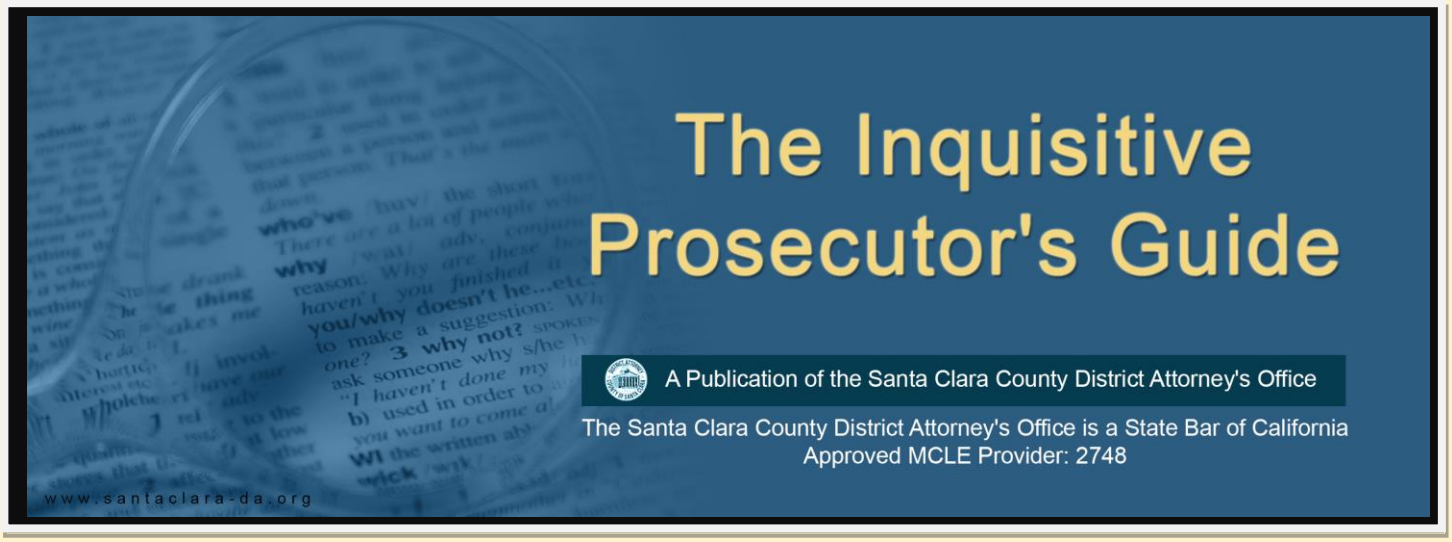

June 29, 2023 | 2023-IPG-56 (ETHICAL OPENING STATEMENT & CLOSING ARGUMENT)

STAYING WITHIN THE CIRCLE OF PERMISSIBLE OPENING STATEMENT AND CLOSING ARGUMENT*

(June 29, 2023 Edition)**

**This version of the Inquisitive Prosecutors Guide newly updates and revises the February 18, 2022 Edition of "Staying Within the Circle of Permissible Opening Statement and Closing Argument."

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I. OPENING STATEMENT

A. PURPOSE OF OPENING STATEMENT

1. May Opening Statement Be Used for Argument?

"The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present . . ." (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1342; **see also *People* v. *Stoll*** (1904) 143 Cal. 689, 693 [opening statement "serves, and always has served, but one purpose in criminal procedure, which is, when made on the part of the people, to give the jury a general outline of the case which the prosecution claims it will prove"]; ***People* v. *Nelson*** (1964) 224 Cal.App.2d 238, 252 [similar].) Moreover, opening statement is not to be used "for the purpose of discussing questions of law." (***Williams* v. *Goodman*** (1963) 214 Cal.App.2d 856, 869.) However, "[t]he function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (***People* v. *Gurule*** (2002) 28 Cal.4th 557, 610; ***People v. Dennis*** (1998) 17 Cal.4th 468, 518; **accord *People* v. *Ramos*** (1982) 30 Cal.3d 553, 575.)

Although there do not appear to be any actual cases affirmatively stating that opening statement may not be used for purposes of argument, the cases stating the sole purpose of opening statement (see above) preclude use of the opening statement for argument. Moreover, there are cases where courts have rejected defendant's claims that opening statement had been improperly used for purposes of argument. (**See e.g., *People* v. *Dykes*** (2009) 46 Cal.4th 731, 761; ***People* v. *David*** (1939) 12 Cal.2d 639, 650.) And, presumably, the claim would not be made if it was perfectly okay to use opening statements to argue the case.

That said, a prosecutor is not limited in opening statement to making an unadorned recital of the facts. "It is difficult to conceive of how the prosecutor can accomplish [the] function of [opening statement] if he is not entitled to state his theory of the case in terms of the requisite elements of the crime." (***People* v. *Ramos*** (1982) 30 Cal.3d 553, 575; **see also *People* v. *Parker*** (2022) 13 Cal.5th 1, 72-73 [remarks previewing prosecutor theory of the case proper as is discussing reasonable inferences from the evidence].)

In addition, "[n]othing 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. *Seumanu*** (2015) 61 Cal.4th 1293, 1342; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 168; **see also *People* v. *Dennis*** (1998) 17 Cal.4th 468, 518 [opening statement is not objectionable because it is "delivered it in a manner meant to hold the jurors' attention"].) A prosecutor is not required "to describe relevant events in artificially drab or clinical terms." (***People* v. *Millwee*** (1998) 18 Cal.4th 96, 138.) Thus, there is nothing inappropriate about using epithets in describing defendant's conduct in opening statement so long as they are "reasonably warranted by the evidence" and are "not inflammatory and principally aimed at arousing the passion or prejudice of the jury." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 168 [and finding prosecutor's opening statement to be "no more than fair comment on what she anticipated the evidence would show" even though, in the course of opening statement, the prosecutor described defendant as "monstrous," "cold-blooded," vicious, and a "predator," and called the evidence "horrifying" and "more horrifying than your worst nightmare"]; **but see** this IPG, section II-I-1-a at pp. 51-57 [discussing bar on race-based epithets dehumanizing defendants].)

B. REFERENCE TO EVIDENCE IN OPENING STATEMENT NOT LATER ADMITTED AT TRIAL

1. Is it Misconduct for a Prosecutor to Refer to Evidence in Opening Statement That is Not Later Admitted at Trial?

"The rule is that in an opening statement it is the duty of counsel to state the facts fairly and to refrain from referring to facts which he cannot or will not be permitted to prove." (***People* v. *Romero*** (2007) 149 Cal.App.4th 29, 44; ***People* v. *Ney*** (1965) 238 Cal.App.2d 785, 793; ***People* v. *Nelson*** (1964) 224 Cal.App.2d 238, 252–253.) And it can be error for the prosecution to place before the jury information which the prosecution knows (and defense warns) will not be produced. (**See *People* v. *Barajas*** (1983) 145 Cal.App.3d 804, 806.)

However, the fact that a prosecutor mentions evidence in opening statement that is not later introduced at trial is not necessarily misconduct. It is only when the evidence is "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted" that remarks made in an opening statement to evidence later excluded constitute misconduct. (***People* v. *Parker*** (2022) 13 Cal.5th 1, 72; ***People* v. *Flores*** (2020) 9 Cal.5th 371, 404; ***People* v. *Dykes*** (2009) 46 Cal.4th 731, 762; ***People* v. *Davenport*** (1995) 11 Cal.4th 1171, 1212-1213; ***People* v. *Wrest*** (1992) 3 Cal.4th 1088, 1108; ***People* v. *Martinez*** (1989) 207 Cal.App.3d 1204, 1225.) Indeed, even when a prosecutor told the jury in opening statement that one of two co-defendants in a dual jury trial would testify and told the jury what the defendant would say was held not to be misconduct where defense counsel gave repeated assurances the defendant intended to take the stand and "any error was invited by the defense's calculated strategy to have defendant testify during the prosecutor's case-in-chief. (***People* v. *Powell*** (2018) 6 Cal.5th 136, 151; **see also *Frazier* v. *Cupp*** (1969) 394 U.S. 731, 733-736 [finding no misconduct or constitutional violation in prosecutor talking in opening statement about what former codefendant (who did not end up testifying) would say and noting: "Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given."].)

☢ WARNING!!: A prosecutor who is less than certain about the admissibility of evidence should <u>not</u> mention such evidence in opening statement without obtaining pre-approval from the trial court.

Moreover, in the event the prosecutor discusses evidence in opening statement that is not later admitted, it is a good idea to ask for an instruction from the court admonishing the jury that statements of counsel are not evidence. Such an instruction will help mitigate any possible prejudice arising from the variance between opening statement and the evidence presented. (**See e.g.**, ***People* v. *Powell*** (2018) 6 Cal.5th 136, 151; ***People* v. *Wrest*** (1992) 3 Cal.4th 1088, 1108; ***People* v. *Barajas*** (1983) 145 Cal.App.3d 804, 809.)

C. USE OF ITEMS NOT YET INTRODUCED INTO EVIDENCE IN OPENING STATEMENT

1. May a Prosecutor Utilize Objects in Opening Statement (Weapons, Transcripts, Etc.,) Even Though the Items Have Not Yet Been Introduced into Evidence?

A prosecutor may use admissible evidence in opening statement. "The purpose of the opening statement 'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect' [citation], and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose." (***People* v. *Wash*** (1993) 6 Cal. 4th 215, 257; ***People* v. *Green*** (1956) 47 Cal.2d 209, 215; **accord**, ***People* v. *Ramos*** (1982) 30 Cal.3d 553, 575.)

"[I]t is well settled that the "use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate." (***People* v. *Wash*** (1993) 6 Cal. 4th 215, 257; ***People* v. *Fauber*** (1992) 2 Cal.4th 792, 827; **see also *People* v. *Green*** (1956) 47 Cal.2d 209, 215 [upholding use of photographs of murder victim during opening statement]; ***People* v. *Kirk*** (1974) 43 Cal.App.3d 921, 929 [rejecting claim of prosecutorial misconduct based on use of taped admissions during opening statement].)

Indeed, "[e]ven where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement." (***People* v. *Green*** (1956) 47 Cal.2d 209, 215; **see also *People* v. *Fauber*** (1992) 2 Cal.4th 792, 826-827 [illustrative use of enlarged page from transcript of prosecution witness' preliminary hearing testimony proper in opening statement even though prosecutor apparently only intended to call witness and not introduce transcript at trial].)

D. CONDUCT THAT WOULD BE IMPROPER IN CLOSING ARGUMENT WILL LIKELY BE EQUALLY IMPROPER IN OPENING STATEMENT

Section II of this outline, at pp. 10-106, will discuss many of the recurring types of misconduct in closing argument. It should be assumed that statements of a prosecutor that would constitute misconduct in closing argument will *also* be deemed misconduct if done in the course of an opening statement. (**See e.g.**, ***People* v. *Millwee*** (1998) 18 Cal.4th 96, 137 [citing cases involving closing argument in assessing propriety of remarks in opening statement]; ***People* v. *Adams*** (1939) 14 Cal.2d 154, 161-162 [noting attempt to inflame jury (generally improper in closing argument) is misconduct in opening statement].)

II. CLOSING ARGUMENT

"[A] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (***People* v. *Peoples*** (2016) 62 Cal.4th 718, 796.) "He [or she] has the right to fully state his [or her] views as to what the evidence shows and to urge whatever conclusions he [or she] deems proper." (***People* v. *Lewis*** (1990) 50 Cal.3d 262, 283.) **However**, "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (***People* v. *Espinoza*** (1992) 3 Cal.4th 806, 819.) "A prosecutor's closing argument is an especially critical period of trial. (***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 694.) "Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective." (***Ibid***.)

As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (***Berger* v. *United States*** (1935) 295 U.S. 78, 88; ***People* v. *Hill*** (1998) 17 Cal.4th 800, 819–820.)*

Editor's note:** But don't tell this to the jury. (**See *People* v. *Hawthorne (1992) 4 Cal.4th 43, 59 [error for prosecutor to quote from dissenting opinion in ***United States* v. *Wade*** (1967) 388 U.S. 218 to the effect that law enforcement has an obligation to ascertain "the true facts surrounding the commission of the crime" while defense counsel do not]; **see also *People* v. *Dale*** (1978) 78 Cal.App.3d 722, 733-734; ***People* v. *Clark*** [unreported portion] (2021) 62 Cal.App.5th 939, 972 [prosecutor's remarks that she "not allowed to hide anything," and "could lose job and law card if she did" improper].)

A. VOUCHING - STATEMENT OF PERSONAL BELIEF IN GUILT OF DEFENDANT

1. Statement of Personal Belief in Defendant's Guilt.

It is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office. (***People* v. *Fuiava*** (2012) 53 Cal.4th 622, 694; ***People* v. *Huggins*** (2006) 38 Cal.4th 175, 207; **see also *People* v. *Tyler*** (1991) 233 Cal.App.3d 1456, 1459-1460 [a *defense attorney* cannot express personal belief in the innocence of his client].)

