

**An Appellate Defender's Guide to
Prosecutorial Misconduct**

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INTRODUCTION

This document is designed as a reference guide on prosecutorial misconduct in the California state courts, in particular for panel attorneys and other appellate defenders litigating claims of prosecutorial misconduct. The guide draws heavily from similar materials created by the other appellate projects, including Appellate Defenders, Inc.’s “Prosecutorial Misconduct Outline” (2018) and the Sixth District Appellate Program’s “Prosecutorial Misconduct Before and After Trial” and “Prosecutorial Misconduct in Argument” (2015).

For ease of reference, the guide uses full case citations throughout, except where a case is cited multiple times within the main text of a single subsection.

We plan to continually update the guide to improve its content and to stay abreast of new cases and other legal developments. If you have questions or suggestions about the guide, please contact us at info@fdap.org.

BASIC LEGAL STANDARD

I. Elevated Standard of Conduct Applicable to Prosecutors

“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 ... As the United States Supreme Court has explained, the prosecutor represents ‘a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” (*People v. Hill* (1998) 17 Cal.4th 800, 819-20, quoting *Berger v. United States* (1935) 295 U.S. 78, 88.)

See also:

- *In re Sakarias* (2005) 35 Cal.4th 140, 159 [“A criminal prosecutor’s function is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial. His or her goal must be not simply to obtain a conviction, but to obtain a fair conviction.”]
- *People v. Force* (2019) 39 Cal.App.5th 506, 508 [“[t]he prosecutor’s job is to provide [judges and juries] the platform for their decisions by presenting the evidence against the defendant clearly and fairly”]

- *People v. Arredondo* (2018) 21 Cal.App.5th 493, 505 “[a]s the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law”]
- *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378 [“The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial.”]
- *U.S. v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [“Prosecutors are subject to constraints and responsibilities that don’t apply to other lawyers ... While lawyers representing private parties may – indeed, must – do everything ethically permissible to advance their clients’ interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules.”]

II. State and Federal Constitutional Standards for Prosecutorial Misconduct

Both the state and the federal constitutions protect against misconduct by a prosecutor.

A. State Constitutional Standard

A prosecutor’s misconduct violates the state constitution where it “involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

B. Federal Constitutional Standard

A prosecutor’s misconduct violates the federal constitution where it “infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 92.) “In other words, the misconduct must be of sufficient significance to result in the denial of the defendant’s right to a fair trial.” (*Ibid.*; see also, e.g., *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

C. Showing of Bad Faith Not Required

Neither the state nor the federal constitutional standard requires a showing of bad faith on the part of the prosecutor. (See *People v. Centeno* (2014) 60 Cal.4th 659, 666-67; *People v. Hill* (1998) 17 Cal.4th 800, 822-23, 823 n.1.) In this way, “[t]he 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.” (*Centeno, supra*, 60 Cal.4th at 666-67, quoting *Hill, supra*, 17 Cal.4th at 823 n.1.)

See also:

- *People v. Force* (2019) 39 Cal.App.5th 506, 517 [finding prosecutorial misconduct even “[t]hough [the prosecutor] may have merely acted unwisely rather than with culpable intent”]
- *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362 [observing that prosecutorial misconduct may include misstatements made “inadvertent[ly] [or] negligent[ly] ... as well as misstatements involving mental states more culpable than negligence”].)
- *People v. Fusaro* (1971) 18 Cal.App.3d 877, 886 [even if prosecutor “did not [know what he was doing], his ignorance had no less potential for harm”]

Editor’s Note:

The above authorities raise the question of whether, in litigating a claim of prosecutorial misconduct, appellate counsel should instead use the term “prosecutorial error.”

Each approach has its pros and cons.

On the one hand, using the term “prosecutorial error” may marginally increase the chances of a favorable outcome by mitigating the risk of the claim being rejected due to a reluctance on the part of the court to find that the prosecutor acted in bad faith.

On the other hand, using the term “prosecutorial error” may marginally decrease the chances of a favorable outcome by implicitly minimizing the egregiousness of the prosecutor’s actions, especially in a case where the record strongly supports the conclusion that the prosecutor indeed acted in bad faith.

We consistently use the term “prosecutorial misconduct” in this guide. In doing so, we do not mean to take a categorical position on which term should be used in practice. Our advice is simply to consider this issue whenever litigating a claim of prosecutorial misconduct, and to make a deliberate choice about which term will best serve your client’s interests given the specific circumstances of the case.

D. Showing of “Clean Hands” Not Required

Neither the state nor the federal standard requires a showing of “clean hands” on the part of the defense. That is, “[a] prosecutor’s misconduct cannot be justified on the ground that defense counsel ‘started it’ with similar improprieties.” (*People v. Bain* (1971) 5 Cal.3d 839, 849.)

See also:

- *People v. Rodriguez* (2020) 9 Cal.5th 474, 484-85 “[i]mpermissible vouching ... does not become permissible simply because the speaker claims to be responding to something opposing counsel said”]
- *People v. Hill* (1998) 17 Cal.4th 800, 820 “[p]rosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve”]
- *People v. Bell* (1989) 49 Cal.3d 502, 539 “[e]ven if defense counsel’s remarks were improper based on the state of the evidence, they did not justify the prosecutor’s response”]
- *People v. Terry* (1962) 57 Cal.2d 538, 569 [“nor is it any justification for making argument of this character that it is in answer to argument made by counsel for the defense”]
- *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1150 [“the prosecution is not allowed to use improper tactics even in response to similar tactics by the defense”]

III. Special Standards Applicable to Certain Types of Prosecutorial Misconduct

Note that certain types of prosecutorial misconduct are governed by their own special standards, and may not even be commonly referred to as “prosecutorial misconduct” (despite involving misconduct by a prosecutor).

These include failing to disclose evidence (see, e.g., *Brady v. Maryland* (1963) 373 U.S. 83), selective/discriminatory prosecution (see, e.g., *United States v. Armstrong* (1996) 517 U.S. 456), vindictive prosecution (see, e.g., *Blackledge v. Perry* (1974) 417 U.S. 21), and using a peremptory challenge to dismiss a prospective juror based on their race or other protected characteristic (see, e.g., *Batson v. Kentucky* (1986) 476 U.S. 79).

IV. Other Authorities Governing Prosecutorial Misconduct

A. Ethical Rules

While ethical rules like the California Rules of Professional Conduct – and those promulgated by organizations like the American Bar Association (ABA), the National District Attorneys Association (NDAA), and the California District Attorneys Association (CDA) – are not binding on the courts, “courts have often recognized [that such rules] serve as a useful reference for evaluating the propriety of a prosecutor’s conduct.” (*People v. Force* (2019) 39 Cal.App.5th 506, 517 [citing cases].)

See also:

- *People v. Force* (2019) 39 Cal.App.5th 506, 508, 516-17 [relying on ABA, NDAA, and CDA ethical rules]
- *People v. Hill* (1998) 17 Cal.4th 800, 832 [relying on ABA ethical rules]
- *People v. Daggett* (1990) 225 Cal.App.3d 751, 759 [relying on ABA ethical rules]

B. Racial Justice Act

With the enactment of the Racial Justice Act (RJA) (Pen. Code, §§ 745, 1473, subd. (f)), various forms of racially discriminatory prosecutorial misconduct that were previously challengeable only under the framework of prosecutorial misconduct may now also be challenged under the RJA. (See, e.g., *People v. Arredondo* (2018) 21 Cal.App.5th 493 [prosecutor repeatedly referred to defendants and other alleged gang members as “cockroaches”]; *People v. Herring* (1993) 20 Cal.App.4th 1066 [prosecutor described defendant, who was biracial, as a “primal man in his most basic level”])

V. Appellate Review of Prosecutorial Misconduct

A. Standard of Review

A claim of prosecutorial misconduct is reviewed de novo. (See, e.g., *People v. Hubbard* (2020) 52 Cal.App.5th 555, 562.)

