their crimes. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 702.)
>
> **Improper:** Misconduct to ask jury "to take [the defendant] off the streets." (*People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.)
>
> **Improper:** Prosecutor argued, "'You have to walk in [the victim's] shoes. You have to literally relive in your mind's eye and in your feelings what [the victim] experienced the night he was murdered. You have to do that. You have to do that in order to get a sense of what he went through." Pursuing this theme she asked the jury to feel, what the victim felt, as he was choked to death. "'We all on one occasion or another have experienced the sense of what it's like to be suffocated to a lesser degree, maybe when we've swallowed some water or beverage and it's gone down the wrong way. [] There's nothing more terrifying than a feeling of not being able to breathe. You're totally trapped. Trapped in darkness

without the ability to breathe [.]'"[12] (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1198-1; see also *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1112-1113 [prosecutor committed misconduct where he asked jurors to consider the "'subjective experience'" of the victim at the time of his murder].)

Improper: Prosecutor responding to duress defense regarding drug smuggling improperly argued: "[W]hy don't we send a memo to all drug traffickers, to all persons south of the border and in Imperial County and in California—why not our nation while we're at it. Send a memo to them and say dear drug traffickers, when you hire someone to drive a load, tell them that they were forced to do it. Because even if they don't say it [to government investigators], they'll get away with it if they just say their family was threatened. Because they don't trust Mexican police, and they don't think that the U.S. authorities can help them. Why don't we do that?" (*United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1256.)

Improper: In, *Trillo v. Biter* (9th Cir. 2014) 754 F.3d 1085, 1090, "the prosecutor described `reasonable doubt' as `something that makes you comfortable with your decision today,' so that each member of the jury could `go explain to it to your neighbor next day, conversation, explain the decision.' The prosecutor used this theme to revisit the facts of the case in full. The prosecutor then suggested that each of the members of the jury would explain to his or her neighbor `gosh, we got the instructions about reasonable doubt, and we walked him. Your neighbor's going to be, you did what? And you're going to be very uncomfortable.'" The court found this to be an appeal to convict the defendant to protect the neighborhood from harm.[13]

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[12] This prosecutor's remarks are what has been called a "Golden Rule" argument, one that improperly urges jurors to put themselves in the victim's place. Such arguments have been universally condemned, because they ask jurors to abandon their neutrality and make a decision based on vindicating a wrong rather than on the evidence.

[13] It is interesting to note that "the California Court of Appeal interpreted the prosecutor's statement to mean that the jurors `should convict because it

Beware: An unpublished opinion found error where a prosecutor pointed to gang members in the courtroom audience and "asked the jurors if they were nervous in the presence of these men who would kill anyone who testified against them. (*People v. Garcia* (2005) Cal.App.Unpub. LEXIS 8902, 18.) [14]

Names May Never Hurt Me

Rule: *Argument may be vigorous and may include opprobrious epithets reasonably warranted by the evidence.* (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

The following is a list of name-calling, *based on the evidence*, which were not improper:

> ["C]ontract killer," a "snake in the jungle," "slick," "tricky," a "pathological liar," and "one of the greatest liars in the history of Fresno County." (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1030.)
>
> "[A] person who is a devotee of Marquis de Sade, a practitioner of sadism" (*People Thornton* (1966) 11 Cal.3d 738, 763, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12.)
>
> "[P]rofessional robber" (*People v. Mitchell* (1966) 63 Cal.2d 805, 809.)
>
> "[C]op-killers" (*People v. Ketchel* (1963) 59 Cal.2d 503, 540.)
>
> "[A]nimal" and one of the most "vicious gunmen and killers." (*People v. Terry* (1962) 57 Cal.2d 538, 561-562.)

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was not reasonable under the evidence to acquit.' Construing the statement in this light, the California Court of Appeal held that it was acceptable prosecutorial commentary." (*Trillo v. Biter*, *supra*, 754 F.3d at p. 1090.)

[14] California Rules of Court, rule 8.1115 (a), prohibits the citation or reliance on unpublished opinions.

"[F]oul fiend from hell..." (*People v. Glaze* (1903) 139 Cal. 154, 159.)

"[M]ass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer" (*People v. Thomas* (1992) 2 Cal.4th 489, 537.)

"[M]other-killer" and "sneaky" mother-killer" (*People v. Hardenbrook* (1957) 48 Cal.2d 345, 352.)