A prosecutor "may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion." (***People* v. *Powell*** (2018) 6 Cal.5th 136, 172 ***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 183; accord ***People* v. *Thomas*** (2011) 51 Cal.4th 449, 487; ***People* v. *Lopez*** (2008) 42 Cal.4th 960, 971; CPRC, Rule 3.4(g) [forbidding attorneys to "state a personal opinion as to guilt or innocence of the accused"].) "[E]vidence of a prosecutor's subjective motivations when prosecuting a case is not relevant[.]" (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293 1329.)

"Improper vouching occurs when the prosecutor . . . suggests that evidence not available to the jury supports [an] argument." (***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, 480.) "Statements by the prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of the defendant's guilt and

that he would not conduct the prosecution unless he believed the defendant to be guilty are misconduct." (***People* v. *Kirkes*** (1952) 39 Cal.2d 719, 723; **see also *People* v. *Bain*** (1971) 5 Cal.3d 839, 847 [misconduct for prosecutor to state that he, as a black man, would not be prosecuting a black defendant unless he personally believed the man to be guilty]; ***People* v. *Alvarado*** (2006) 141 Cal.App.4th 1577, 1583-1585 [improper for a prosecutor to claim that she would not prosecute a case if she had a doubt about whether the crime occurred - even in response to a defense argument attacking the prosecutor's credibility].)

"The danger that the jury will view the prosecutor's expressed belief in the defendant's guilt as being based on outside sources '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.' [Citations.]" (***People* v. *Lopez*** (2008) 42 Cal.4th 960, 971.)

"Nevertheless, not all such comments are improper. Rather, '[t]he prosecutor's comments must ... be evaluated in the context in which they were made, to ascertain if there was a substantial risk that the jury would consider the remarks to be based on information extraneous to the evidence presented at trial.' [Citations.]" (***People* v. *Lopez*** (2008) 42 Cal.4th 960, 971; **see also *People* v. *Krebs*** (2019) 8 Cal.5th 265, 344 [stating "While some of us have been working on this case for over two years now ... you, too, have now devoted a significant portion of your lives to this case.... [¶] You realize now what so many of us have realized for a long time. You realize now you have been in the presence of one of the most cruel, calculating, and brutal individuals on the planet," did not suggest the prosecution formed that opinion based on evidence not available to the jury or imply that the jury should adopt the prosecution's view because of its "prestige, reputation, or depth of experience"]; ***People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1057–1058 [it was not inappropriate for prosecutor to argue "'that's the best case I've ever seen in any case I've ever prosecuted of intentional misrepresentation and consciousness of guilt'"]; ***People* v. *Rich*** (1988) 45 Cal.3d 1036, 1092 [prosecutor made appropriate comment on the evidence by arguing that " 'I have never seen deliberation and premeditation like that.'"]; ***People* v. *McIntyre*** (1981) 115 Cal.App.3d 899, 911["Every use of the words 'I think' or 'I submit,' however, does not constitute improper argument."].)

Editor's note: One way of avoiding claims that a prosecutor has violated the rule against stating personal opinions is to include a caveat at some point in the closing argument, that any opinions expressed are based on the evidence presented. (**See e.g., *People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1058 [finding statement "'that's the best case I've ever seen in any case I've ever prosecuted of intentional misrepresentation and consciousness of guilt' appropriate where, inter alia, prosecutor more than once reminded the jury that his views were not controlling]; ***People* v. *Prysock*** (1982) 127 Cal.App.3d 972, 996 [in rejecting claim prosecutor's expression of opinion required reversal, the court noted the prosecutor began his argument with the following comment: "[A]nything I say is only my opinion of what I feel the evidence shows. The evidence shows certain things; from these things you can infer that other things have happened. Throughout the course of my argument I will be giving you my opinions from what I feel the evidence shows. I've already formed my opinion in this case; you have not."].)

2. May a Prosecutor State He or She Personally Believes the Evidence Proves Defendant is Guilty?

A prosecutor **<u>may</u>** state that he or she personally believes the evidence presented shows defendant is guilty beyond a reasonable doubt, so long as it is clear the belief is based on the evidence presented. (**See *People* v. *Mincey*** (1992) 2 Cal.4th 408, 447-448; ***People* v. *Ratliff*** (1987) 189 Cal.App.3d 696, 702; ***People* v. *Prysock*** (1982) 127 Cal.App.3d 972, 997; ***People* v. *Brown*** (1981) 119 Cal.App.3d 116, 133; ***People* v. *Dale*** (1978) 78 Cal.App.3d 722, 733-734.) 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. *Tully*** (2012) 54 Cal.4th 952, 1043; ***People* v. *Lewis*** (1990) 50 Cal.3d 262, 283.)

In ***People* v. *Gamache*** (2010) 48 Cal.4th 347, the court held the statement of a prosecutor in three co-defendant case that "I think everybody here expects you to find him guilty and find the charges true" was a fair comment where the evidence was stronger against defendant than other co-defendants and the comment expressed nothing more than the prosecutor's expectation that the jury would find defendant's case an "easier case than his codefendants." (***Id***. at p. 371.) The ***Gamache*** court also found the prosecutor's statement that he was "flabbergasted" by the defense attorney's argument not to be an improper statement of personal belief. (***Id***. at p. 372.)

In ***People* v. *Ratliff*** (1987) 189 Cal.App.3d 696, the defendant contended the prosecutor improperly attacked his alibi defense during final argument when he argued that he "would characterize the alibi defense ... as a Johnny-come-lately defense. It's something that was cooked up...." (***Id***. at p. 702.) In rejecting defendant's claim, the court stated a prosecutor may "relate to the jury that, in his opinion, the evidence shows that the defendant is guilty of the crime charged." (***Ibid***.)

In ***People* v. *Bush*** (1978) 84 Cal.App.3d 294, the court held the statement of a prosecutor that the victim "did not deserve to die for slapping a woman" was not an expression of personal opinion that defendant was guilty but was merely a way of drawing jury's attention to evidence tending to suggest that defendant's stabbing of the victim was not commensurate with the force which he had used against her. (***Id***. at p. 308.)

In ***People* v. *Dale*** (1978) 78 Cal.App.3d 722, the court held the prosecutor's comments that "this case is what we in the business call a lead pipe, it is a dead bang," and "I tried to prove [defendant] guilty because I think that he is and the evidence shows it conclusively" were proper. (***Id***. at p. 733.) However, the court found the prosecutor "got carried away" when he stated, in reference to his concern the jury would think a pro per defendant might be taken advantage of, that "no one takes advantage of anybody in a criminal courtroom, no prosecutor, because of the higher standards of ethics that he is held to," and that his "license, my ethics and my career are in the judge's hands," and that there is "no way that one defendant is worth taking advantage of, ever." (***Id***. at pp. 733-734.)

Cases in the Ninth Circuit take a harder line, however, on the issue. (**See *United States* v. *Kerr*** (9th Cir.1992) 981 F.2d 1050, 1053 ["A prosecutor has no business telling the jury his individual impressions of the evidence"]; ***United States* v. *Wright*** (9th Cir. 2010) 625 F.3d 583, 610 [quoting ***Kerr***]; ***United States* v. *Hermanek*** (9th Cir. 2002) 289 F.3d 1076, 1100 [same]; ***Rowland* v. *Chappell*** (9th Cir. 2017) 876 F.3d 1174, 1187-1188 [harmless, but still error, for prosecutor to state he would vote for the death penalty if he were on the jury].)

☢ WARNING!! Thus, even if a prosecutor makes it clear to the jury that any expression of personal opinion is based on the evidence, prosecutors should venture into the realm of such expression with trepidation.

3. Use of Term "We Know . . ."

It is not unusual for a prosecutor to use a collective form of expression (e.g., "we know the defendant is a loner") as a plural second person, when discussing what *the jury* knows from the overwhelming evidence a particular fact or referring only to the jury.

The California Supreme Court has held an objection to the use of the term "we know" to be without merit where "the word 'we' obviously included the jury, and the comment referred to the evidence presented to the jury." (**See *People* v. *Mendoza*** (2000) 24 Cal.4th 130, 172; **see also *People v. Ramos*** (2023) 90 Cal.App.5th 578, 597 (unpublished portion) [jury would likely interpret prosecutor's use of "we" as a plural second person, referring only to the jury]; ***People* v. *Recarte*** [unreported] 2014 WL 2739038, *12 [Use of 'we know' is not improper when used . . . to refer to the People's evidence and to summarize the People's case"]; ***People* v. *Garcia*** [unreported] 2011 WL 1318796, *7 [noting when the term is used in this context, the jury is not likely to interpret a prosecutor's argument as a statement of personal belief derived from evidence the jury never heard]; **but see *People* v. *Valencia*** [unreported] 2010 WL 527984, *17 ["better practice is to avoid using the phrase 'we know'" in argument].)

The Ninth Circuit, in ***United States* v. *Younger*** (9th Cir. 2005) 398 F.3d 1179, on the other hand, stated the term "we know" as in "we know the defendant did such and such . . ." should not be used in closing argument since it tends to blur the line between improper vouching and legitimate summary. Nevertheless, the Ninth Circuit found that where the use of the term was done "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," it was not improper. (***Id***. at p. 1191; **see also *United States* v. *Bentley*** (8th Cir. 2009) 561 F.3d 803, 811 [noting courts are often critical of, and discourage use of, terms "we know" and "I submit" but finding their use is not always "plain error"].)

4. Indirect or Less Obvious Statements of Personal Belief

Sometimes statements of the prosecutor regarding his or her personal belief are indirect and/or subtle. But this does not change the fact they may constitute misconduct. (**See *People* v. *Fernandez*** (2013) 216 Cal.App.4th 540, 561] [misconduct if prosecutor *"implies* she has evidence about which the jury is unaware," emphasis added].)

For example, in ***People* v. *Mendoza*** (2007) 42 Cal.4th 686, in reference to the testimony of a child witness, the prosecutor stated, "I don't know about you, I'm an old war horse. I've been through a lot of these. That choked me up when I saw that testimony." (***Id***. at p. 704.) The ***Mendoza*** court characterized this statement as misconduct on grounds it reflected the prosecutor's personal beliefs, presumably because it indirectly conveyed to the jury that the prosecutor believed the witness' testimony. (***Ibid*** [albeit finding comments were not prejudicial since reference was brief, it occurred during argument, and the judge admonished the jury].)

Similarly, in ***People* v. *Fuiava*** (2012) 53 Cal.4th 622, the defendant was charged with killing a police officer. One issue in the case was whether the deputy who was killed had fired on the defendant. The defense claimed he did so, in part, because the deputy was a member of a group of deputies called the "Vikings" who the defendant claimed acted like a rival criminal gang to the defendant's own street gang. During closing argument, the prosecutor took a pin symbolizing the "Vikings" and pinned it to his lapel. The prosecutor stated that, while he was perhaps not worthy enough, he had received permission and was "going to become a Viking." The ***Fuiava*** court was "quite troubled" by this act, characterizing it as improper "vouching" because (i) "[t]he prosecutor essentially gave unsworn testimony that the Vikings were not a group of rogue deputies as the defense suggested, but were, instead, simply anyone who (with the deputies' permission) wore a Viking pin in solidarity with the deputies"; (ii) "the prosecutor placed his own prestige and the prestige of his office behind the Vikings, and in so doing, improperly interjected into the trial his personal view of the credibility of the heart of the defense case;" and (iii) "the prosecutor's comments that he had 'asked permission' to become a Viking, and, nonetheless, wondered if he was 'worthy' of doing so, implied to the jury that the status of the prosecutor and his office actually was less than that of the Vikings. (***Id***. at

pp. 693-694 [and finding the misconduct was compounded because the prosecutor had successfully argued to keep out evidence of the Vikings "bad reputation"].)

5. Can a Prosecutor State His or Her Personal Beliefs in Response to Defense Argument?

It is improper for a prosecutor to claim that she would not prosecute a case if she had a doubt about whether the crime occurred - even in response to a defense argument attacking the prosecutor's credibility. (***People* v. *Alvarado*** (2006) 141 Cal.App.4th 1577, 1583-1585.)

However, it was held proper rebuttal argument for a prosecutor to say "I like to win cases and this is a big case ... there were certain things [i.e., suborn perjury] I wasn't going to do or compromise in order to win cases" where the prosecutor was rebutting the defense argument that he had prepared a witness to commit perjury. (***People* v. *Pensinger*** (1991) 52 Cal.3d 1210, 1251.)