“When the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) “In conducting this inquiry, [the reviewing court] do[es] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

B. Prejudice

1. *Watson or Chapman*

The prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818 applies to prosecutorial misconduct that violates the state, but not the federal, constitution. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

The prejudice standard of *Chapman v. California* (1967) 386 U.S. 18 applies to prosecutorial misconduct that violates the federal constitution, either because the misconduct, due to its overall pervasiveness and/or egregiousness, amounts to a violation of the federal constitutional right to due process, or because the misconduct involves the violation of another federal constitutional right. (See *Bolton, supra*, 23 Cal.3d at 214, 214 n.4; *People v. Barajas* (1983) 145 Cal.App.3d 804, 810.)

Cases applying the *Chapman* standard to claims of prosecutorial misconduct include:

- *People v. Bolton* (1979) 23 Cal.3d 208 [prosecutor “twice hinted that, but for certain rules of evidence that shielded appellant, he could show that appellant was a man with a record of prior convictions or with a propensity for wrongful acts”; while declining to resolve whether *Chapman* standard applied, court noted that it “seem[ed] probable that the prosecutor’s [misconduct] was a violation ... of appellant’s Sixth Amendment right of confrontation”; found harmless under both *Watson* and *Chapman*]

- *People v. Force* (2019) 39 Cal.App.5th 506 [prosecutor indicated to trial counsel that defendant could be prosecuted for perjury if he testified; prosecutor violated defendant’s Sixth Amendment right to testify; found prejudicial under *Chapman*]
- *People v. Denard* (2015) 242 Cal.App.4th 1012 [prosecutor argued in rebuttal that defendant “d[id] not want to take responsibility for his actions” and “put it upon [his ex-wife] to testify [against him]”; argument violated defendant’s Fifth Amendment right to silence; found harmless under *Chapman*]
- *People v. Hall* (2000) 82 Cal.App.4th 813 [after defense counsel highlighted that prosecution called only one of two arresting officers to testify, prosecutor argued that second officer’s testimony would have been “repetitive”; argument violated defendant’s Sixth Amendment right to confrontation; found prejudicial under *Chapman*]
- *People v. Barajas* (1983) 145 Cal.App.3d 804 [prosecutor stated in opening that “uncooperative witness” would identify defendant as perpetrator, and witness then refused to answer prosecutor’s questions when called to testify; prosecutor’s actions violated defendant’s Sixth Amendment right to confrontation; found prejudicial under *Chapman*]
- *People v. Hudson* (1981) 126 Cal.App.3d 733 [“[w]hen all of th[e] [prosecutor’s acts of misconduct] are combined, there is no doubt that appellant was deprived of his right to a fair trial”]
- *People v. Mendoza* (1974) 37 Cal.App.3d 717 [“[w]e think the foregoing misstatements and irrelevancies may have erroneously prejudiced the jury against the defendant, and we are not persuaded beyond a reasonable doubt that the cumulative impact of these errors had no effect in bringing about the guilty verdict”]

2. Cumulative Prejudice

“[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of ... prejudicial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 844.)

Cases finding cumulative prejudice based on prosecutorial misconduct include:

- *Berger v. U.S.* (1935) 295 U.S. 78, 89 [“we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential”]
- *People v. Hill* (1998) 17 Cal.4th 800 [prosecutor’s misconduct, combined with several trial court errors, “created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors”]
- *People v. Hudson* (1981) 126 Cal.App.3d 733 [“[w]hen all of th[e] [prosecutor’s acts of misconduct] are combined, there is no doubt that appellant was deprived of his right to a fair trial”]
- *People v. Mendoza* (1974) 37 Cal.App.3d 717 [“[w]e think the foregoing misstatements and irrelevancies may have erroneously prejudiced the jury against the defendant, and we are not persuaded beyond a reasonable doubt that the cumulative impact of these errors had no effect in bringing about the guilty verdict”]

C. Cognizability

The general rule is that a claim of prosecutorial misconduct is preserved for appeal only where the defendant made a timely and specific objection and, if the objection was sustained, requested an admonition. (See, e.g., *People v. Potts* (2019) 6 Cal.5th 1012, 1035; *People v. Johnson* (2015) 61 Cal.4th 734, 781 n.15.)

The general rule does not apply where an objection “would have been futile,” or where an admonition “would not have cured the harm.” (*People v. Hill* (1998) 17 Cal.4th 800, 820-22, quotation marks omitted.)

An appellate court may also review a claim of prosecutorial misconduct, despite a failure to adequately preserve the issue, either as a matter of discretion, or under the framework of ineffective assistance of counsel (which, of course, requires a showing of deficient performance and prejudice under the standard of *Strickland v. Washington* (1984) 466 U.S. 668).

Cases reviewing claims of prosecutorial misconduct that were not adequately preserved include:

- *People v. Hill* (1998) 17 Cal.4th 800 [trial counsel objected to some but not all of prosecutor’s extensive misconduct; “any additional attempts [to object] would have been futile and counterproductive to [the] client”]
- *People v. Denard* (2015) 242 Cal.App.4th 1012 [prosecutor committed *Griffin* error; “[b]ecause the *Griffin* error implicates appellant’s ‘substantial rights’ in this case, we exercise our discretion to address the merits of his claim”]
- *People v. Sanchez* (2014) 228 Cal.App.4th 1517 [prosecutor committed *Griffin* error; “because a Fifth Amendment violation may affect [a] defendant’s ‘substantial rights,’ we will exercise discretion in this case to address the merits of the claim”]
- *People v. Anzalone* (2006) 141 Cal.App.4th 380 [prosecutor misstated the law regarding the elements of attempted murder; trial counsel provided ineffective assistance by failing to object]

SPECIFIC EXAMPLES OF PROSECUTORIAL MISCONDUCT

I. Prosecutorial Misconduct Before Trial

A. Selective/Discriminatory Prosecution

A prosecutor may not make a charging decision “based on an unjustifiable standard such as race, religion, or other arbitrary classification.” (*United States v. Armstrong* (1996) 517 U.S. 456, 464.)

B. Vindictive Prosecution

A prosecutor may not make a charging decision for the purpose of retaliating against the defendant for the exercise of a statutory or constitutional right (e.g., by moving for a new trial or appeal). (See *Blackledge v. Perry* (1974) 417 U.S. 21.)

Cases finding prosecutorial misconduct – or the possibility of prosecutorial misconduct – of this sort include:

- *Blackledge v. Perry* (1974) 417 U.S. 21
- *Twiggs v. Superior Court* (1983) 34 Cal.3d 360
- *People v. Puentes* (2010) 190 Cal.App.4th 1480

C. Obstructing/Intimidating Witnesses

A prosecutor may not:

- instruct a prosecution witness to not communicate with the defense. (See *Schindler v. Superior Court* (1958) 161 Cal.App.2d 513, 520-21; *Walker v. Superior Court* (1957) 155 Cal.App.2d 134, 139-40.)
- intimidate the defendant or a defense witness by threatening to prosecute them for any crimes they reveal or commit (e.g., perjury) in the course of their testimony. (See *People v. Force* (2019) 39 Cal.App.5th 506; *In re Martin* (1987) 44 Cal.3d 1, 30 [citing cases].)
- take other action “wholly unnecessary to the proper performance of [their] duties and of such a character as to transform a defense witness from a willing witness to one who would refuse to testify” (*In re Martin* (1987) 44 Cal.3d 1, 31; see also *People v. Force* (2019) 39 Cal.App.5th 506, 514 [prosecutors “are not allowed to engage in conduct that undermines the willingness of a defense witness to take the stand”].)

D. Failing to Disclose Evidence

A prosecutor may not fail to disclose evidence they are obligated to disclose. (See *Brady v. Maryland* (1963) 373 U.S. 83; *In re Jenkins* (Cal., Mar. 27, 2023, No. S267391) 2023 WL 2639727, ___ Cal.5th ___ .)