Beware: A prosecutor crossed the line when he argued that the defendant was a "primal man," and told the jury that the defendant "is 'like a parasite . . . never works . . . stays at people's homes . . . [d]rives people's cars . . . steals from his own parents to get anything . . . won't work for it'..." These remarks had nothing to do with the charges against the defendant and, therefore, were improper. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074-1075,)

Reading Books to the Jury

Rule: *"[T]he reading from printed accounts is not a practice to be permitted, and this negative rule of action is applicable to papercovered reprints and clippings from newspapers as well as to handsomely bound volumes."* (*People v. Polite* (1965) 236 Cal.App.2d 85, 92.)

But See: Prosecutor did not commit misconduct where he read a passage from a book expressing the view that the murder victim is often forgotten at trial.[15] (*People v. Hines*

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[15] "This was the passage read by the prosecutor: 'When one person kills another, there is immediate revulsion at the nature of the crime. But in a time so short as to seem indecent, to the members of the personal family, the dead person ceases to exist as an identifiable person. To those individuals in this community of good will and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate and that is always the criminal. The dead person ceases to be a part of everyday reality, ceases to exist. She is only a figure in a historic event. We inevitably turn away from the past toward the ongoing reality. And the ongoing reality is the criminal, trapped, anxious, desperate, belligerent. [He] usurps the compassion that justifiably belongs to his victim. He steals the victim's moral constituency along with her life.' The prosecutor did not identify the author or the title of the work in which the

(1997) 15 Cal.4th 997, 1063.) There is no indication if the prosecutor merely read from a piece of paper or actually held the book as he recited the quote to the jury.

Sunday Morning -- Bible in the Courtroom

Rule: *Courts have "generally condemned invocations to a different or higher law than that found in the California Penal Code."* (*People v. Freeman* (1994) 8 Cal.4th 450, 515.*) It is improper to argue that religious authority supports the death penalty.* (*Ibid*.)

Improper: In *People v. Hill* (1998) 17 Cal.4th 800, 836, including footnote 6, the prosecutor argued about the Biblical admonition that "Vengeance is mine sayeth the Lord" and "an eye for an eye, a tooth for a tooth[,]" the ancient doctrine of *lex talionis*, retributive justice based on Mosaic law. The court admonished concerning such arguments, "*We cannot emphasize too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct."* (*Ibid*., emphasis added.)

Improper: Prosecutor erred in child sexual assault case, where he told jury that voting not guilty "would be at odds with Christ and would be condoning the type of behavior the Bible condemns." (*People v. Pitts, supra,* 223 Cal.App.3d at p. 702.)

Improper: Prosecutor committed misconduct where he paraphrased Romans 13: 1-5, commonly thought to justify the death penalty.[16] (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 775.)

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quotation appeared." [The quote is from Gaylin, *The Killing of Bonnie Garland: A Question of Justice* (1995).] (*People v. Hines, supra,* 15 Cal.4th 997 at p. 1063, fn. 17.)

[16] The prosecutor told the jury:

> that God sanctioned the death penalty for people like [the defendant] who were evil and have defied the authority of the State. He explained that by sentencing [the defendant] to death, the jury would be "doing what God says." The

Note: "There is nothing wrong, per se, with quoting from the Bible in closing argument..." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 701.) The error is in asking jury to apply a "higher authority" in their decision making process. (*Ibid*.)

Defining Reasonable Doubt

Rule: *It is improper to trivialize the reasonable doubt standard by equating it with every day decisions such as changing lanes on the freeway or even the decision who to marry, given divorce rates.*[17] (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.)

Beware: It is improper to quantify the reasonable doubt standard through the use of PowerPoint slides or charts that use a puzzle with missing pieces.

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> prosecutor added that imposing the death penalty and destroying [the defendant's] mortal body might be the only way to save [the defendant's] eternal soul.

(*Sandoval v. Calderon, supra*, 241 F.3d at p. 776.)

[17] Prosecutor told jurors:

> 'The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It's a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes.
>
> 'So it's a standard that you apply in your life. It's a very high standard. And read that instruction, too. I won't paraphrase it because it's a very difficult instruction, but it's not an unattainable standard. It's the standard in every single criminal case.'

(*People v. Nguyen, supra,* 40 Cal.App.4th at p. 35, see also, *People v. Johnson* (2004) 115 Cal.App.4th 1171-1172 [judge during jury selection diminishes reasonable doubt equating it with daily decisions].)

(*People v. Centen* (2014) 60 Cal.4th 659, 662 [map of California with information omitted]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 [defendant's booking photo with pieces missing]; see also *People v. Otero* (2012) 210 Cal.App.4th 865, 870-872 [improper to use map of California with some errors (e.g. San Diego in Northern part of the state) as example of reasonable doubt].)