B. VOUCHING - STATEMENT OF PERSONAL BELIEF IN CREDIBILITY OF WITNESS

1. May a Prosecutor State His or Her Own Personal Belief in the Credibility of a Witness?

"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." (***People* v. *Frye*** (1998) 18 Cal.4th 894, 971 [quotations and citations omitted]; **see also *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1330 ["it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' . . . The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence"]; ***People* v. *Turner*** (2004) 34 Cal.4th 406, 433 [finding improper vouching occurred where prosecutor referred to his prior use of court-appointed experts when prosecutor was a defense attorney and openly expressed his admiration and respect for these witnesses].)

However, "a prosecutor may properly argue a witness is telling the truth based on the circumstances of the case." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 433.) "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." (***People* v. *Frye*** (1998) 18 Cal.4th 894, 971 [quotations and citations omitted]; **accord *People* v. *Redd*** (2010) 48 Cal.4th 691, 740; ***People* v. *Martinez*** (2010) 47 Cal.4th 911, 958.)

Thus, in ***People* v. *Peoples*** (2016) 62 Cal.4th 718, the court held it was "reasonable commentary on the credibility of the witnesses and would not have been understood by the jury to vouch for the witnesses' credibility" for the prosecutor to ask the jurors to compare the defense experts with the prosecution expert and note "There is no comparison. [The prosecution expert] is so much more capable, with no agenda, and serving the bottom line to you." (***Id***. at p. 796.)

One way to avoid a claim of vouching is to qualify any statement that a witness is telling the truth by noting that assessment is based on the evidence. Otherwise, the Ninth Circuit will not assume that qualification is implicit. Thus, in ***United States* v. *Weatherspoon*** (9th Cir. 2005) 410 F.3d 1142, the court held a prosecutor improperly vouched for a witness by arguing, "three times over in rapid succession that a witness 'told the truth.'" (***Id***. at p. 1148; **see also *United States* v. *Preston*** (9th Cir. 2017) 873 F.3d 829, 844 [finding improper vouching where prosecutor repeatedly stated child molestation victim told the truth or that his allegations were true].)

2. Can Prosecutors Argue an Officer Has No Motive to Lie, Would Not Risk His or Her Job by Lying in Court, and/or Would Face Perjury Charges if the Officer Did So?

In ***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, a defendant was charged with an assault on a correctional officer. In argument, defense counsel stated that "the officers who testified aren't credible" and questioned the officer's version of events. In the rebuttal portion of his closing argument in an assault on a prison guard case, the prosecutor pointed out that defendant's testimony conflicted with that of the officers, and the jurors would have to decide whom to believe. The prosecutor stated: "So you are being asked to believe by the defense that Officer Stephens, an officer, I think, with 17 years of experience with the Department of Corrections, for some reason, would put his entire career on the line. He would take the stand, subject himself to possible prosecution for perjury and lie and make up some story and tell you that this guy, who he didn't know, attacked him and hit him on the back of the head. For what reason? What possible motive would he have to do that?" (***Id***. at pp 478-479.) The prosecutor made a very similar argument regarding another officer who testified. (***Ibid***.)

The ***Rodriguez*** court held that the prosecutor's argument generally asking, "what motive would [the officer] have to lie?" was *proper* because it did not "suggest the prosecutor had personal knowledge of facts outside the record showing [the officer] was telling the truth" or "invite[ ] the jury to abdicate its responsibility to independently evaluate for itself whether [officer] should be believed." (***Id***. at pp. 480-481, emphasis added [and noting there was evidence to support the inference created by the rhetorical question since the officer did not know the inmate].) However, the court held that "the prosecutor's arguments that the officers would not lie because each would not put his "entire career on the line" or "at risk" constitute[d] impermissible vouching." (***Id***. at p. 481.) The court stated these arguments were based on matters outside the record because the record did not "contain any direct or circumstantial evidence about whether the officers 'would put' their 'entire career on the line' or 'at risk' by giving false testimony. (***Ibid***.) It did not make a difference that the prosecutor did not specifically say the officers would lose their job since the argument nevertheless conveyed they would." (***Id***. at p. 482.) "Furthermore, the prosecutor's statements conveyed that he knew information about the discipline of law enforcement officers that was not known to the lay juror. This was improper." (***Ibid***.) The court rejected the argument that the information conveyed was "common knowledge." (***Ibid***; **see** this outline, section II-C-7 at p. 25.)

The ***Rodriguez*** court recognized that this was not exactly the type of vouching that is condemned because it "involves reliance on the personal beliefs or honor or integrity of the attorney making the statement." But went to note that telling the jury about the career risks of untruthful testimony poses similar concerns to that form of vouching because it "invites the jury to fill in gaps in the evidentiary record by reference to the jury's own surmise based on the special reputation of law enforcement agencies and officers for veracity, as well as suppositions about the special insight prosecutors may have into law enforcement disciplinary procedures." (***Id***. at pp. 482-483; **see also *People* v. *Padilla*** (1995) 11 Cal.4th 891,

946 [expressing doubt about the propriety of the prosecutor's argument that if the prosecution's ballistics expert had lied, he would have "risked his whole career of 17 years" and citing to a federal case that held a similar argument improper].) The ***Rodriguez*** court left open the question of whether the prosecutor's comments regarding "possible prosecution for perjury" also constituted improper vouching. The court recognized that the testimony a perjury prosecution was "possible" may have been a fact within the common knowledge of jurors." (***Id***. at p. 483 [noting when witnesses testify under oath, they are sometimes told their testimony is "under penalty of perjury"].) However, the court then stated "a lay juror would naturally think that a prosecutor would know more about when someone can be prosecuted for perjury than a juror. For this reason, prosecutors are well advised to generally avoid raising the subject of future perjury prosecutions in their closing arguments." (***Ibid***.)

The ***Rodriguez*** court disapproved the holding in ***People* v. *Caldwell*** (2013) 212 Cal.App.4th 1262 insofar as it would authorize a rebuttal argument that the officers would not commit perjury and put their career on the line" when "rebutting the defense attorney's charge that the officers had lied about the photo lineup." (***Rodriguez*** at p. 484.) The ***Rodriguez*** court stated: "Impermissible vouching — where counsel relies on evidence not available to the juror or invokes his or her personal prestige or depth of experience — does not become permissible simply because the speaker claims to be responding to something opposing counsel said." (***Ibid***; **see also** this outline, section II-L-1 at pp. 73-77.)

The ***Rodriguez*** court distinguished several earlier cases where claims of prosecutorial vouching were rejected on grounds that in those cases, "the prosecutor's statements were either more directly tied to the record than the arguments at issue [in ***Rodriguez***] or were sufficiently general such that they would not convey to the jury that the prosecutor had any special knowledge about the subject. (***Id***. at p. 486 citing to ***People* v. *Peoples*** (2016) 62 Cal.4th 718, 796 [prosecutor argued that an expert was " 'so much more capable, with no agenda, and serving the bottom line to you' "; the comment was "reasonable commentary on the credibility of the witnesses"]; ***People* v. *Redd*** (2010) 48 Cal.4th 691, 741 [prosecutor argued that a testifying officer "went the extra distance" and took his "job seriously"; the comments "were based upon facts established by the testimony"]; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 433 [prosecutor argued witnesses had no motive to lie; the comments were "simply argument based on inferences from the evidence presented"]; ***People v. Medina*** (1995) 11 Cal.4th 694, 757 [prosecutor argued that ballistics experts had no reason to lie, were not being paid for testifying, and told the truth to the jury; "the prosecutor properly relied on facts of record and the inferences reasonably drawn therefrom"]; ***People* v. *Davenport*** (1995) 11 Cal.4th 1171, 1217–1218 [prosecutor argued, " '[i]s that [expert], for 75 bucks going to come in here and, you know, make all of his findings up or try and sway them?' "; "the prosecutor reasonably inferred that [the expert] had received $75 for the ... autopsy based on [testimony about payments]. Reference to this modest payment suggested that [the expert] had no motive to fabricate in making his report"].)

Lastly, notwithstanding its finding of misconduct, the ***Rodriguez*** court hinted (without expressing a particular view) that it would have found no prejudice had harmlessness been argued by the prosecution. The ***Rodriguez*** court stated the Court of Appeal appeared "to have overstated the import and effect of the prosecutor's remarks" and doubted that a reasonable juror would have drawn the conclusions the Court of Appeal believed they would have from the prosecutor's remarks. (***Id***. at p. 486-487 [and observing that "courts have often found that brief statements such as those before us have limited prejudicial effect."].)

In ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, the defense challenged the credibility of the officers who arrested the defendant for engaging in a hand-to-hand sale of cocaine. Defendant was found in possession of cocaine after police

arrested defendant. (***Id***. at p. 110.) During closing argument, the prosecutor 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. Mr. Woods and his cocaine that he tossed that day. 12 officers, 12 individual careers, pensions, house notes, car notes." (***Id***. at p. 114.) Defense counsel objected that there was no evidence to support the argument, the objection was overruled, and the prosecutor continued to argue the officers would risk "bank accounts and children's tuition." (***Id***. at p. 114.) Defense counsel again made a fruitless objection and the prosecutor rhetorically asked, "Are these 12 officers willing to risk those things for Mr. Woods and his five rocks of cocaine?" (***Id***. at p. 114.) Defense counsel objected that "12 officers didn't testify" but the judge directed the prosecutor to continue. (***Id***. at p. 114.) On appeal, defendant claimed the prosecutor impermissibly vouched for prosecution witnesses and argued matters not in evidence. (***Id***. at p. 115.)

The ***Woods*** court held that the prosecutor's reference to the 12 officers allowing a report to be filed with their names and serial numbers on it was **improper** as it extended beyond the evidence and implicitly suggested (i) that all 12 unidentified, mostly nontestifying officers, would testify to the same factual version of what occurred during the incident or its aftermath; (ii) the same 12 officers had been involved in a case or cases involving higher stakes such as kilos of cocaine, heroin, and stolen Maserati parts, but had not risked their careers for the higher stakes case or cases; and (iii) the same 12 officers had mortgages, car loans, and children in private schools. (***Id***. at p. 115.) The court concluded that implying that all 12 officers would testify to the same facts as the officers who were called violated defendant's Sixth Amendment right to confront and cross-examine those witnesses. (***Id***. at p. 115.) In addition, the court found that claims about the officers' financial obligations (i.e., the officers' mortgages, car loans, and kids in private school) were irrelevant and not supported by the record. (***Id.*** at p. 115; **see also *People* v. *Rodriguez*** (2020) 9 Cal.5th 474, 485-487 [citing ***Woods*** with approval].)

In the case of ***United States* v. *Weatherspoon*** (9th Cir. 2005) 410 F.3d 1142, the Ninth Circuit also found it improper to argue officers would not risk their jobs by lying in court. In ***Weatherspoon***, the defendant (a convicted felon) was a passenger in the front seat of a car stopped by two Las Vegas police officers. A loaded handgun was found underneath the front passenger seat. The police obtained statements from the driver and the rear seat passenger implicating the defendant. (***Id***. at pp. 1144-1145.) At trial, defense counsel argued that the initial statements of the driver and passenger should be disbelieved because they were made in response to police pressure. (***Id***. at p. 1145.) During his rebuttal argument, the prosecutor told the jury, the officers "had no reason to lie in this case or not tell the truth." A defense objection was overruled. The prosecutor then reiterated the point and stated, "And they took the stand and told you the truth." The prosecutor then stated that if defense counsel was right about the officers lying, the officers "risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury. Doesn't make sense because they came in here and told you the truth, ladies and gentleman." (***Id***. at p. 1146.) The court found the above statement improper vouching because it "clearly urged that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony" and thus was based on matters outside the record. (***Id***. at p. 1146; **see also *United States* v. *Alcantara-Castillo*** (9th Cir. 2015) 788 F.3d 1186, 1195 [prosecution improperly vouched for agent's credibility when it began its rebuttal argument by stating: "Ladies and gentlemen, this case boils down to the credibility of a 15–year methamphetamine addict, a man who

has every incentive to lie, versus the testimony and the evidence of Border Patrol agents who are sworn to uphold the law" where there was no evidence in the record that Border Patrol agents were "sworn to uphold the law."]; ***United States* v. *Combs*** (9th Cir. 2004) 379 F.3d 564, 574-575 [finding prosecutor compounded error in asking defendant if the investigating officer was a liar by arguing that in order to acquit the defendant, the jury had to believe that agent risked losing his job by lying on the stand because the argument improperly implied prosecutor knew the agent would be fired for committing perjury]; ***United States* v. *Boyd*** (D.C. Cir. 1995) 54 F.3d 868, 871–872 [holding that a prosecutor improperly "relied on evidence not in the record" when she argued that police witnesses would not "jeopardize their careers and risk criminal prosecution" for perjury, and collecting cases]; **cf.**, ***People* v. *Pettie*** (2017) 16 Cal.App.5th 23, 75 [calling victim "brave" did not constitute an assurance of her veracity].)