E. Fabricating Evidence

A prosecutor may not fabricate evidence. (See *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439 [prosecutor modified transcript of defendant’s police interrogation to add fabricated incriminating statements by defendant and provided transcript to defense counsel during plea negotiations; Court of Appeal affirmed trial court’s dismissal of case as sanction for “outrageous” and “conscience-shocking” misconduct]

II. Prosecutorial Misconduct in Jury Selection

A prosecutor may not:

- try to commit a prospective juror to vote in a particular way. (See *People v. Smith* (2003) 30 Cal.4th 581, 603 [stating in dicta that this would be misconduct].)
- use a peremptory challenge to dismiss a prospective juror based on their race or other protected characteristic. (See *Batson v. Kentucky* (1986) 476 U.S. 79.)
- make statements during jury selection that would constitute error if made during other portions of the trial. (See *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789, 808-15 [in pre-AEDPA habeas case, reversing for prosecutorial misconduct based on prosecutor’s “inflammatory, unsupported, and inaccurate” statements during jury selection and closing argument regarding likelihood that defendant would be paroled if death penalty were not imposed].)

III. Prosecutorial Misconduct in Opening Statement

A prosecutor may not refer to facts in opening statement that they know or should know they will not be able to prove. (See *People v. Dykes* (2009) 46 Cal.4th 731, 762.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Purvis* (1963) 60 Cal.2d 323 [prosecutor made unsupported statements in opening that defendant was previously “involved in a knifing” incident; found prejudicial]
- *People v. Barajas* (1983) 145 Cal.App.3d 804 [prosecutor stated in opening that “uncooperative witness” would identify defendant as perpetrator, and witness then refused to answer prosecutor’s questions when called to testify; found prejudicial]

IV. Prosecutorial Misconduct in the Presentation of Evidence

A. Presenting False Evidence

A prosecutor may not present false evidence, whether or not they know the evidence is false. (See *U.S. v. Young* (9th Cir. 1994) 17 F.3d 1201, 1203-04.)

As the Ninth Circuit has explained, “assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part on false

evidence, even false evidence presented in good faith, hardly comports with fundamental fairness.” (*Ibid.*)

Cases finding prosecutorial misconduct of this sort include:

- *Banks v. Dretke* (2004) 540 U.S. 668 [prosecution did not correct the record when two key prosecution witnesses testified falsely about their pretrial communications with law enforcement and the prosecution; petitioner was entitled to federal habeas relief]
- *United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1203-04 [testimony of one police officer at hearing on new trial motion indicated that another police officer had testified falsely at trial; conviction reversed]

B. Presenting Inadmissible Evidence

A prosecutor may not elicit testimony or otherwise present evidence they know or should know is inadmissible. (See *People v. Trinh* (2014) 59 Cal.4th 216, 248 [prosecutor may not “intentionally elicit inadmissible testimony”]; *People v. Chatman* (2006) 38 Cal.4th 344, 380 [prosecutor may not “s[EEK] to present evidence he kn[OWS] [i]s inadmissible”]; *People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Bonin* (1988) 46 Cal.3d 659, 689.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Daggett* (1990) 225 Cal.App.3d 751 [after expert witness inadvertently referred to wrong report and began describing accusations made against defendant by different victim in unrelated case, prosecutor, instead of “stopp[ing] [the witness] right there ... and call[ing] for a bench conference,” elicited details about accusations; prosecutor “had absolutely no excuse for asking [the witness] about [the accusations]”; found prejudicial in combination with other errors]
- *People v. Fusaro* (1971) 18 Cal.App.3d 877 [prosecutor twice asked question aimed at eliciting statement that was “intrinsicall[ly] prejudicial, addressed to an insignificant collateral topic, [and] devoid of foundational inquiry to ascertain the witness’s personal knowledge and thus inviting potential hearsay”; found harmless]

C. Unsubstantiated Questioning

A prosecutor may not ask a witness a question that implies or insinuates a fact harmful to a defendant unless the prosecutor either: (1) has a reasonable basis to anticipate an answer confirming the fact; or (2) is prepared to prove the fact by other means. (See *People v. Earp* (1999) 20 Cal.4th 826, 859-60; *People v. Price* (1991) 1 Cal.4th 324, 481.)

As the Ninth Circuit explained in a case where the prosecutor asked a defense witness an unsubstantiated question insinuating that the defendant had planned to commit other, uncharged crimes: “The danger [with such a question] is that the prosecution will use [it] to waft an unwarranted innuendo into the jury box, knowing that the witness’[s] denial will ... leav[e] uncontradicted the reference to the defendant’s prior bad conduct.” (*United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1463.)

Or, as the Eighth Circuit has explained: “This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation.” (*United States v. Beeks* (8th Cir. 2000) 224 F.3d 741, 748.)

Although a prosecutor’s unsubstantiated questioning generally does not result in the presentation of actual evidence, courts have repeatedly found such questioning prejudicial. For example:

- *People v. Wagner* (1975) 13 Cal.3d 612, 619-20 [observing that prosecutor’s unsubstantiated questioning “[by] [its] very nature ... suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question”]
- *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388 [where trial court previously “declared the good faith” of prosecutor in overruling defense objection, “it would have been natural for the jurors to believe that [the prosecutor] also acted in good faith in all of his other questioning and had reason to believe the existence of facts which his questioning suggested”]
- *United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1463 [because witness’s “denial would ... leave uncontroverted the insinuation that the defendant had planned” to commit other,

uncharged crimes, “[t]he prejudice to the defendant was ... created by the question itself rather than by the testimony given in response”]

- *United States v. Beeks* (8th Cir. 2000) 224 F.3d 741, 746 [“the negative response heightens the truth imputed in the asking of the question by the respected public official”]

Cases finding prosecutorial misconduct of this sort include all of those cited immediately above, as well as the following:

- *People v. Perez* (1962) 58 Cal.2d 229 [prosecutor asked defense witness whether he had prior felony conviction and whether he had been threatened in connection with his testimony; witness answered both questions in the negative, and prosecutor offered no evidence indicating otherwise; found prejudicial in combination with other errors]

Cases declining to find prosecutorial misconduct of this sort include:

- *People v. Hughes* (2002) 27 Cal.4th 287, 388 [record did not “lea[ve] [the court] with any substantial suspicion that the prosecutor lacked ... evidence [to support his questioning], or that he asked the questions in bad faith”]
- *People v. Mooc* (2001) 26 Cal.4th 1216, 1233-34 [record indicated that prosecutor “had a good faith belief that he could have produced a witness to provide a factual basis for the questioning”]
- *People v. Bittaker* (1989) 48 Cal.3d 1046, 1098 [record did not reveal whether or not prosecutor, “at the time he asked the question, intended to prove the fact at issue”]

D. Argumentative Questioning

A prosecutor may not ask a witness an argumentative question, i.e., a question directed not at eliciting admissible testimony, but at “talk[ing] past the witness” and “mak[ing] an argument to the jury.” (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) In other words, “[a]n argumentative question is a speech to the jury masquerading as a question.” (*Ibid.*)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Chatman* (2006) 38 Cal.4th 344 [after defendant stated that he did not know how safe at crime scene was opened, prosecutor asked

defendant, “Well, is the safe lying about you?”; question was argumentative, as “[a]sking whether the safe was ‘lying’ could add nothing to [defendant’s] testimony”; found harmless]

E. Presenting Evidence of Defendant’s Post-Arrest, Post-Miranda-Warnings Exercise of Their Right to Silence (Doyle Error)

A prosecutor may not present, either in their case-in-chief or in impeaching the defendant’s testimony, evidence of the defendant’s post-arrest, post-Miranda-warnings exercise of their right to silence. (See *Doyle v. Ohio* (1976) 426 U.S. 610.)

V. Prosecutorial Misconduct in Closing Argument

Because a prosecutor’s closing argument “comes from an official representative of the People,” the argument “carries great weight” and “is an especially critical period of trial.” (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.)