> **Improper:** Prosecutor lowered burden of proof, where she argued, "'Well, what does not guilty mean? It means you didn't commit a crime.'" (*People v. Lloyd* (2015) 236 Cal. App.4th 49, 62.) The court observed that this was a common misconception, but "by arguing not guilty means the defendant is *innocent*, the prosecutor misstated the law, reducing the prosecution's burden of proof." (*Id*. at pp. 62-63, emphasis in original.) Not guilty instead means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. (*Id*. at p. 62.)

He's Not Innocent Anymore – Arguing Presumption of Innocence

A prosecutor "has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) This includes commenting about the presumption of innocence. (*People v. Panah* (2005) 35 Cal.4th 395, 463 [prosecutor's argument that the evidence had "stripped away" defendant's presumption of innocence was a proper comment on the evidence, not an incorrect statement of the innocence presumption]; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 190 [prosecutor's comment "[t]here is *no more presumption of innocence*[;] [d]efendant Goldberg ha[d] been proven guilty by the evidence" was proper comment on the evidence] However it was **improper** when prosecutor argued that "[t]he *presumption of innocence is over*[;] [defendant] has gotten his fair trial". This was both an incorrect statement of the law and distinguishable from the comments made in *Panah* and *Goldberg*. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1408.)

In *People v. Cowan* (2016) 2016 CALAPPLEXIS 409, the court strongly condemned the prosecutor's argument where she said, "'Let me tell you that presumption [of innocence] is over. Because that presumption is in place only when the charges are read. But you have now heard all the evidence. That presumption [of innocence] is gone.'" The court observed:

> The presumption of innocence is a fundamental component of a fair trial under our system of criminal justice. (Citation omitted.) *The presumption of innocence continues not only during the taking of testimony, but during the deliberations of the jury until they reach a verdict.* (Citation omitted.) [¶] To tell the jury that the presumption of innocence is gone prior to the jury's deliberations is egregious misconduct. It strikes at the very heart of our system of criminal justice. Even the most unseasoned prosecutor should know better than to make such an argument to the jury.

(*Ibid*., emphasis added.)

Never Argue Inconsistent Theories as to Co-defendants

Rule: "[T]*he People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for—and, where prejudicial, actually achieves—a false conviction or increased punishment on a false factual basis for one of the accuseds. 'The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth.'[Citation omitted.]"* (*In re Sakarias* (2005) 35 Cal.4th 140, 159-160.)

> **Improper:** Prosecutor argued at first co-defendant's murder trial, that he was the sole cause of a series of blows to the victim. At second trail for co-defendant # 2, the DDA argued that the fatal blows were inflicted solely by co-defendant #2. (*Id*. at p. 160.)

> **No Error**: Prosecutor argued at first trial for co-defendant #1 that he was the murderer, with co-defendant #2 acting as an aider and abettor. DDA made the same argument at the trial of co-defendant #2. (*People v. Richardson* (2008) 43 Cal.4th 959, 1015-1016.) The court emphasized that, "Variations in emphasis where...the underlying theory of the case was consistent at both trials, does not amount to inconsistent and irreconcilable theories." (*Id.* at p. 1017, see also *Haynes v. Cupp* (9th Cir. 1987) 827 F.2d 435, 439 ("variations in emphasis" not cause for reversal where "underlying theory of the case" is consistent); *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, 1271, fn. 32 (verdicts and judgments in two cases where prosecutor made varying arguments as to who fired

fatal shot "are not inconsistent" and did not entitle [the defendant] to relief from capital murder conviction because neither the guilt nor the punishment verdict depended on that fact).)

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Biography

William Woods
Assistant Head Deputy District Attorney

For 13 of my 30 years with the Los Angeles County District Attorney's office, I was assigned to the Appellate Division. During that time I was the counsel of record on 14 published opinions, including two in the California Supreme Court. I have also published articles for both the California District Attorney Association and the California State Bar Journal on such vastly entertaining topics as bail, ethics, *Wheeler/Batson* and the Public Records Act. I am the current author of Chapter 2, Professional

Responsibility, in Continuing Education of the Bar publication, *California Criminal Law Procedure and Practice (2016).*

From 2010 to 2013, I was one of twelve members of the California State Bar Standing Committee on Professional Responsibility and Conduct. Since 2005 I have been a member of LADA's Professional Responsibility Committee and have been its chair since 2011. I am currently the Assistant Head Deputy District Attorney of LADA's Training Division.

Prior to and during law school at Southwestern Law School in Los Angeles, I spent 10 years as a high school history teacher. Married for 42 years, I live in Los Angeles with my wife and teenage daughter.