Editor's note: There should be no problem with arguing the officer faced consequences for lying *if the officer testified about the consequences of lying* because the argument does not rest on facts outside the record. (**See e.g.**, ***People* v. *Thomas*** [unreported] 2010 WL 597177, *9 [finding prosecutor's observation that a detective would not risk his career just to convict defendant was a reasonable inference considering the officer's testimony that he did not know defendant before the day of his arrest, there was no bad blood between them, he had no motive to lie, and would not get a "pay raise or anything if the case against defendant resulted in a conviction."]; **cf.**, ***People* v. *Harris*** (1989) 47 Cal.3d 1047, 1083 [nothing wrong with asking prosecution witness if witness was "aware of Penal Code section 128, and that the section provided for the death penalty for a witness who gave perjured testimony leading to a conviction in a capital case."].) However, be aware that eliciting the specific consequences may open the door to defense evidence challenging whether such consequences are, in fact, imposed.

3. Can a Prosecutor Argue that in Order to Believe the Defense, the Jury Must Believe a Police Officer Witness Committed Perjury?

In ***People* v. *Haslouer*** (1978) 79 Cal.App.3d 818, the court held it was not objectionable for a prosecutor to argue that to believe the defense it was necessary to believe that the police officer who took the statement of a child witness committed perjury. (***Id.*** at p. 833 [and rejecting defendant's claim the argument was improper "since it pitted a well-respected institution, i.e., the police department, against the defendant"]; **but see *United States* v. *Sanchez*** (9th Cir. 1999) 176 F.3d 1214, 1224 [citing to ***United States* v. *Richter*** (2nd Cir. 1987) 826 F.2d 206, 209 for proposition that "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying"].)

There is nothing wrong, in general, with pointing out what the ramifications are of believing a defense argument. (**See *People* v. *Garcia*** (2022) 76 Cal.App.5th 887, 899–900 [finding argument of prosecutor proper where prosecutor pointed out that if the jury bought defendant's argument he acted in self-defense, then the jury would essentially be saying the victim was the criminal].)

4. Can a Prosecutor Explain His or Her Reasoning Behind Strategic Decisions?

In general, a prosecutor does not get to explain the strategy or reasoning behind decisions as to how to best prosecute the case unless there is evidence introduced to support that explanation or strategy.

For example, it was improper for a prosecutor to state that "[m]any of the witnesses we could have called would have been repetitive, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings. There isn't much more to add." (***People* v. *Rivera*** (2019) 7 Cal.5th 306, 335.) The Attorney General conceded the prosecutor's statement that he could have called other witnesses was improper, albeit the error was held to be harmless. (***Ibid***.)

It may also be improper for the prosecutor to explain his or her personal reasons for granting immunity to a witness. In the case of ***People* v. *Guzman*** (1988) 45 Cal.3d 915, the court indicated that there might be merit to defendant's argument that a prosecutor's testimony regarding why immunity was offered to a witness was irrelevant and "was the functional equivalent of an expert opinion on the credibility of a witness"; and that the prosecutor's closing argument tying together the prosecutor's views with those of the judge who had accepted the immunity agreement "aggravated the error and amounted to vouching in the classic sense of that term." (***Id***. at pp. 940-941; **see also *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1331.)

C. REFERENCE TO FACTS NOT IN PRESENTED TO JURY

1. In General

Counsel is not permitted to assume or state facts not in evidence. (***People* v. *Holmes*** (2022) 12 Cal.5th 719, 787; ***People* v. *Valdez*** (2004) 32 Cal.4th 73, 133.) It is misconduct for the prosecutor to refer to facts not in evidence. (***People* v. *Fuiava*** (2012) 53 Cal.4th 622, 693; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 948; ***People* v. *Bolton*** (1979) 23 Cal.3d 208, 212; ***People* v. *Kirkes*** (1952) 39 Cal.2d 719, 724; ***People* v. *Hall*** (2000) 82 Cal.App.4th 813, 818; ***People* v. *Villa*** (1980) 109 Cal.App.3d 360, 365; ***People* v. *Galloway*** (1979) 100 Cal.App.3d 551, 564.) A prosecutor is not permitted to suggest that evidence of which he or she is aware, but which has been not submitted to the jury corroborates the prosecution's case. (**See *People* v. *Fuiava*** (2012) 53 Cal.4th 622, 728; ***People* v. *Linton*** (2013) 56 Cal.4th 1146, 1207; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 336; ***People* v. *Cook*** (2006) 39 Cal.4th 566, 593.) "Statements of supposed facts not in evidence … are a highly prejudicial form of misconduct, and a frequent basis for reversal." (***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, 480.) However, counsel is permitted to draw reasonable *inferences* from the evidence and is given "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence." (***People* v. *Valdez*** (2004) 32 Cal.4th 73, 134.) And whether an inference is reasonable is for the jury to decide. (***People* v. *Holmes*** (2022) 12 Cal.5th 719, 787; ***People* v. *Valdez*** (2004) 32 Cal.4th 73, 134.)

Courts often treat "vouching" for the credibility of a witness or a statement of a prosecutor's personal belief in the guilt of the defendant as an indirect form of attempting to bring before the jury facts in evidence. The theory is that by vouching for the credibility of the witness or the truth of defendant's guilt, the prosecutor is implying to the jury the prosecutor is aware of additional evidence bearing on these issues to which the jury is not privy. (**See *People* v. *Sandoval*** (1992) 4 Cal.4th 155, 183.) And it is misconduct "to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness." (***People* v. *Mendoza*** (2016) 62 Cal.4th 856, 906.)

2. Can a Prosecutor Tell the Jury About Himself or Herself or Reference Personal Experience?

The prohibition on reference to facts not in evidence includes reference to personal information about the prosecutor. "[P]rosecutors should not invoke their personal beliefs or ***experiences*** as support for facts not in evidence[.]" (***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 149, emphasis added.) For example, in ***People* v. *Mendoza*** (2007) 42 Cal.4th 686, in reference to the testimony of a child witness, the prosecutor stated, "I don't know about you, I'm an old war horse. I've been through a lot of these. That choked me up when I saw that testimony." (***Id***. at p. 704.) The ***Mendoza*** court characterized this statement as misconduct, not only on grounds it reflected the prosecutor's personal beliefs, but also because it was based on facts not in evidence: "In underscoring the egregiousness of defendant's crimes, the prosecutor emphasized his long experience as a basis for assessing [the child's] testimony. This constituted misconduct." (***Ibid*** [albeit finding misconduct not prejudicial]; **see also *People* v. *Edwards*** (2013) 57 Cal.4th 658, 742 ["prosecutors should not purport to rely in jury argument on their outside experience . . ."]; ***People* v. *Bandhauer*** (1967) 66 Cal.2d 524, 530 [improper for prosecutor to tell jury that in his career he had seldom seen a more depraved character than the defendant because the prosecutor's opinion "was not related to the evidence in the case and was not subject to cross-examination"; and "presented to the jury an external standard by which to fix the penalty based on the prosecutor's long experience"]; ***People* v. *Whitehead*** (1957) 148 Cal.App.2d 701, 705 ["It is always misconduct for a prosecutor to bring before a jury facts from his own experience"]; **but see *People* v. *Yeoman*** (2003) 31 Cal.4th 93, 149 [prosecutor "did not clearly violate" the rule against arguing personal experiences by saying "you can try a million murder cases over the years and there is no special mark an individual has when he does murders" because this "merely restated, albeit from the rhetorical stance of a trial lawyer, the common wisdom that appearances can deceive"].)

In ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, the prosecutor referenced special knowledge on several occasions. First, he described the protections afforded to criminal defendants who plead guilty in an attempt to rebut one witness' claim that she did not understand to what she had plead guilty. Second, the prosecutor described the procedures for assigning prison inmates in an apparent effort to challenge another defense expert's knowledge of prison practices. Third, the prosecutor described the duty of school officials to report child abuse in an apparent effort to challenge defendant's claim that he was beaten daily by his mother and stepfather. The court indicated such use of personal knowledge might not have been proper, but found it was not prejudicial since the references were brief and largely involved collateral matters. (***Id***. at pp. 786-787.) The ***Monterroso*** court also noted that "*it would have been better* if the district attorney had not invoked his own familiarity with the criminal justice system" when discussing how the jury may be unaware of "a whole industry of these defense experts that bounce around from trial to trial, state to state, collecting good money for testimony." (***Id***. at pp. 783-784.) However, the ***Monterroso*** court did *not* find that the prosecutor improperly referenced specialized knowledge by stating (in response to a defense expert's testimony regarding the problems of life in defendant's native country of Guatamala) that "Guatemala is not a cesspool. There are a lot of very nice, hard-working people that do very well, thank you." (***Id***. at p. 786.)

In ***United States* v. *Wright*** (9th Cir. 2010) 625 F.3d 583, a prosecutor stated, "Now, I've been handling these cases for a number of years and ''ve seen where defense-where the defense of it was my roommate has been advanced, and I've seen the defense advanced that it was some sort of hacker or trojan or virus, something along those lines, and then I've also seen, well, somebody did something inappropriately, the interview, this, that, something along those lines. ¶ But never have I seen the trifecta, all three in this same place." (***Id***. at p. 610.) The court held this comment was misconduct as it

"improperly introduced evidence outside the record- i.e., the prosecutor's experience with similar cases-as a means of commenting on the defense's case and Wright's credibility." (***Id***. at p. 611-612.)

In ***United States* v. *Leon-Reyes*** (9th Cir. 1999) 177 F.3d 816, a prosecutor discussed how he was proud to be an attorney, told a story about how his immigrant grandfather took him to court, and said he tried cases for 26 years both as a defense attorney and as a prosecutor around the country. The court held the information was objectionable since it was irrelevant, unnecessary, and tended to vouch for [the prosecutor's] own credibility and thereby the credibility of the prosecution's case. (***Id***. at p. 822; **cf**., ***People* v. *Castillo*** (2008) 168 Cal.App.4th 364, 386 [prosecutor should not have interjected personal information about himself or other cases he had tried *during voir dire*].)

3. Introduction of Evidence Not Admitted at Trial During Closing Argument

It goes without saying that a prosecutor may not refer to evidence in closing argument that was not introduced at trial. (**See *People* v. *Tate*** (2010) 49 Cal.4th 635, 694; ***People* v. *Brophy*** (1954) 122 Cal.App.2d 638, 652.)

In ***People* v. *Tate*** (2010) 49 Cal.4th 635, the court held it was improper for the prosecutor to ask the jury to consider the size of a revolver and then use his hands to demonstrate the size - where no evidence had been elicited about the subject. (***Id***. at p. 694 [albeit finding misconduct harmless in light of curative admonition to disregard the statement and general instruction that arguments are not evidence].)

In ***People* v. *Higgins*** (2011) 191 Cal.App.4th 1075 [*depublished*], an issue arose at trial as to whether the defendant could have carried some firearms in his pants pocket without the victim noticing the bulge caused by the firearms. In a demonstration before the jury, the defendant wore the pants he had allegedly worn on the date of the crime while two handguns were stowed in the pocket. In closing argument, the prosecutor stated, "I don't know if those pockets are the same.... I would submit to you that when the defendant was walking by, I could see the bulges through the lining, regardless." (***Id***. at p. 1099.) The court held this was improper as no witness testified to what could be seen in the pocket and thus the prosecutor was essentially testifying to a fact not in the record during closing argument. (***Ibid***.)

In ***People* v. *Brophy*** (1954) 122 Cal.App.2d 638, the prosecutor committed prejudicial misconduct by producing in closing argument a theretofore-missing bullet that had never been admitted in evidence. (***Id***. at p. 652.)

In ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, the appellate court tried to squeeze a prosecutor's statement that a defendant would be going home and laughing at the jurors' expense if one of the jurors believed the defense argument into the category of arguing facts not in evidence. The court reasoned the prosecutor's comment was based on speculation or the prosecutor's personal belief about defendant's character even though there was no evidence as to defendant's character. (***Id***. at pp. 1532-1533.) The ***Sanchez*** court also believed this argument was improper even if there had been evidence of defendant's off-stand demeanor because "[c]onsideration of [a] defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (***Id***. at p. 1533.) **See** this outline, section II-C-4, at p. 22.)

4. Can a Prosecutor Comment Upon the Courtroom Demeanor or Behavior of a Defendant or Witness While Not on the Stand?

"[C]omment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper . . . unless such comment is simply that the jury should ignore a defendant's demeanor." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 434; **see also *United States* v. *Schuler*** (9th Cir. 1987) 813 F.2d 978, 981 [prosecutor's comment during argument on a non-testifying defendant's laughter during testimony was misconduct warranting reversal of the judgment].)