A. Vouching

The category of prosecutorial misconduct commonly referred to as “vouching” can be broken into three basic forms: (1) where the prosecutor suggests that information other than the evidence admitted at trial supports their argument; (2) where the prosecutor expresses a personal belief in the defendant’s guilt based on information other than the evidence admitted at trial; and (3) where the prosecutor invokes the prestige, experience, or reputation of themselves, their office, or their witnesses in support of their argument. (See *People v. Rodriguez* (2020) 9 Cal.5th 474, 480; *People v. Anderson* (2018) 5 Cal.5th 372, 415; *People v. Fuiava* (2012) 53 Cal.4th 622, 693-94.)

Editor’s Note:

While it can be analytically helpful to differentiate between the various forms of vouching in this way, the forms are overlapping, and in practice most instances of vouching are accurately characterized as fitting within more than one of them.

With any of the forms, the implicit message conveyed by the prosecutor to the jury is, in essence, “Trust me. I know more about this than you do.”

1. Suggesting That Information Other Than the Evidence Admitted at Trial Supports the Argument

A prosecutor may not suggest that information other than the evidence admitted at trial supports their argument; statements to this effect are “clearly misconduct.” (*People v. Hill* (1998) 17 Cal.4th 800, 828.)

This is because such statements effectively “make the prosecutor [their] own witness” and allow them to “offe[r] unsworn testimony not subject to cross-examination [or] the rules of evidence.” (*Ibid.*) While such statements are “worthless as a matter of law, [they] can be dynamite to the jury because of the special regard the jury has for the prosecutor.” (*Ibid.*)

Accordingly, such statements “are a highly prejudicial form of misconduct, and a frequent basis for reversal.” (*Ibid.*)

Note, however, that this rule does not prohibit a prosecutor from drawing on “matters of common human experience or well known laws of natural science” in arguing to the jury. (*People v. Rodriguez* (2020) 9 Cal.5th 474, 481-82.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Rodriguez* (2020) 9 Cal.5th 474 [prosecutor argued that officer witnesses would not lie because doing so would put their careers “on the line” or “at risk”; argument “conveyed that [the prosecutor] knew information about the discipline of law enforcement officers that was not known to the lay juror” and “invite[d] the jury to rely on the prestige of the government and its agents rather than the jury’s own evaluation of the evidence”; found prejudicial by Court of Appeal]
- *People v. Fuiava* (2012) 53 Cal.4th 622 [where key aspect of defense was that sheriff’s deputy killed by defendant belonged to group of rogue deputies called the “Vikings” who regularly assaulted suspected gang members, prosecutor stated that he was “going to become a Viking” and affixed a Viking pin to his lapel; prosecutor “essentially gave unsworn testimony that the Vikings were not a group of rogue deputies as the defense suggested, but were ... simply anyone who ... wore a Viking pin in solidarity with the deputies,” and “placed his own prestige and the prestige of his office behind the Vikings”; found forfeited]
- *People v. Tate* (2010) 49 Cal.4th 635 [prosecutor asked jury to consider size of revolver and used hands to demonstrate size, despite no evidence on subject having been presented; found harmless]

- *People v. Hill* (1998) 17 Cal.4th 800, 827-29 [prosecutor suggested without evidence that no similar crimes had been committed since defendant was arrested, implied that an expert would have testified favorably for prosecution had she called one, and suggested without evidence that someone who had same last name as defendant was related to him; found prejudicial in combination with other errors]
- *People v. Bell* (1989) 49 Cal.3d 502 [after defense counsel suggested that charged crimes could have been committed by third party while using cocaine, prosecutor argued that anyone with “medical knowledge” would “know that cocaine is a downer, you get mellow on it”; argument was inaccurate, misleading, and “went far beyond the speculative suggestion of defense counsel ... since the prosecutor purported to be stating a scientific fact”; found forfeited]
- *People v. Bolton* (1979) 23 Cal.3d 208 [prosecutor “twice hinted that, but for certain rules of evidence that shielded appellant, he could show that appellant was a man with a record of prior convictions or with a propensity for wrongful acts”; found harmless]
- *People v. Hall* (2000) 82 Cal.App.4th 813, 817-818 [after defense counsel highlighted that prosecution called only one of two arresting officers to testify, prosecutor argued that second officer’s testimony would have been “repetitive”; found prejudicial]

2. Expressing a Personal Belief in the Defendant’s Guilt Based on Information Other Than the Evidence Admitted at Trial

A prosecutor may not express a personal belief in the defendant’s guilt where there is a “substantial danger” that the jury will view the prosecutor’s statement as based on information other than the evidence admitted at trial. (*People v. Bain* (1971) 5 Cal.3d 839, 848; accord *People v. Thomas* (2011) 51 Cal.4th 449, 487.) “The danger is acute when the prosecutor offers his opinion and does not explicitly state that it is based solely on inferences from the evidence at trial.” (*Bain, supra*, 5 Cal.3d at 848; accord *People v. Lopez* (2008) 42 Cal.4th 960, 971.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Mendoza* (2007) 42 Cal.4th 686, 703-04 [prosecutor commented on witness’s testimony, “I’m an old war horse. I’ve been through a lot of these. That choked me up when I saw that testimony”;

comments “emphasized [the prosecutor’s] long experience as a basis for assessing [the witness’s] testimony” and “stated [the prosecutor’s] personal beliefs ... based on facts not in evidence”; found harmless]

- *People v. Bain* (1971) 5 Cal.3d 839 [prosecutor stated that he personally believed defendant to be guilty and, “in effect, asked the jury to give credence to his belief in defendant’s guilt ... because he, as a black man, ‘understood’ black defendants”; found prejudicial in combination with other errors]

- *People v. Alvarado* (2006) 141 Cal.App.4th 1577 [prosecutor stated, “I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred”; found prejudicial]

3. Invoking Prestige, Experience, Reputation

A prosecutor may not invoke the prestige, experience, or reputation of themselves, their office, or their witnesses in support of their argument.

Cases finding prosecutorial misconduct of this sort include:

- *People v. Rodriguez* (2020) 9 Cal.5th 474 [prosecutor argued that officer witnesses would not lie because doing so would put their careers “on the line” or “at risk”; argument “conveyed that [the prosecutor] knew information about the discipline of law enforcement officers that was not known to the lay juror” and “invite[d] the jury to rely on the prestige of the government and its agents rather than the jury’s own evaluation of the evidence”; found prejudicial by Court of Appeal]

- *People v. Fuiava* (2012) 53 Cal.4th 622 [where key aspect of defense was that sheriff’s deputy killed by defendant belonged to group of rogue deputies called the “Vikings” who regularly assaulted suspected gang members, prosecutor stated that he was “going to become a Viking” and affixed a Viking pin to his lapel; prosecutor “essentially gave unsworn testimony that the Vikings were not a group of rogue deputies as the defense suggested, but were ... simply anyone who ... wore a Viking pin in solidarity with the deputies,” and “placed his own prestige and the prestige of his office behind the Vikings”; found forfeited]

- *People v. Mendoza* (2007) 42 Cal.4th 686, 703-04 [prosecutor commented on witness’s testimony, “I’m an old war horse. I’ve been through a lot of these. That choked me up when I saw that testimony”;

comments “emphasized [the prosecutor’s] long experience as a basis for assessing [the witness’s] testimony” and “stated [the prosecutor’s] personal beliefs ... based on facts not in evidence”; found harmless]

B. Mischaracterizing the Evidence

“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.) “A prosecutor’s vigorous presentation of facts favorable to his or her side does not excuse either deliberate or mistaken misstatements of fact.” (*Ibid.*; accord *People v. Jackson* (2016) 1 Cal.5th 269, 349.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Hill* (1998) 17 Cal.4th 800 [prosecutor mischaracterized forensic analysis of blood found on alleged murder weapon, asked multiple questions in examining witnesses that conflated alleged murder weapon with another knife found at scene, and mischaracterized eyewitness’s statements regarding perpetrator’s height; each of the mischaracterizations resulted in an “unfair advantage” to prosecution by “gloss[ing] over an [unfavorable] inconsistency in the evidence” or otherwise “bolster[ing] a critical weakness” in prosecution’s case; found prejudicial in combination with other errors]
- *People v. Purvis* (1963) 60 Cal.2d 323 [prosecutor stated that psychiatric witnesses had testified that defendant actually formed deliberate and premeditated intent to kill, when witnesses had in fact testified only that defendant was capable of forming such intent; found forfeited]