In criminal trials of guilt, prosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (i) demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness and where a defendant does not testify, his credibility is not in issue; (ii) prosecutorial comment infringes on the defendant's right not to testify; and (iii) 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. *Boyette*** (2002) 29 Cal.4th 381, 434; ***People* v. *Heishman*** (1988) 45 Cal.3d 147, 197.)

A common argument made by prosecutors is to ask the jury not to confuse the image of the defendant as displayed in the courtroom (i.e., quiet, behaved, nonaggressive, etc.,) with how the defendant must have appeared or acted during the commission of the charged crime. This may be viewed as simply no more than properly asking the jury to ignore defendant's courtroom demeanor. (**See *People* v. *Price*** (1991) 1 Cal.4th 324, 454 [prosecutor did not err when telling the jury in opening statement to disregard the defendant acting like a gentleman and attempting to play the "Gee willikers, golly shucks" role at trial since the comment "did not urge the jury to draw any adverse inference from defendant's courtroom behavior," but rather they "advised the jury, in effect, to ignore defendant's courtroom demeanor and to determine his guilt or innocence on the basis of the evidence."]; ***People* v. *Bell*** [unreported] 2015 WL 6470796, at *8 [proper to comment on defendant's short hair and calm demeanor while sitting at counsel table while advising the jury to disregard defendant's appearance at trial and to decide the facts of the case based on the evidence]. Prosecutors must be careful in how this argument is presented, however.

In *People* v. *Spencer* (2018) 5 Cal.5th 642, the court approved of an argument in the penalty phase where the prosecutor illustrated the difference between the defendant seated in court and the defendant when he committed murder by recounting a parable about how a visitor to a zoo seeing a Bengal tiger "lying in the sun," "kind of fat and relaxed and comfortable" did not see a Bengal tiger; it was only when he encountered and narrowly escape from a tiger in a jungle "fifteen feet long," standing "over its kill," with "blood dripping from its mouth" that the real tiger was seen. (*Id*. at pp. 687–688.) However, while ***Spencer*** is authority for the proposition that asking jurors not to consider the demeanor of the defendant in court is permissible, comparing the defendant to a tiger (or other animal) is now generally considered a violation of the California Racial Justice Act. (**See** this outline, section II-I-1-a at pp. 51-57.)

In ***People* v. *Boyette*** (2002) 29 Cal.4th 381, the prosecutor said ""[Defendant is a v]ery remorseless, cold-blooded individual.... Remember, appearances can be very deceiving and he's been working on you. He has been working on you, watching you come and go, smiling and waving when he's introduced to you. Appearances, ladies and gentlemen, can be very deceiving." (***Id***. at p. 434.) The ***Boyette*** court held that "to the extent [the prosecutor] was simply urging the jury to disregard defendant's demeanor, there was no misconduct" but "[t]o the extent she was instead suggesting that the jury should find defendant was duplicitous based on his courtroom demeanor, she committed misconduct." (***Ibid***.)

In ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, the court held arguing that a defendant would be going home and laughing at the jurors' expense if one of the jurors believed the defense argument was improper even if there had been evidence of defendant's off-stand demeanor because "[c]onsideration of [a] defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (***Id***. at p. 1533.)

In ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, the court held that a prosecutor's remarks about "the defendant's appearance throughout this trial" being "extremely deceiving" what with "the defendant ... sitting there looking like a pitiful excuse for a human being" were at best, imprudent, because "comment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper." (***Id***. at p. 1201.)

In ***Matthews* v. *Neven*** (D. Nev. 2017) 250 F.Supp.3d 751, the court held the prosecutor's comments, urging the jurors to stare at the defendant, scrutinize their attire, and ask rhetorically: "How innocent do they look to you?" were plainly improper where there "was nothing for the jury to see from looking at the defendants other than that they were young black men." (***Id***. at p. 763 [and noting, at p. 761 it may also have been an improper attempt to associate the defendants with a group of youths dressed in oversized white T–shirts and baggy shorts who attended the proceedings and were involved in a disturbance in the halls outside the courtroom].)

A defendant's courtroom demeanor or behavior may sometimes be relevant on an issue other than guilt and thus "comment on courtroom demeanor may be proper under some circumstances." (***People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1031; **see e.g., *People* v. *Valencia*** (2008) 43 Cal.4th 268, 307-308 [proper to consider defendant's courtroom demeanor in penalty phase of capital trial]; ***People* v. *Navarette*** (2003) 30 Cal.4th 458, 516 [comment during penalty phase closing argument on defendant angrily pointing finger at prosecutor permissible]; ***People* v. *Coddington*** (2000) 23 Cal.4th 529, 613 [proper for prosecutor to ask expert about defendant's behavior in courtroom to show defendant was a "con man" in sanity phase]; ***People* v. *Prince*** (1988) 203 Cal.App.3d 848, 854-856 [proper for prosecutor to ask jurors to consider defendant's demeanor at counsel table in determining whether defendant was competent].)

Moreover, ***if a witness on the stand testifies*** to a defendant's relevant off-stand, but in-court, behavior or demeanor (i.e., "a finger across the throat" gesture), it may be commented upon because it is now in evidence. This makes sense since the primary concern of the court with prosecutorial comment on off-stand demeanor is that the jury may not have seen the behavior and the defense had no chance to cross-examine about whether it occurred. (**See *People* v. *Manson*** (1976) 61 Cal.App.3d 102, 156 [testimony establishing a defendant's attempt to intimidate a witness while she is testifying is relevant evidence]; ***United States* v. *Gatto*** (3rd Cir. 1993) 995 F.2d 449, 455-456 [prosecution may discuss in closing argument a witness' testimony that he had received intimidating looks from a defendant before and *during the time* the witness was on the stand in order to show consciousness of guilt and to explain the witness' reluctance to give information on direct and eagerness to agree with defense on cross]; ***United States* v. *Mickens*** (2nd Cir. 1991) 926 F.2d 1323, 1329 [testimony of prosecution witness that defendant made hand gesture in the shape of a gun as witness entered courtroom to testify was admissible to prove consciousness of guilt, albeit not the bad character of the defendant]; ***United States* v. *Maddox*** (6th Cir. 1991) 944 F.2d 1223, 1229-1230 [witness permitted to testify that defendant mouthed in-court threat to her during break in testimony].)

Finally, if the prosecutor's comment on a defendant's off-stand demeanor is made in a trial where the defendant has testified, at least one of the reasons for finding such comment improper (i.e., that prosecutorial comment impinges on the

defendant's Fifth Amendment right not to testify) is obviated. (**See *People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1031; ***Allen* v. *Woodford*** (9th Cir. 2005) 395 F.3d 979, 997.)

Editor's note:** As to whether a prosecutor's comment on defendant's off-stand demeanor or behavior violates the defendant's Fifth Amendment privilege against self-incrimination (i.e., whether it constitutes ***Griffin error), **see** IPG's ***Doyle*** and ***Griffin*** Error outline, available upon request.

5. Can a Prosecutor Comment on the Physical Behavior or Demeanor of a Defendant or Witness While on the Stand that is Not Identified for the Record?

In ***People* v. *Caro*** (2019) 7 Cal.5th 463, the defendant claimed that the prosecutor committed misconduct by describing a witness as "stifl[ing] sobs" and "crumpl[ing] over in pain" during his testimony because these physical cues were not in the record. (Id. at p. 511.) The California Supreme Court held "there was no misconduct. The demeanor of a witness is "rarely reflected in the record" [Citation omitted] but is a proper factor for the jury to consider when assessing the witness's credibility". (***Ibid*** citing to ***People* v. *Jackson*** (1989) 49 Cal.3d 1170, 1205-1206 and Evid. Code, § 780(a).)

6. Can a Prosecutor Argue a Defendant Has Changed His Appearance in Order to Raise Doubts as to Identity if the Defendant Does Not Testify, i.e., Comment Upon Defendant's Off-Stand Appearance?

So long as witness have testified that defendant's appearance has changed, it should be proper to argue that defendant has deliberately changed his appearance in order to raise doubts as to his identity as the perpetrator. For example, in ***People* v. *Cunningham*** (2001) 25 Cal.4th 926, the prosecutor asked several witnesses in what respects the defendant's present appearance was different from what it had been at the time of the murder and the witnesses testified that the defendant's hair was shorter with more gray, that his facial hair was different, that the frames on his glasses were darker, that he had lost 30 to 40 pounds, and that his front tooth no longer had a gold cap. The prosecutor also had the defendant display his teeth to the jury. In response, the defense introduced evidence that defendant had dental work done due to tooth decay. (***Id***. at pp. 999-1000.) The prosecutor argued that defendant had deliberately changed his appearance to raise doubts about his identity. The defense argued that defendant's gold tooth had been replaced because his teeth were rotting, that defendant had been able to have his hair cut, and had lost weight because "jail food isn't wonderful." (***Id***. at p. 1000.)

The California Supreme Court held, as a general rule, a prosecutor is entitled to explain that a defendant's appearance had changed between the time of the murder and the time of trial, and therefore witnesses would describe him differently from his appearance at trial. (***Id***. at p. 1001 [and citing to ***People* v. *Ashmus*** (1991) 54 Cal.3d 932, 974 for the proposition that a defendant's alteration of appearance between the time of incident and the time of trial is relevant to the issue of identity].) Moreover, the court held that prosecutor was entitled to argue that "defendant ***deliberately*** altered his appearance in order to raise a doubt that he was the distinctively attired and coifed person described by a number of the witnesses." (***Cunningham*** at p. 1001, emphasis in original.) The ***Cunningham*** court pointed out that "[a]s a general matter, that argument was not improper, because it related to the issues of identity and consciousness of guilt." (***Ibid*** [albeit noting that if the prosecutor had known that defendant was motivated solely by medical necessity to obtain the dental treatment, it would have been improper to argue to the contrary].)

7. Can a Prosecutor Discuss Matters of General Knowledge During Argument?

"Counsel may argue facts not in evidence that are common knowledge or drawn from common experiences." (***People* v. *Mendoza*** (2016) 62 Cal.4th 856, 707; ***People* v. *Young*** (2005) 34 Cal.4th 1149, 1197.) "[F]acts are deemed within the common knowledge of the jury only if they are matters of common human experience or well known laws of natural science." (***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, 481; ***People* v. *Davis*** (2013) 57 Cal.4th 353, 360.) "If the People seek to excuse the production of evidence by urging the fact is one of common knowledge, the following test applies. First, 'is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know; and [second,] is it certain and indisputable.' [Citation omitted]. '[I]f there is any reasonable question whatever as to either point, proof should be required.'" (***People* v. *Davis*** (2013) 57 Cal.4th 353, 360.)

It is "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." (***People* v. *Hill*** (1998) 17 Cal.4th 800, 819; **see also *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1153-1154 ["prosecutors have wide latitude to . . . refer to matters of common knowledge (such as the meaning of words)"]; ***People* v. *Mendoza*** (2000) 24 Cal.4th 130, 172 [proper for prosecutor to state matters of common knowledge].) It is also proper to talk about well-publicized criminal trials (**see *People* v. *Johnson*** (1950) 99 Cal.App.2d 717, 730), but if the cases are not common knowledge or the details are not well-known, reference to them should be avoided (**see *People* v. *Terry*** (1962) 57 Cal.2d 528, 562).

In ***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, the court rejected the claim that a prosecutor's closing argument in which the prosecutor stated that officers would not lie because each would not put his "entire career on the line" or "at risk" was not impermissible vouching because it was "common knowledge" that would occur. The court believed in the absence of any testimony regarding what would occur if the officer lied, the prosecutor introduced a fact not in evidence. The court held "the fact that a law enforcement officer would risk termination for providing false testimony is not a matter of common knowledge. Instead, the validity of this assertion hinges on the inner workings of the relevant disciplinary procedures, including the disciplinary rules of the relevant law enforcement agency and the applicability of any collective bargaining agreement. This kind of determination lies beyond the ken of the average juror. (***Id***. at pp. 481-482.)

The ***Rodriguez*** court left open the question of whether the prosecutor's comments regarding "possible prosecution for perjury" also constituted improper vouching and suggested a claim that a perjury prosecution was "possible" may have been a fact within the common knowledge of jurors" - especially given the fact that at least one version of the oath a witness takes affirms that the testimony is under penalty of perjury. (***Id***. at p. 483.) However, the court then went on to say that since a "lay juror would naturally think that a prosecutor would know more about when someone can be prosecuted for perjury than a juror, . . . prosecutors are well advised to generally avoid raising the subject of future perjury prosecutions in their closing arguments." (***Id***. at p. 483; **see also** this outline, section II-B-2 at pp. 15-17 [discussing the holding in ***Rodriguez*** relating to whether it is impermissible vouching to claim an officer would face loss of job or a perjury prosecution].)

In ***People* v. *Caro*** (2019) 7 Cal.5th 463, the defendant killed several of her children. In the penalty phase, the prosecutor argued the circumstances did not excuse defendant's crime: "This defendant's situation is really not that much different

from other people who are facing difficult relationships or failed marriages. [¶] In fact, hers was a lot better." The prosecutor continued, "The only real emotional disturbance or strain that separates this defendant from any other woman or any man who's facing a failing marriage is her vanity. Her pride. …" (***Id***. at p. 513.) The court held there was no misconduct because "[t]hese references to how other women react to similar circumstances draws on "'common knowledge'" or "'common experiences.'"" (***Ibid***.)

In ***People* v. *Mendoza*** (2016) 62 Cal.4th 856, the prosecutor responded to the defense claim that there was reasonable doubt regarding the element of premeditation because the defendant had been under stress and his mental condition was deteriorating as follows: "Everybody who commits murder has a particular reason: Greed, lust, anger, jealousy, revenge. Everybody before they commit murder has to have a reason. And why that reason finally hits and ripens to the point where that person comes to grips with what they're going to do and they decide to do it and take action, it is an ugly emotion. It is an ugly state of mind. [¶] *But nobody who goes out and intentionally takes a life does it when they're all right in the head*." (***Id***. at pp. 907-908, emphasis in original.) Although the defense claimed the italicized statement presented evidence outside the record and improperly vouched for the strength of the case, the California Supreme Court found no misconduct, noting that "the argument was essentially an appeal to common sense—to the idea that no one who intentionally kills in a domestic setting is in a normal or calm state of mind." (***Id***. at p. 908.)

In ***People* v. *Boyette*** (2002) 29 Cal.4th 381, the court **rejected** an argument that statements by a prosecutor "that people are often killed on the streets of Oakland, and that one often reads about remorseless 'teenage kids' intending to kill people" constituted either introduction of facts not in evidence or an appeal to the passions of the jury. (***Id***. at p. 436.)

It is not improper vouching or impermissible introduction of facts not in evidence for a prosecutor to point to hypothetical scenarios to illustrate circumstances where certain defenses might be available, or questions raised about guilt, in order to contrast those scenarios with the circumstances in the case before the jury. Thus, in ***People* v. *Mendoza*** (2016) 62 Cal.4th 856, a case where defendants entered the victim's home and fired multiple shots from multiple weapons, the prosecutor pointed out that malice was clearly present unlike in other cases where only a few shots are fired, and defendants could argue: "Well I thought he had a gun. Well, I was just trying to scare him. Well, I didn't know it was loaded." (***Id***. at pp. 905-906.) The California Supreme Court *rejected* the defense claim the remarks impermissibly referred to facts not in evidence and vouched for the strength of the prosecution's case. The court stated: "The use of hypotheticals is not forbidden and there is no misconduct when, as here, '[n]o reasonable juror would have misunderstood the expressly hypothetical example to refer to evidence outside the record.'" (***Id***. at p. 907.)

In ***People* v. *Moore*** (2016) 6 Cal.App.5th 73, the court held it was permissible "as a mere example or analogy "for a prosecutor to refer to DNA experts who do not say something is a positive match or is definitely someone's DNA but who give possibilities larger than the number of people who ever lived on earth as a way of explaining why a document examiner expert did not state there was a 'positive match' between papers introduced at evidence at trial" – even though there was no there was no DNA analysis in evidence. (***Id***. at p. 98 [and noting "in context, there is no danger the jurors were misled or that the document examiner's expert testimony was falsely elevated to the stature of DNA evidence"].)

In ***People* v. *Bloom*** (1989) 48 Cal.3d 1194, the court appeared to **reject** the notion that it was misconduct for the prosecutor to argue that it is not unusual in a murder case for the defendant to "create a defense" and "try and show the victim was an S.O.B. to excuse the act." (***Id***. at p. 1213.)

In ***People* v. *Zurinaga*** (2007) 148 Cal.App.4th 1248, two defendants were charged and convicted of multiple counts of false imprisonment, armed robbery, and other crimes based on a home invasion robbery of nine college students in their residence hall. (***Id***. at p. 1250-1254.) At trial, the defense argued no robberies had occurred. In both his opening statement and his closing argument, defense counsel for defendant Zurinaga suggested that it was unlikely the two defendants would have been able to rob and imprison 10 persons, including nine men who were all larger than the defendants, for two hours. (***Id***. at pp. 1253-1255.) In response to defense counsel's argument, the prosecution projected a chart listing the airlines, flight numbers, time of departure, and the number of passengers and crew on each of the planes involved in the terrorist attacks of September 11, 2001. (***Id***. at p. 1255.) The prosecutor told the jury: "Counsel's statement was these two men were outmanned, outsized. What are these[?] These are the four airliners that were high jacked [sic] on September 11, 2001.... [¶] American Airlines Flight 11, 81 passengers and crew; United Airlines flight 175, 56 passengers and crew; American Airlines 77, 58 passengers and crew; United Airlines flight 93, 38 passengers and crew. [¶] Did those three airliners, four-there were five men. I don't remember. One of them only had four men." (***Id***. at p. 1255.)

The defense attorneys objected to the argument and asked for a mistrial on grounds that it was not a proper analogy and that the prosecutor was appealing to the sympathies of the jury based on the national 9/11 tragedy. The trial judge denied the trial motion. When the proceeding resumed, the prosecutor continued: "One person took over the cockpit. Four men stayed behind keeping 81, 56, 58 passengers hostage. What weapon did these men use. Box cutters.... Four men versus 81, 56, 58. That's what happened. [¶] So to say why, as counsel argued, these people were-what was the word-I wrote it down. Anyway, they were superior in numbers, strength, size; but of these four airliners on only one of them did the passengers rise up, and that was the last one when they had apparently been calling their loved ones, calling emergency numbers, and learned what happened to the other planes. [¶] In this case these people were going along to get along. There was a promise that we're just here for business, and that's what they wanted...." (***Id***. at p. 1256.)

On appeal, defendants argued that the prosecutor's reference to the 9/11 incident amounted to prejudicial misconduct. In response to that claim, the People argued the prosecutor's reference was brief, based on common knowledge, and within the permissible range of argument in that it was directly responsive to the defense theory that defendants could not have held 10 people hostage for an extended period of time. (***Id***. at p. 1258.)

The appellate court agreed with the defense that the prosecutor's argument was based on facts not in evidence that were not common knowledge: "Although the 9/11 incident itself is undoubtedly a matter of common knowledge, the specific information the prosecutor presented regarding the airlines, flight numbers, and numbers of passengers and crew is not." (***Id***. at p. 1259 [and finding it noteworthy that the prosecutor did not show his visual aid to opposing counsel or court before presenting it to the jury].) Moreover, the court held that "[e]ven accounting for the fact that prosecutors are afforded wide latitude during closing argument," the prosecutor's inflammatory comments regarding 9/11 crossed the line and constituted misconduct. (***Id***. at pp. 1258-1259 [albeit finding error was not prejudicial].)

Editor's note The ***Zurinaga*** opinion should be viewed more as a cautionary tale against prosecutors acting "intemperately" by discussing highly emotional and potentially inflammatory incidents when arguing to the jury, rather than as a primer on what constitutes a true violation of the rule barring arguing facts not in evidence. The rationale behind the rule preventing prosecutors from arguing facts not in evidence is to avoid the risk that the jury might assume those facts are true and rely on them in assessing guilt (without the facts being subject to challenge), instead of limiting themselves to evidence properly admitted at trial. The prosecutor's assertions regarding the flight numbers, departure times, number of passengers, etc., clearly does not present this risk since they have no relevance to any issue over and above the relevance that would be provided from general knowledge of the 9/11 incident. The appellate court's complaint that the analogy was inapt is similarly off base. First, the fact that an argument is a crummy argument does not make the argument improper. Second, it was an apt argument: the defense had claimed that it was unlikely that "[n]o one resisted" despite being outmanned and outsized (***id***. at p. 1254) and discussing a well-known incident where it is very likely the victims did not resist the assailants, despite outnumbering the assailants, seems directly responsive to the defense claim.

In ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, a prosecutor told the jury about a current United States senator from Florida who did not report a child molestation for a long time and was disbelieved as an argument in support of not discounting the victims' testimony because they did not report their molestation quickly. (***Id***. at p. 703.) The court "questioned" whether the story about the senator from Florida, albeit factually based, fell within the rule that a prosecutor could use common knowledge or illustrations drawn from common experience, history, or literature in closing argument. (***Id***. at p. 704.)

In ***People* v. *Prysock*** (1982) 127 Cal.App.3d 972, a prosecutor told the jury "I don't know about you, but if I would have walked up to that scene like Mrs. Erickson's son did, I probably would have puked my guts out, much less witnessing the event." (***Id***. at p. 996, fn. 16.) The prosecutor also stated, "This type of conduct in this particular case, in my opinion, is one of the most brutal and atrocious crimes that's ever been committed in this county, and you may live a long time before you'll hear about one more depraved than this one." (***Ibid***.) The court held that while the statements about the prosecutor being nauseated and the crime being brutal were overstated and unnecessary, they were not susceptible to an inference that the prosecutor's opinion was based on information other than evidence adduced at trial. (**Id**. at p. 997.)

8. Quoting from Literary Sources or Other Publications

Reading of a quotation from a book or other source is generally a permissible tactic during argument to the jury. (***People* v. *Riggs*** (2008) 44 Cal.4th 248, 325, citing to ***People* v. *Vieira*** (2005) 35 Cal.4th 264, 298 [quotation from Lord Denning] and ***People* v. *Hines*** (1997) 15 Cal.4th 997, 1063 [passage from unidentified book].) Closing argument may "properly include not only the sayings of famous men, but illustrations taken from life, or from books, showing the actions and thoughts of human beings, other than the parties and their witnesses, under various types of pressure and stress." (***People* v. *Polite*** (1965) 236 Cal.App.2d 85, 93.) However, prosecutors may not read from books or other sources for the purpose of placing evidence before the jury. (***Id***. at pp. 92-93.)

CC. USE OF DEMONSTRATIVE EVIDENCE OR PROPS TO RECREATE EVENTS DURING ARGUMENTS

It is not unusual for prosecutors to attempt to defuse defense arguments by using evidence, props, or body movements to physically demonstrate why a disputed event occurred or could have occurred. The more involved the demonstration, the

more likely it may be viewed as seeking to introduce facts not in evidence. Some demonstrations using physical movement or objects have not been found to be misconduct, while others have been. (**See *State* v. *Ancona*** (Conn. 2004) 854 A.2d 718, 738 ["no court has erected a per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court."]; **see also *People* v. *Barnett*** (1998) 17 Cal.4th 1044, 1136 [no error for prosecutor, during closing argument, to display a knife and a fishing lure not in evidence but similar to those used in the crime, stating "[i]t is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration"].)

Cases Finding Use of Evidence or Props Was Proper

In ***Laney* v. *State*** (Georgia 1999) 515 S.E.2d 610, the Georgia Supreme Court upheld a prosecutor's use of a five-pound bag of sugar to illustrate how much pressure it took to pull the trigger of the shotgun which the defendant used to kill the victim. Specifically, the court held it was proper for the prosecutor to state: "This is a five pound bag of sugar. This is what you have to do, you have to be able to lift this with one finger. That's what you're doing. You're putting 7.5 pounds of pressure to pull that trigger.... Can you do it accidentally? Can the gun just go off? Think about it. 7.5 pounds of pressure it took to pull that trigger." (***Id***. at p. 613.)

In ***State* v. *Suber*** (Ohio Ct. App. 1997) 694 N.E.2d 98, while addressing the jury during closing argument, the prosecutor held a firearm taken from the defendant's car. The weapon "was placed in such a manner that only that portion of the weapon to which [an officer] testified could be seen that night was showing." (***Id***. at p. 101.) When defense counsel objected to the demonstration, the trial judge stated he could not see what was being demonstrated. The prosecutor then stated, "That's my point." The trial judge overruled the objection. (***Ibid***.) The appellate court held neither the prosecutor's statement nor the demonstration amounted to prosecutorial misconduct, noting that witnesses had testified and demonstrated to the jury how much of the weapon was visible and "[a]s such, the prosecutor's demonstration was based upon the facts as presented to the jury through the testimony of the officers." (***Ibid***.) The appellate court recognized how defense counsel might view this as misconduct but stated: "from another perspective, the prosecutor's demonstration did demonstrate for the jury that a weapon could be concealed from view from one vantage point while still being observable from another vantage point. (***Id***. at p. 102.)

In ***Commonwealth* v. *Nol*** (Mass. App. Ct. 1995) 652 N.E.2d 898, the defense argued that the witnesses' identifications of the defendant were unreliable because the defendant was wearing a handkerchief over the bottom half of his face. The prosecutor responded by covering his own face with a handkerchief and stating, inter alia, "[W]hen I held up a handkerchief in front of my face a moment ago, did you have difficulty with the fact that it was still me behind the handkerchief? Why not? Because you recognized me." (***Ibid***.) The appellate court held there was no error because "[d]emonstrating by gesture and with an everyday personal accessory to illustrate what had been testified to did not constitute introducing material from outside the record." (***Id***. at p. 899.)