C. Urging the Improper Use of Evidence

A prosecutor may not “urg[e] [the jury to use] evidence for a purpose other than the limited purpose for which it was admitted.” (*People v. Lang* (1989) 49 Cal.3d 991, 1022.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Lang* (1989) 49 Cal.3d 991 [referring to defendant’s statement that he would “waste any motherfucker that screws with me,” which was admitted for limited purpose of showing motive and

intent, prosecutor argued that defendant was “somewhat of a self-styled gangster” who “likes to think he’s a bad man, tough”; argument constituted an “improper use for character or disposition”; found harmless]

D. Making Statements or Suggesting Inferences That the Prosecutor Knows Are False or Misleading

A prosecutor may not make statements or suggest inferences that they know are false or misleading, even where those statements are consistent with the evidence admitted at trial. (See *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Castaneda-Prado* (2023) 94 Cal.App.5th 1260 [reversing for evidentiary error based on exclusion of evidence that child witness believed her testimony against defendant would help her mother obtain a visa, and observing that the claim could have been brought as one of prosecutorial misconduct; “[n]o matter how fervently the prosecutor here believed in [defendant’s] guilt ... , he had no business suggesting to the jury that the absence of a motive to lie was significant to the issue of veracity, when in fact he knew that there was such evidence, having vigorously and successfully fought to keep the jury from hearing it”]
- *People v. Zaheer* (2020) 54 Cal.App.5th 326 [at second trial following mistrial, defense counsel failed to introduce key exculpatory evidence that had been introduced at first trial; prosecutor “seized on the evidentiary gap that defense counsel left in his case” and argued a theory “she had every reason to doubt” in light of omitted exculpatory evidence; found prejudicial]
- *People v. Daggett* (1990) 225 Cal.App.3d 751 [after evidence that victim had been molested by individuals other than defendant was excluded, prosecutor argued in closing that victim must have learned about molestation from defendant; prosecutor “asked the jurors to draw an inference that they might not have drawn if they had heard the [excluded] evidence” and thus “unfairly took advantage of the judge’s ruling”; found prejudicial]

- *People v. Varona* (1983) 143 Cal.App.3d 566 [after evidence that victim had pled guilty to prostitution was excluded, prosecutor argued in closing that victim was not a prostitute; prosecutor “went beyond the bounds of any acceptable conduct” by “not only argu[ing] the lack of evidence where the defense was ready and willing to produce it, but [also] compound[ing] that tactic by ... arguing that the [victim] was not a prostitute although he had seen the official records and knew that he was arguing a falsehood”; found prejudicial]
- *United States v. Reyes* (9th Cir. 2009) 577 F.3d 1069 [where defendant was charged with backdating stock options and his defense was that he was relying on finance department’s expertise, prosecutor argued that no one in finance department was aware of backdating, despite knowing from related FBI and SEC investigations that multiple senior members of finance department were in fact aware of backdating; found prejudicial]
- *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962 [prosecutor argued that recordings of defendant’s phone conversations showed defendant “concocting an alibi” when recordings did not actually support this accusation; prosecutor improperly “ask[ed] the jury to infer one or more facts that he either knew to be false or, at least, could not have believed might be true, given that he had specific evidence indicating the contrary”; found prejudicial]

E. Misstating the Law

“It is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.” (*People v. Hill* (1998) 17 Cal.4th 800, 829; accord *People v. Doane* (2021) 66 Cal.App.5th 965, 976.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Centeno* (2014) 60 Cal.4th 659 [in addressing reasonable doubt standard, prosecutor displayed a diagram showing the geographical outline of California and argued that prosecution’s burden was satisfied if its theory was “reasonable” in light of evidence; prosecutor “unduly risked misleading the jury about the standard of proof”; found prejudicial]

- *People v. Hill* (1998) 17 Cal.4th 800 [prosecutor misrepresented circumstantial evidence instruction, incorrectly stated that “pretend[ing] to sell ... something in order to get money” constituted robbery, and improperly stated that “[t]here has to be some evidence on which to base a doubt,” thereby incorrectly suggesting that “defendant had the burden of producing evidence to demonstrate a reasonable doubt”; found prejudicial in combination with other errors]
- *People v. Doane* (2021) 66 Cal.App.5th 965 [prosecutor argued that circumstantial evidence instruction, CALCRIM No. 224, applied only where defendant “didn’t do anything wrong,” and not where there was evidence indicating “ordinary negligence” on the one hand and “gross negligence” on the other; prosecutor misstated the law, in that “‘innocence’ under CALCRIM No. 224 refers to being not guilty of the charged crime, not to being not guilty of the charged crime and any lesser included offenses”; found prejudicial in combination with other errors]
- *People v. Lloyd* (2015) 236 Cal.App.4th 49 [prosecutor argued, “If you find there is self-defense, you are saying [that] defendant’s conduct was absolutely acceptable,” and then argued in rebuttal, “And he talks about [how] voting not guilty is not saying that you condone his behavior. Well, what does not guilty mean? It means you didn’t commit a crime”; prosecutor’s arguments “played on a common misconception and misstated the law”; found prejudicial]
- *People v. Jasso* (2012) 211 Cal.App.4th 1354 [in arguing that defendant’s act of firing single shot at two people established intent to kill both people, prosecutor stated that California Supreme Court had endorsed same conclusion; prosecutor also described facts of Court of Appeal decision with similar facts and stated that evidence was found sufficient to support finding of intent to kill; prosecutor’s statements could have caused jurors to conclude that their “role [was] less significant than it [was],” and that the appellate courts “had already done [their] work and made [their] choice for [them]” and “would expect [them] to find defendant guilty”; found harmless]
- *People v. Mendoza* (1974) 37 Cal.App.3d 717 [prosecutor stated that “a child molestation case ... requires very little evidence”; found prejudicial in combination with other errors]

F. Inflaming the Passions or Prejudices of the Jury

A prosecutor may not make arguments that are “inflammatory and principally aimed at arousing the passion or prejudice of the jury.” (*People v. Farnam* (2002) 28 Cal.4th 107, 168; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 693, quotation marks omitted [prosecutor may not “make arguments to the jury that give it the impression that emotion may reign over reason,” or “present irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response”].)

A common form of this category of prosecutorial error is where a prosecutor makes an argument appealing to jurors’ sympathy for the victim, in particular by encouraging jurors to imagine themselves in the place of the victim or the victim’s family. (See, e.g., *People v. Vance* (2010) 188 Cal.App.4th 1182, 1192-93 [citing cases].)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Seumanu* (2015) 61 Cal.4th 1293 [prosecutor urged jury to view crime through eyes of victim by stating, e.g., “Imagine trying to save your own life, giving them the most you can give them, and you are being called a liar and having a gun pointed at you”; found harmless]
- *People v. Fuiava* (2012) 53 Cal.4th 622 [where defendant was charged with killing sheriff’s deputy, prosecutor had victim’s partner testify while wearing bloodstained uniform he wore the night of the shooting; prosecutor also elicited emotional testimony from victim’s partner and referred to this testimony in closing; prosecutor “engaged in inflammatory conduct that appealed to the passions of the jury”; found forfeited]
- *People v. Kipp* (2001) 26 Cal.4th 1100 [in discussing elements of murder, prosecutor urged jury to consider that “a human being was killed ... [a] living, breathing human being had all of that taken away”; argument improperly “invit[ed] the jury to reflect on all that the victim had lost through her death”; found harmless]
- *People v. Vance* (2010) 188 Cal.App.4th 1182 [prosecutor urged jury to view crime through eyes of victim by stating, e.g., “In order for you as jurors to do your job, you have to walk in [the victim’s] shoes. You have to literally relive in your mind’s eye and in your feelings what [he]

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”; found prejudicial in combination with other errors]

G. Urging Jurors to Convict to Alleviate a Social Problem

A prosecutor may not urge jurors to convict to alleviate a social problem, e.g., “to protect community values, preserve civil order, or deter future lawbreaking.” (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149.) The risk with such an argument “is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.” (*Ibid.*) “Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem.” (*Ibid.*)

Cases finding prosecutorial misconduct of this sort include:

- *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142 [prosecutor’s statements included that “convicting [the defendant] is gonna make you comfortable knowing there’s not convicted felons on the street with loaded handguns,” and that “finding this man guilty is gonna protect other individuals in this community”; found prejudicial in combination with other errors]
- *People v. Mendoza* (1974) 37 Cal.App.3d 717 [prosecutor urged jurors “to take [the defendant] off the streets”; found prejudicial in combination with other errors]

H. Urging Jurors to Convict Based on Religious Authority

A prosecutor may not urge jurors to convict based on religious authority. (See *People v. Hill* (1998) 17 Cal.4th 800, 836-37.) Such argument “tends to diminish the jury’s personal sense of responsibility for the verdict” and “carries the potential the jury will believe a higher law should be applied and ignore the trial court’s instructions.” (*Ibid.*)

I. Urging Jurors to Convict Based on the Perceived Adverse Consequences of Voting Not Guilty

A prosecutor may not urge jurors to convict based on the perceived adverse consequences of voting not guilty.

Cases finding prosecutorial misconduct of this sort include:

- *People v. Shazier* (2014) 60 Cal.4th 109 [prosecutor urged jurors to consider future discussions with friends and family about the case and argued that they “might have difficulty explaining” a defense verdict; “[b]ecause the specter of outside social pressure and community obloquy as improper influences on the jurors’ fairness and objectivity is so significant, we cannot countenance argumentative insinuations that jurors may confront such difficulties if they make the wrong decision”; found harmless]

- *People v. Sanchez* (2014) 228 Cal.App.4th 1517 [prosecutor argued that defense position was “about hope that one of you – and just one of you, that’s all they need – just one of you, will be gullible enough,” “naive enough,” and “hoodwinked” by defense arguments “[s]o that the defendant can go home and have a good laugh at your expense”; argument “created a risk that a juror would decide the case not based on the evidence or the law, but rather find defendant guilty to avoid being viewed as gullible, naïve, or hoodwinked”; argument also incorrectly suggested that in event of hung jury defendant would automatically “go home”; found harmless]

- *People v. Pitts* (1990) 223 Cal.App.3d 606 [at conclusion of months-long trial, prosecutor argued that hung jury would “wip[e] out six months, ... as though it never existed”; argument “planted in the jurors’ minds that anyone not voting for conviction would be nullifying a great deal of hard work and rendering vain the personal sacrifice of all”; found prejudicial in combination with other errors]

J. Addressing Jurors Individually

A prosecutor may not address jurors individually during closing argument, including by quoting statements made by individual jurors during jury selection. (See *People v. Johnson* (2016) 62 Cal.4th 600, 652.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Johnson* (2016) 62 Cal.4th 600 [prosecutor asked each juror, one by one, whether they were “indignant yet”; found forfeited]

- *People v. Riggs* (2008) 44 Cal.4th 248 [during penalty phase argument, prosecutor presented chart displaying enlarged copies of jury questionnaires in which then-prospective jurors made comments regarding purpose of death penalty; found harmless]

People v. Lima (2022) 80 Cal.App.5th 468 [in arguing that charged shooting was gang motivated, prosecutor referred to statements made by individual jurors during jury selection regarding personal experiences with gang violence; prosecutor “improperly argued facts not in evidence” and “improperly quoted individual jurors”; found harmless]

K. Commenting on Defendant’s Exercise of Their Right Not to Testify (*Griffin* Error)

A prosecutor may not comment, directly or indirectly, on the defendant’s exercise of their right not to testify. (See *Griffin v. California* (1965) 380 U.S. 609.)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Sanchez* (2014) 228 Cal.App.4th 1517 [prosecutor told jurors that defendant was “hiding from all of you,” and that they should “pull him out ... one last time”; “hiding” comment constituted misconduct, and “pull him out” comment “compounded” it; found harmless]
- *People v. Denard* (2015) 242 Cal.App.4th 1012 [prosecutor argued in rebuttal that defendant “d[id] not want to take responsibility for his actions” and “put it upon [his ex-wife] to testify [against him]”; prosecutor’s argument “represented nothing less than a bare assertion that [defendant], who knew the facts, had failed to come forward and ‘take responsibility’”; found harmless]

L. Commenting on Defendant’s Courtroom Demeanor While Off the Stand

A prosecutor may not comment on a defendant’s courtroom demeanor while off the stand, “unless such comment is simply that the jury should ignore [the] defendant’s demeanor.” (*People v. Boyette* (2002) 29 Cal.4th 381, 434.) Such comment is improper because it “infringes on the defendant’s right not to testify,” and because “[c]onsideration of the defendant’s behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character.” (*Ibid.*)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Boyette* (2002) 29 Cal.4th 381 [prosecutor advised jury to “[r]emember, appearances can be very deceiving and [the defendant has] been working on you ... , watching you come and go, smiling and

waving when he's introduced to you"; statement was "ambiguous" but was improper insofar as prosecutor was "suggesting that the jury should find defendant was duplicitous based on his courtroom demeanor"; found harmless]

- *People v. Vance* (2010) 188 Cal.App.4th 1182 [prosecutor argued that "[o]ne of the things that is extremely deceiving in this courtroom is the defendant's appearance throughout this trial," as "defendant has been sitting there looking like a pitiful excuse for a human being"; found prejudicial in combination with other errors]

M. Insulting Defendant

A prosecutor may not make insulting comments about the defendant, where the comments encourage the jury to make an improper inference. (See, e.g., *People v. Bloom* (1989) 48 Cal.3d 1194, 1213 ["prosecutors should refrain from comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence"].)

Cases finding prosecutorial misconduct of this sort include:

- *People v. Zarazua* (2022) 85 Cal.App.5th 639 [prosecutor repeatedly used male pronouns to refer to defendant who identified as female; while declining to resolve whether prosecutor's misgendering of defendant constituted misconduct, court noted that "[p]arties are to be treated with respect, courtesy, and dignity – including the use of preferred pronouns," and that failure to do so "offends the administration of justice, can inject prejudice into the proceedings, and can suggest a defendant is not credible"; found harmless]

- *People v. Arredondo* (2018) 21 Cal.App.5th 493 [prosecutor repeatedly referred to defendants and other alleged gang members as "cockroaches," so much so that "the epithet became, by virtue of both its repetition and its power, the major theme of the prosecutor's argument"; "[t]he clear message conveyed by the prosecutor's [comments] is that this group of individuals is not entitled to any individual consideration or justice, but must be viewed as a disgusting group which poses an ongoing threat to the entire community"; found prejudicial with respect to gang enhancements]

- *People v. Herring* (1993) 20 Cal.App.4th 1066 [prosecutor described defendant, who was biracial, as a "primal man in his most basic level" who was "like a dog in heat" and "thinks all I have to do is put a little

force on her”; prosecutor further described defendant as “parasite” who “never works,” “stays at people’s homes,” “[d]rives people’s cars,” and “steals from his own parents to get anything”; prosecutor’s “primal man” statements were, “at the very least, in bad taste,” while his “parasite” comments were “directed at [defendant’s] character [and] invited the jury to decide the case based upon its own value judgment and not on the law”; found prejudicial in combination with other errors]

N. Insulting Defense Counsel

A prosecutor may not “attac[k] the integrity of defense counsel” or otherwise “cas[t] aspersions on defense counsel.” (*People v. Hill* (1998) 17 Cal.4th 800, 832.)