In ***People* v. *Dowds*** (Ill. App. Ct. 1993) 625 N.E.2d 878, the court held a prosecutor's demonstration during rebuttal argument in a driving under the influence case, during which the prosecutor poured seven cans of beer into a mug, then poured the beer from the mug into a pitcher was not improper where the defendant had testified that he had consumed seven or eight beers before his arrest, and [the] prosecutor's demonstration merely showed jury what seven beers look like when poured into container." (***Id***. at p. 957.)

In the unpublished case of ***People* v. *Mendoza*** [unreported] 2018 WL 343765, the prosecutor desired to show how it was possible that someone could be carrying a gun without anyone noticing it. During rebuttal argument, the prosecutor "asked his investigating detective to stand up, and he asked the jury if the detective had a gun. The prosecutor noted that '[j]ust 'cause you don't see it doesn't mean it's not there.'" (***Id***. at p. *5.) The trial court then noted for the record that "the detective stood up, pulled his jacket back, had a gun." (***Ibid***.) In finding the absence of misconduct, the appellate court held "the demonstration did not violate due process, and it was not a deceptive or reprehensible attempt to persuade the jury." (***Id***. at p. *10.)

In ***Commonwealth* v. *Twilley*** (Penn. 1992) 612 A.2d 1056, the court held a trial court reasonably permitted the prosecutor to hold up a standard size bat and a forty-ounce beer in a brown paper bag for the jury to compare- even though those two items had not been introduced into evidence, where the defendant had testified that he was holding a 40-ounce beer bottle in a brown paper bag in his hand and not a baseball bat. (***Id***. at pp. 1059-1060.)

Cases Finding Use of Evidence or Props Was Misconduct

In ***Bonner* v. *State*** (Ala. Crim. App. 2005) 921 So.2d 469, the defendant wore brown (or possibly black) sheer panty hose over his face during the robbery. During closing argument, the prosecutor "produced an unopened package of brown panty hose, which were not in evidence, unwrapped the package, and placed the panty hose over his head." (***Id***. at p. 470.) The trial court denied the defense motion for the mistrial but admonished the prosecutor to continue his argument sans pantyhose. The appellate court rejected the argument that the prosecutor was not presenting the panty hose as physical evidence but was drawing an inference "as to the color of the panty hose and as to the witnesses' ability to identify the defendant as the person wearing the panty hose over his head -matters that were in evidence through the testimony of the eyewitnesses to the robbery." (***Id***. at p. 473.) The ***Bonner*** court held that since the panty hose the prosecutor used as his "visual aid" were not in evidence, and there was a dispute in the testimony as to the witnesses' report of the color of the panty hose, the "prosecutor's actions went beyond legitimate argument based on facts and evidence presented at trial" and was error – albeit harmless error. (***Ibid***; **but see** conc. opn, J. Baschab [finding no error at all].)

In ***Price* v. *Commonwealth*** (Ky. 2001) 59 S.W.3d 878, the victim testified that the defendant was three feet away from him when the defendant aimed his shotgun directly at the victim's forehead. The victim stated he "instinctively grabbed the barrel of the shotgun with his left hand and pushed it down away from his head. When he did so, [the defendant] pulled the trigger and shot [the victim] in the right thigh. The victim did not attempt to demonstrate or otherwise reenact the crime." (***Id***. at p. 880.) During closing argument, the prosecutor, using the shotgun and the victim, physically demonstrated "how victim had grabbed barrel of shotgun and pushed it down and away from victim's head." (***Id***. at p. 880.) The appellate court held the victim's "participation in the reenactment of the crime during the prosecutor's closing argument, whether planned or unplanned, was highly improper" but not reversible error. (***Id***. at p. 881.)

In ***Williams* v. *State*** (Ga. 1985) 330 S.E.2d 353, the prosecutor attempted to show that the victim did not fire a shot because if the victim had fired a shot, he would have hit the defendant at close range. To respond to the defense argument that the twenty-pound trigger pull of the victim's pistol forced the victim to jerk as he fired the pistol and caused the victim's shot to miss its mark, the prosecutor asked an assistant district attorney who reportedly weighed around one-hundred pounds to point the pistol at a wall and pull the trigger. (***Id***. at p. 355.) The appellate court held the "gun was properly in evidence and thus was a proper subject for the prosecutor's final argument" but that "the prosecutor's actions were improper since they introduced evidence during the closing argument and constituted an experiment which was dissimilar to the actual event." (***Id***. at pp. 355-356.)

D. SPEAKING DIRECTLY TO INDIVIDUAL JURORS OR QUOTING FROM A JUROR DURING ARGUMENT

"[A]rguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved...." (***People* v. *Johnson*** (2016) 62 Cal.4th 600, 652 citing to ***People* v. *Wein*** (1958) 50 Cal.2d 383, 395; ***People* v. *Freeman*** (1994) 8 Cal.4th 450, 517 [same]; **see also *People* v. *Sawyer*** (1967) 256 Cal.App.2d 66, 78 [stating the prosecutor should not have addressed the jurors individually as "sir" or "ma'am" during closing argument].)

Editor's note: In ***People* v. *Johnson*** (2016) 62 Cal.4th 600, the prosecutor asked each individual juror: "Are you indignant, yet?" during argument. The court indicated this was inappropriate but declined to find misconduct since the defense failed to object and declined to find reversible error on grounds of ineffective assistance of counsel since there were potential reasons for defense counsel not to object to the prosecutor's argument. (***Id***. at pp. 652-654.)

Counsel should not quote individual jurors in their argument to the entire jury. (**See *People* v. *Johnson*** (2016) 62 Cal.4th 600, 652; ***People* v. *Riggs*** (2008) 44 Cal.4th 248, 325–326; ***People* v. *Freeman*** (1994) 8 Cal.4th 450, 517; ***People* v. *Lima*** (2022) 80 Cal.App.5th 468, 478.) Thus, in ***People* v. *Riggs*** (2008) 44 Cal.4th 248, it was held improper for the prosecutor to have posted a chart during penalty phase argument displaying questionnaire comments regarding the purpose of the death penalty that had been written by 12 prospective jurors, some of whom were members of the penalty phase jury. (***Id***. at pp. 325-326.) In ***People* v. *Freeman*** (1994) 8 Cal.4th 450, it was held improper during penalty phase argument for the prosecutor to quote a seated juror's voir dire response describing the role of a juror in the death penalty process. (***Id***. at p. 517.) In ***People* v. *Lima*** (2022) 80 Cal.App.5th 468, the court held it was held error (albeit harmless error) to recount some of the comments that jurors expressed during voir dire about their experiences and gangs. (***Id***. at p. 478-479.)

DD. MISSTATEMENT OF THE FACTS OR IMPLYING KNOWN TRUE FACTS ARE NOT TRUE

It is prosecutorial misconduct to misstate facts. (**See *People* v. *Collins*** (2010) 49 Cal.4th 175, 230; ***People* v. *Boyette*** (2002) 29 Cal.4th 381, 435; ***People* v. *Dennis*** (1998) 17 Cal.4th 468, 522.) A "prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (***People* v. *Jackson*** (2016) 1 Cal.5th 269, 349.) A prosecutor "may not mislead the jury as to what the record actually contains." ***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 797.)

Moreover, a prosecutor may not argue against facts known to be true. "It is misconduct for a prosecutor to urge a failure of proof and argue the contrary is true, when the prosecutor knows or should know the assertion is, in fact, false." (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 428; ***People* v. *Harrison*** (2005) 35 Cal.4th 208, 242; **see also *United States* v. *Reyes*** (9th Cir. 2009) 577 F.3d 1069, 1077 ["it is improper for the government to present to the jury statements or inferences it knows to be false *or has very strong reason to doubt*."], emphasis added.)

Nor can a prosecutor argue inferences when the prosecutor knows the inference is not justified. Several cases illustrate this principle:

In ***People* v. *Roberts*** (2021) 65 Cal.App.5th 469, the court held it was misconduct for the prosecutor in a domestic violence case to say "we don't know if [the victim] went to the hospital" when the prosecutor knew the victim did not go to

the hospital after the incident because she had been arrested later that day on an outstanding warrant and the jury did not know that because the prosecutor had successfully moved to exclude evidence of her arrest. (***Id***. at p. 481 [but also noting, at p. 482, fn. 1, that it was not misconduct for the prosecutor to argue there was no evidence of third-party culpability when the court had excluded evidence that the victim was with another man later on the day of the incident].)

In ***People* v. *Zaheer*** (2020) 54 Cal.App.5th 326, a key aspect of the defense attack on the credibility of a sexual assault victim involved the operational condition of the electronic door lock system in the defendant's car. In the first trial (which hung 11-1 for acquittal), the defense presented evidence that the locking mechanism in his car was broken to undermine the victim's claim about how the defendant locked her inside the car by pressing a button on the driver's side door. (***Id***. at p. 329.) In closing argument, the prosecutor asserted that either the victim was mistaken in thinking the door was locked or that the defendant did lock the door—either manually or electronically. (***Id***. at p. 333.) In the second trial, however, defense counsel neglected to introduce evidence the vehicle driven by the defendant was the defendant's own car. (***Id***. at p. 329.) The prosecutor seized on this oversight to suggest for the first time during her closing argument that defendant might have been driving a company car. (***Id***. at p. 329.) Specifically, the prosecutor stated: "What we don't know is whether or not that was even the car that the defendant was driving … he has a company car. There was no testimony that said, yes, that car is the same car that he picked up [the victim] in. Maybe it was, maybe it wasn't." (***Id***. at p. 334.) The appellate court held the prosecutor's suggestion was misleading given that she knew or had strong reason to believe that defendant was driving his own car based on the previous trial and police reports. (***Id***. at p. 338.) And that "the combined effect of defense counsel's failure to establish a critical predicate fact and the prosecutor's decision to take advantage of his omission" required reversal. (***Id***. at p. 330.)

In ***People* v. *Cunningham*** (2001) 25 Cal.4th 926, the court held that it would be improper for a prosecutor to argue that defendant changed his appearance to show consciousness of guilt and help prevent identification where the prosecutors knows the changes were done for health reasons, e.g., if the prosecutor had argued defendant had dental work done in order to raise doubts about his identity knowing the dental work was a medical necessity, such argument would be misconduct. (***Id***. at p. 1001.)

However, a prosecutor does not misstate facts by drawing inferences from the evidence that a defendant might not draw. The prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom." (***People* v. *Collins*** (2010) 49 Cal.4th 175, 230; accord ***People* v. *Valdez*** (2004) 32 Cal.4th 73, 134.) And "it is not misconduct for the prosecutor to argue in closing that there was no evidence supporting a particular proposition after the trial court has *properly* excluded evidence the defense had sought to introduce on that point." (***People* v. *Peterson*** (2020) 10 Cal.5th 409, 465.)

A different type of misstatement of fact occurred in the case of ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517. In ***Sanchez***, the court criticized the prosecutor for implying that if one of the jurors was a holdout, then the defendant would "go home" or go free when, in fact, a defendant may remain incarcerated if there is a hung jury. (***Id***. at p. 1532.) This type of argument might also be characterized as a misstatement of law. (**See** this outline, section II-G-7 at p. 49.)

Prosecutors need to be aware that even obvious rhetorical arguments may be taken at face value by the Ninth Circuit (perhaps disingenuously so) in order to find prosecutorial misconduct based on alleged misstatements of fact. For example, in the case of ***United States* v. *Preston*** (9th Cir. 2017) 873 F.3d 829, the prosecutor argued there were "only two possibilities," either the victim of a molestation was telling the truth or he was "making up these allegations because

he is a vicious, cold, calculating human being." (***Id***. at p. 844.) The Ninth Circuit ruled the argument misstated the nature of the evidence (which was actually that the victim could be misremembering or could be telling the truth) because the defense did not argue the victim was a liar but "simply provided expert opinion testimony that [the victim] have experienced memory problems as a consequence of his drug use." (***Id***. at p. 844.)

E. ASKING JURORS TO SPECULATE VERSUS ASKING JURORS TO DRAW REASONABLE INFERENCES

The line between speculation and reasonable inference can be a thin line. (**See *People* v. *Coddington*** (2000) 23 Cal.4th 529, 599 ["A reasonable inference … 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work"].) A prosecutor should not ask jurors to speculate. (**See *People* v. *Yeoman*** (2003) 31 Cal.4th 93, 149; ***People* v. *Williams*** (1971) 22 Cal.App.3d 34, 48.) On the other hand, a prosecutor may ask jurors to draw reasonable inferences from the evidence. (***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 149; ***People* v. *Hamilton*** (2009) 45 Cal.4th 863, 928; **see also** Evid. Code, § 600(b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].) And this holds true "even if the evidence is in dispute. (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 797.)