O. Presenting Inconsistent Theories

A prosecutor may not “without a good faith justification ... attribute to two defendants, in separate trials, a criminal act only one defendant could have committed.” (*In re Sakarias* (2005) 35 Cal.4th 140, 155-56.)

Cases finding prosecutorial misconduct of this sort include:

- *In re Sakarias* (2005) 35 Cal.4th 140 [in separate trials, prosecutor argued that each defendant was guilty of striking same blows against victim and should thus be sentenced to death; found prejudicial as to one defendant but not other]

PRACTICE TIPS FOR RAISING PROSECUTORIAL MISCONDUCT

I. Packaging Prosecutorial Misconduct With Other Errors

The prejudicial effect of a prosecutor’s misconduct is often enhanced when considered in the context of other errors at trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [“a number of instances of prosecutorial misconduct may act synergistically to create an atmosphere of prejudice more intense than the sum of its parts”]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1207 [“the possible prejudicial effect of the improper comments by the prosecutor was exacerbated by the trial court’s passive reaction to them”].) “[T]he combination of prosecutorial misconduct and improper judicial conduct can, in an extreme case, deny a defendant a fair trial.” (*United States v. Elkins* (11th Cir. 1989) 885 F.2d 775, 787; see also *United States v. Sardelli* (5th Cir. 1987) 813 F.2d 654, 657 [reversal for cumulative effect of evidentiary error and prosecutorial misconduct].)

The following cases provide examples of how a prosecutor can exploit other trial errors to increase the likelihood of reversible error. Note that in some of the cited cases, the misconduct is discussed in the context of the prejudice analysis of another error, but could arguably have given rise to a standalone prosecutorial misconduct claim. (See also discussion in section II below.) As reflected in these cases, raising trial court error claims in conjunction with related prosecutorial misconduct claims can be an effective means of highlighting the full scope, prejudicial impact, and overall injustice of the errors and misconduct at issue, and of thereby increasing the likelihood of a favorable outcome on appeal.

A. Exploiting the Erroneous Admission of Prosecution Evidence

- Prosecutor exploited erroneously admitted prior convictions during final arguments to discredit a key defense witness and suggested the witness had committed perjury where there was no such indication in the record. (*People v. Woodard* (1979) 23 Cal.3d 329, 341.)
- Prosecutor exploited erroneously admitted hearsay statements of child witness, suggesting an earlier prosecution was dismissed because the girl was afraid to testify against her father when in fact it was dismissed after he was cleared by a polygraph test. (*Paxton v. Ward* (10th Cir. 1999) 199 F.3d 1197, 1203.)

B. Exploiting the Erroneous Exclusion of Defense Evidence

- After the court erroneously excluded evidence the victim had been molested by persons other than defendant, the prosecutor exploited the error by asking the jury to draw an inference that if it was true the victim molested other children, the victim must have learned how to do so from defendant. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 759 [prosecutor had “absolutely no excuse” for his conduct, which violated government’s “unqualified responsibility to try its cases with fairness and integrity”].)
- After the court erroneously excluded evidence that the victim of a sexual assault was a prostitute, the prosecutor committed misconduct by arguing the defense did not produce any evidence the victim was a prostitute. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.)
- Court’s erroneous exclusion of defendant’s release plan was not reversible error on its own, but when combined with prosecutor’s misconduct in threatening the defendant with perjury if he testified, the error infringed on

defendant's right to fair trial, and reversal was required. (*People v. Force* (2019) 39 Cal.App.5th 506, 520, 521.)

C. Exploiting the Trial Court's Failure to Adequately Enforce Its Own Rulings

- Court “undercut its own ruling limiting the scope” of highly prejudicial prior crimes evidence by making later contradictory rulings, allowing the prosecution to “take advantage of the ambiguity” to elicit damaging details of prior crimes from a witness. (*People v. Disa* (2016) 1 Cal.App.5th 654, 674 [finding erroneous admission of prior crimes evidence prejudicial under *Watson*, but declining to address separate claims of prosecutorial misconduct claim or ineffective assistance of counsel].)
- Despite the court's order directing the prosecutor to seek a ruling on the admissibility of gang evidence prior to introducing such evidence, the prosecutor on multiple occasions questioned witnesses in a way that put the irrelevant but inflammatory evidence before the jury. (*People v. Luparello* (1986) 187 Cal.App.3d 410, 421 [while court's “sustaining of defense objections and striking of testimony suggested it did not condone such conduct, the flagrancy of the prosecutor's misconduct makes it highly unlikely that even a conscientious jury could completely ignore what it had heard”].)

D. Exploiting Erroneous or Ambiguous Jury Instructions

- Prosecutor “magnified” the harmful effect of the erroneous instruction that homicide is “always a foreseeable consequence of any gang attack” by arguing that the only required showing to prove guilt of the homicide was appellant's participation of the gang attack on the victim. (*People v. Godinez* (1992) 2 Cal.App.4th 492, 504.)
- After the court erred by failing to deliver adequate presumption of innocence and other evidentiary instructions, the prosecutor exploited the errors by reading the indictment to the jury and arguing that appellant's status as a defendant tended to establish guilt. (*Taylor v. Kentucky* (1978) 436 U.S. 478.)
- Prosecutor “took his cue” from the court's erroneous instruction likening reasonable doubt to “things that you decide every day in your life” by arguing that any juror who could return a guilty verdict without “some doubt” about guilt was “brain dead,” and equating proof beyond a reasonable doubt to “everyday decision making in a juror's life.” (*People v. Johnson* (2004) 119 Cal.App.4th 976, 983.)

E. Exploiting the Prosecution’s Own Failure to Locate or Produce a Witness

- After the prosecutor failed to make reasonable efforts to locate a material informant witness, the prosecutor made an “inexcusable” argument suggesting defendant purposely failed to call the informant as a witness. (*People v. Frohner* (1976) 65 Cal.App.3d 94, 108-10.)
- Prosecutor engaged in “highly misleading” and false argument suggesting the government had no ability to call the witness, when in fact the prosecutor made a “strategic decision” to present key witness evidence through hearsay and “did everything he could to keep the defense from learning [the witness’s] whereabouts and the existence and nature of the cooperation agreement.” (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1318.)

F. Exploiting the Prosecutor’s Own Earlier Misconduct

- Misconduct found where the prosecutor allowed a prosecution witness to make false statements and then argued the witness had been completely honest. (*Banks v. Dretke* (2004) 540 U.S. 668, 675.)

G. Exploiting the Prosecutor’s Improper Intimidation of a Witness by Using the Witness’s Nervous Demeanor as Evidence of Lying

- After the prosecutor threatened a defense witness with a perjury prosecution, the prosecutor exploited the witness’s halting and stressful demeanor on the stand to argue he was lying. (*People v. Hill* (1998) 17 Cal.4th 800, 835.)

H. Exploiting Defense Counsel’s Deficiencies to Present False or Misleading Evidence or Testimony

- After defense counsel failed to present the jury with evidence that conclusively established a key fact in his defense to sexual battery, the prosecutor “seized on the evidentiary gap that defense counsel left in his case” and argued an alternate theory she knew or should have known was false. (*People v. Zaheer* (2020) 54 Cal.App.5th 326, 329 [“we are compelled to conclude that defense counsel’s error, as compounded by the prosecutor’s comment, was prejudicial”].)
- Defense counsel’s failure to present expert testimony on battered women’s syndrome allowed the prosecutor to exploit “myths” and “misconceptions

about battered women” in urging the jury to reject the self-defense claim. (*People v. Day* (1992) 2 Cal.App.4th 405, 419-20.)

- Defense counsel’s failure to investigate prevented counsel from “deal[ing] significant blows to the prosecution’s case,” including challenging key testimony that the prosecution “should have known ... was misleading and false.” (*Thomas v. Kuhlman* (E.D.N.Y. 2003) 255 F.Supp.2d 99, 113 [granting habeas relief on grounds of ineffective assistance of counsel].)
- Defense counsel’s failure to interview or present witnesses who would have corroborated the self-defense claim allowed the prosecutor to “capitaliz[e]” and “exploit[t]” the omission by arguing there was no corroboration of defendant’s testimony, and by falsely stating that the witnesses were not at trial “because they can’t help him.” (*People v. Glass* (Cal. Ct. App., May 30, 2006, No. G034420) 2006 WL 1467654, at *1 [unpublished].)¹

II. The Prosecutorial Misconduct/Prejudice Crossover

In addition to giving rise to a standalone claim, a prosecutor’s misconduct is often relevant to the prejudice showing of many trial court errors, e.g., the improper admission or exclusion of evidence. This is so because “[a] prosecutor’s reference to evidence that should not have been presented to the jury increases the potential for prejudice flowing from the error.” (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384; see also *People v. Cruz* (1964) 61 Cal.2d 861, 868 [“There is no reason why we should treat this evidence as any less ‘crucial’ than the prosecutor – and so presumably the jury – treated it.”].)

In fact, the existence of an independently viable prosecutorial misconduct claim may not crystalize until counsel drafts the prejudice analysis of another error and the full impact of the prosecutor’s exploitation of that error becomes apparent. In this situation, counsel should consider raising prosecutorial misconduct as a standalone claim, and then argue that the errors cumulatively prejudiced appellant. Doing so avoids letting the prosecutor off the hook by cloaking their misdeeds in the prejudice analysis of another error. It also increases the likelihood the misconduct will be reported to the state bar. (See Bus & Prof. Code, § 6086.7 [state bar report required “[w]henEVER a modification or reversal of a judgment in a judicial proceeding

¹ Unpublished cases are included in these materials as examples of how to package prosecutorial misconduct with other errors, not as binding authority.

is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney”].)

Some courts will still choose to sidestep a standalone prosecutorial misconduct claim, and instead analyze the challenged acts as part of the prejudice analysis of another error. For example, in *People v. Clark* (Cal. Ct. App., Nov. 7, 2017, No. A148626) 2017 WL 5151385 [unpublished], Division One of the First District found reversible error based on improperly admitted hearsay evidence, an error that was “further compounded by the prosecutor’s closing statement” emphasizing the erroneously-admitted evidence. By reversing on that ground, the court expressly declined to consider appellant’s separate prosecutorial misconduct claim. (*Id.* at 4; see also *People v. Disa*, *supra*, 1 Cal.App.5th at 675 n.14 [reversing for evidentiary error but declining to address standalone prosecutorial misconduct claim].)

Other courts have signaled a willingness to address the prosecutor’s misconduct head on. For example, in a recent unpublished homicide appeal, *People v. Martin* (Cal. Ct. App., July 2, 2020, No. A151562) 2020 WL 3602303 [unpublished], counsel argued the trial court erred in its mid-deliberation response to a jury question about the antecedent threats instruction and how it related to imperfect self-defense. The court refused to re-instruct the jury, and the prosecutor seized on the jury’s confusion to argue a legally erroneous theory that the victim’s state of mind was relevant to appellant’s self-defense claim. On appeal, counsel challenged the court’s improper response to the jury question and argued that the prosecutor’s argument increased the likelihood of prejudice, but did not raise a standalone prosecutorial misconduct claim. Division Three of the First District reversed on the instructional error, but pointedly remarked in a footnote: “That the prosecutor made the argument that he did is inexplicable. Whether he did so through ignorance of the law or in bad faith is immaterial as there is no claim of prosecutorial misconduct before us.” (*Id.* at *11.)

In dropping the footnote, the court seemed to be signaling that it would have welcomed the opportunity to address the prosecutor’s actions in the context of a prosecutorial misconduct claim. Had the court reversed on that ground, it would have been required to report the prosecutor to the state bar pursuant to Business and Professions Code section 6086.7.

III. Practice Tools and Resources

A. California Public Records Act (Gov. Code, § 7920 et seq.) and Requests for Judicial Notice (Rule of Court 8.252; Evid. Code, §§ 452, 459)

Because courts very rarely identify the offending prosecutor in the opinion, it can be difficult to find out if a particular district attorney is a repeat offender. One potential workaround: make a CPRA request to the Attorney General, then request judicial notice of the opinions discussing the misconduct.

1. Case Example: *People v. Garcia* (Cal. Ct. App., May 10, 2022, No. B304415)²
 - a. After noting “pervasive prosecutorial misconduct” in the record, appellate counsel filed a CPRA request for: “From 2012 to present, all records (e.g., briefs, motions, complaints, memoranda) pertaining to allegations of prosecutorial misconduct by Los Angeles County ADA Adan Montalban raised in proceedings (appeals, habeas, etc.) in which the AG appeared as counsel of record, and all records (e.g., opinions, judgments, orders) resolving or disposing of such allegations.
 - b. The AG turned over a list of 14 cases involving misconduct allegations against Montalban.
 - c. Counsel filed a motion requesting judicial notice of the unpublished appellate opinions (none of which identified Montalban by name), along with the AG’s CPRA response to authenticate the accuracy of the representations. The court granted the judicial notice request.
 - d. Counsel raised a litany of challenges based the prosecutor’s varied and repeated misconduct. Citing the prosecutor’s long history, counsel asserted the

² Contact FDAP for copies of the motions filed in this case, which were graciously shared with FDAP by attorneys Jenny Brandt and Mark Yanis.

prosecutor’s “persistent erosion of our holy constitutional principles cannot continue to pass without rebuke,” and asked the court to reverse due to cumulative prejudice, and to deter further misconduct.

- e. Result: The court finds the “scattered instances of intemperate conduct” harmless. Petitions for rehearing and review were denied.
- f. As for the prosecutor: Adan Montalban is now a judge for the Los Angeles Superior Court.

B. The Prosecutor’s Own Ethics Rules

1. Many District Attorney websites have posted their office’s ethical rules and standards.³ Consider seeking judicial notice of the relevant ethical rule to bolster a claim of misconduct.
2. The Inquisitive Prosecutor’s Guide: The Santa Clara District Attorney posts a series of training materials for prosecutors available to all on its website.⁴ The “Ethics in Opening and Closing Statements” memo includes a thorough overview of different types of misconduct, and is an excellent window into how prosecutors are educated about misconduct.
3. The ACLU Northern California has a years-long, ongoing project that uses the California Public Records Act to obtain copies of ethics policies, training materials, and other data from prosecutors statewide. There are many records available on the [ACLU’s website](#). While the project

³ See, e.g., Sonoma County District Attorney Policy and Procedure Manual, available at: <https://da.sonomacounty.ca.gov/Microsites/District%20Attorney/Documents/2022%20Policy%20and%20Procedure%20Manual.pdf>

⁴ The Inquisitive Prosecutor’s Guide is available at: <https://countyda.sccgov.org/publications/inquisitive-prosecutors-guide?keywords=&page=2>

is related to the implementation of the RJA, the ethics materials have broad application to challenges of all types.

C. RJA Claims

1. The OSPD RJA Sharepoint site contains a robust collection of data, sample motions, and other resources broken down by county that could be useful in supporting an RJA claim that an individual prosecutor “exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin” (Pen. Code, § 745 (a)(1), or used racially discriminatory language about the defendant during proceedings. (Pen. Code, § 745 (a)(2).) The Sharepoint site also includes county-specific data to support systematic claims of racism and bias in charging, convictions, and sentencing. (Pen. Code, §745 (a)(3) & (4).)

D. Other Resources

There are a number of other helpful resources on prosecutorial misconduct available for free online. These include:

- ADI, “Prosecutorial Misconduct (a.k.a Prosecutorial Error) Outline” (October 2018)
- SDAP, “Prosecutorial Misconduct Before and After Trial” (2015)
- SDAP, “Prosecutorial Misconduct in Argument” (2015)
- Charles Sevilla, “Successfully Developing and Litigating Prosecution Errors at Trial and Beyond” (September 2018)