Jurors should *not* be told to avoid asking "what if" questions or refrain from posing hypotheticals since it is entirely appropriate for jurors to ask hard questions and consider hypothetical "what ifs." (***People* v. *Perez*** (2017) 18 Cal.App.5th 598, 625.) But it is fine to highlight that the jury's essential role is "to decide what the facts were and those facts, not hypotheses or personal opinions, [are] determinative of guilt or innocence." (***Ibid***.)

Below are cases illustrating the difference between reasonable inference and speculation:

Reasonable Inference

In ***People* v. *Rhoades*** (2019) 8 Cal.5th 393, the court held that the prosecutor's expression of skepticism that a defendant "could have walked around 10 miles in wet conditions, wearing old, 'cruddy' shoes, without getting blisters on his feet" was a reasonable inference. (***Id***. at p. 420, fn. 9.)

In ***People* v. *Tully*** (2012) 54 Cal.4th 952, a defendant complained a prosecutor "misstated the evidence and referred to facts not in evidence" when the prosecutor argued the deceased victim felt safe in her neighborhood because "you know this is a good neighborhood, I mean there are no bars on the windows." (***Id***. at p. 1022.) The defendant contended there was no evidence of the neighborhood's safety or whether the victim felt secure in her home. However, the court rejected the defense contention, finding the characterization of the neighborhood and victim's sense of security was permissible considering: (i) the evidence showed that the victim lived in a quiet neighborhood of single-family dwellings that partly abutted a golf course and that she employed no special safety precautions in her own home beyond a chain lock on the front door that was easily broken; and (ii) there was testimony that when a neighbor had come knocking at the victim's door one night, she simply opened it. (***Ibid***.) The court also found the prosecutor did not commit misconduct when he argued that the victim submitted to defendant's sexual assault because, by doing so, she may have hoped or believed she would not be killed since this "was an *arguable* inference from the absence of evidence of a struggle in the victim's bedroom, coupled with defendant's admission he had sexual intercourse with the victim and the testimony of the pathologist and criminalist that the absence of semen or traumatic injury did not mean the victim had not been forced to have sexual intercourse before her death." (***Id***. at p. 1044.)

In ***People* v. *Collins*** (2010) 49 Cal.4th 175, a special circumstances murder case, the prosecutor argued the victim was shot by defendant while he "was either on his knees pleading for mercy or running away in fear from this defendant." The court held the argument was permissible since the evidence indicated the victim was kidnapped and held against his will for four hours, and was eventually taken to a dark, distant, and fairly secluded location, and thus "[i]t is not unreasonable to infer that in these circumstances, the victim would know he was about to be killed and would have pleaded for mercy." (***Id***. at p. 231.)

Speculation

In ***Zapata* v. *Vasquez*** (9th Cir. 2015) 788 F.3d 1106, the prosecutor urged the jury to picture the "last words that [the victim] heard," and then "Fucking scrap. Wetback. Imagine again the last words you hear before you leave this Earth." (***Id***. at p. 1112.) The court noted that all the only eyewitness to the actual shooting was able to say was that the killer was shouting and gesticulating at the victim, who was cowering into the phone booth. "Some basis for the prosecutor's speculation could be found in the facts that defendant and some of his gang companions possessed a demonstrated animosity toward Mexican nationals, and that to wear number 8 in the neighborhood of the shooting would furnish a particular stimulus for any [member of defendant's gang] to inflict violence upon the wearer's person. But while this chain of inferences could furnish a motive for the shooting and elements such as intent and premeditation, it was pure fiction to suppose that it also established what was actually being said at the time of the shooting." (***Id***. at p. 1113.) Moreover, while there was evidence that members of the same gang to which defendant belonged had shouted these words in an unrelated attack that occurred seven weeks after the shooting of the victim, "there was not a shred of evidence in the record that the shooter uttered these words" to the victim. (***Id***. at p. 1114, fn. 6.)

In ***People* v. *Fuiava*** (2012) 53 Cal.4th 622, the court condemned a prosecutor for (i) describing defendant as a "killing machine" (although there was no evidence that defendant had killed more than one person), and (ii) asking that the jury speculate "How many others are there?" (***Id***. at p. 649.)

In ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, the court found it was improper (but not prejudicial) for a prosecutor to argue that because jurors saw a defense witness and a relative of defendant in the hallway together during trial they should assume that the relative told the witness to correct a misstatement in his testimony. (***Id***. at p. 948; **see also *People* v. *Galloway*** (1979) 100 Cal.App.3d 551, 564 [impermissible speculation was involved when a prosecutor referred to third participant in robbery by name (absent any identification of third participant in court other than as "a woman") and then linked defendant to crime by pointing out defendant was friendly with the named person].)

Editor's note: The California Supreme Court has repeatedly stated that a prosecutor has "the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper" and that "[o]pposing counsel may not complain on appeal if the *reasoning is faulty or the deductions are illogic*al because these are matters for the jury to decide." (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1043; ***People* v. *Lewis*** (1990) 50 Cal.3d 262, 283.) This seems somewhat inconsistent with the rule that a prosecutor may draw "*reasonable* inferences." One way of reconciling these two principles may be to simply say that so long as *someone* could find the inference being drawn by the prosecutor to be reasonable, it is not improper; even though others might find the inference illogical or faulty.

F. REFERENCE TO MOTION IN LIMINE RULINGS OR PX

In ***United States* v. *Younger*** (9th Cir. 2005) 398 F.3d 1179, at a pre-trial motion, the court ruled a statement made by the defendant was admissible. During closing argument, the prosecutor twice attempted to argue that if there was

anything unfair about how the defendant's statement was taken, the court would have excluded it. However, each time the court cut off the prosecution before the prosecutor was able to fully articulate the argument and gave a curative instruction. (***Id***. at pp. 1191-1192.) The Ninth Circuit held that it was improper for the prosecutor to refer to the ruling on in limine motions (i.e., on whether statement was properly admitted over constitutional objection). (***Id***. at p. 1192 [albeit finding the reference harmless in light of the judge's swiftly imposed corrective instructions]; **but see *People* v. *Roberts*** (2021) 65 Cal.App.5th 469, 482, fn. 1 [no misconduct on part of prosecutor to show "a slide in closing argument indicating spontaneous statements are admissible because they are reliable and trustworthy"].)

In ***People* v. *Whitehead*** (1957) 148 Cal.App.2d 701, it was held error for the prosecutor to argue the fact that defendant was held to answer at preliminary examination. (***Id***. at p. 705.)

FF. REFERENCE TO APPELLATE COURT DECISIONS

Prosecutors sometimes come across appellate cases that uphold convictions based on similar facts to the facts in the case being handled by the prosecutor. It is certainly proper to ask a trial court to instruct on principles of law discussed in appellate opinions and if that request is granted, to argue that law in closing. Also, if a prosecutor likes the way an appellate explained a particular issue, the prosecutor can incorporate that content of that discussion (without citation to the appellate case) into his or her argument. However, a prosecutor should **not** indicate that an appellate court or higher court of review has upheld a verdict based on facts similar to those before the jury in the pending case. (**See *People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, 1363-1369.)

For example, in ***People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, the prosecutor wanted to convince the jury that defendant's single shot at two persons was sufficient to prove an intent to kill both persons. The prosecutor repeatedly cited to the California Supreme Court as having endorsed this principle. The prosecutor also described the facts in a California appellate court case (facts similar to the facts in the pending case) and then stated the court had held those facts were sufficient to support an inference of intent to kill. (***Id***. at p. 1363.) The ***Jasso*** court found the prosecutor's statements to be misconduct because they "implied that the California Supreme Court would expect the jury to return a guilty verdict" and created a risk that "jurors might believe the high court had already done the jury's work and made the jury's choice for it"].) (***Id***. at pp. 1367; **cf**., ***Caldwell* v. *Mississippi*** (1985) 472 U.S. 320 [finding prosecutor improperly told jury that its death sentence would be reviewed by the state supreme court since that information would lead jury to believe responsibility for determining the appropriateness of the defendant's death rested elsewhere].)

As to quoting from specified appellate cases: compare ***People* v. *Hawthorne*** (1992) 4 Cal.4th 43, 59 [error for prosecutor to quote from dissenting opinion in ***United States* v. *Wade*** (1967) 388 U.S. 218 to the effect that law enforcement has an obligation to ascertain "the true facts surrounding the commission of the crime" while defense counsel do not] *with* ***People* v. *Rich*** (1988) 45 Cal.3d 1036, 1092 [summarily dismissing claim of prosecutorial misconduct where prosecutor told jury "Our Supreme Court at one time made a statement about the felony murder rule which I think is appropriate. The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker...."].)

G. MISSTATEMENT OF THE LAW

Although counsel have "broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law." (***People* v. *Mendoza*** (2007) 42 Cal.4th 686, 703; ***People* v. *Bell*** (1989) 49 Cal.3d 502, 538; **accord *People* v. *Boyette*** (2002) 29 Cal.4th 381, 435; ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 831 [and emphasizing it is

particularly improper when it is an attempt to absolve the prosecution of the duty to overcome reasonable doubt on all the elements of a crime].)

Generally, however, prosecutorial misstatements of the law, *if corrected*, are often held to be non-prejudicial since arguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." (***People* v. *Mendoza*** (2007) 42 Cal.4th 686, 703; **but see *People* v. *Lloyd*** (2015) 236 Cal.App.4th 49, 62-63 [finding reversible error where prosecutor told the jury that if it voted not guilty, it had decided that defendant had not committed the crime" and that "if the jury found self-defense, it was saying the defendant's conduct was absolutely acceptable" because the defense need only raise a reasonable doubt to justify an acquittal and it is not necessary for the defendant to establish self-defense by evidence sufficient to satisfy the jury that the self-defense was true].) The following are some examples of alleged misstatements of the law:

1. Asking Jurors to View Their Own Personal Beliefs as that of "the Reasonable Person."

In ***People* v. *Mendoza*** (2007) 42 Cal.4th 686, the prosecutor tried to explain the "reasonable person standard" in the context of discussing whether a voluntary manslaughter verdict would be appropriate. The prosecutor indicated that what a reasonable person would do could be ascertained by assessing what the jurors themselves would do. The court held "it is one thing to refer to the jurors as members of society in the course of explaining the reasonable person standard as a means of determining whether a killing was caused by an event or situation that probably would cause a reasonable person to lose self-control and kill. Accordingly, it was not misconduct for the prosecutor to tell the jury 'And who is the ordinarily reasonable person? You folks are.' It is another thing, however, to imply that the jurors, as individuals, can substitute their own subjective standard of behavior for that of the objective, reasonable person. Statements such as, 'Would any of you do what he did here and say that's reasonable? Would any of you do that? No. Would any of you put a gun to people's heads? Would any of you do what he did here?' appear to encourage jurors to impose their own subjective judgment in place of applying an objective standard. It is here that the prosecutor went too far, committing misconduct." (***Id***. at p. 703.)

2. Inaccurately Characterizing the Presumption of Innocence

"A defendant is presumed innocent until proven guilty, and the government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense." (***People* v. *Booker*** (2011) 51 Cal.4th 141, 184, citing to Pen. Code, § 1096 ["a defendant in a criminal action is presumed to be innocent until the contrary is proved"].) "The presumption of innocence continues during the taking of testimony and during jury deliberations until the jury reaches a verdict." (***People* v. *Cowan*** (2017) 8 Cal.App.5th 1152, 1159 citing to ***People* v. *Arlington*** (1900) 131 Cal. 231, 235; **see also *People* v. *Roberts*** (2021) 65 Cal.App.5th 469, 481 ["It is well established that the presumption of innocence continues into deliberations" and it "could hardly be otherwise, since jurors are required to keep an open mind and not begin to decide any issue—not only the ultimate issue of guilt—until all the evidence has been presented and deliberations have commenced."]; ***Ford* v. *Peery*** (9th Cir. 2021) 999 F.3d 1214, 1224 ["Criminal defendants lose the presumption of innocence only once they have been convicted."].)

A prosecutor may point out that the presumption is overcome when the evidence convinces the jury the defendant is guilty. (**See *People* v. *Dalton*** (2019) 7 Cal.5th 166, 259 [in context, telling the jury the defendant's presumption of innocence was gone was proper where it was a way of saying "the jury should return a verdict in his favor based on the state of the evidence presented"]; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 184 [no misconduct where prosecutor, after acknowledging the prosecution had the burden of proof stated "The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent."]; ***People* v. *Panah*** (2005) 35 Cal.4th 395, 463 [no misconduct to state evidence had "stripped away" defendant's presumption of innocence"]; ***People* v. *Romo*** (2016) 248 Cal.App.4th 682, 692 [no misconduct where prosecutor stated "As the evidence comes in—and the evidence has come in—and when you walk into that jury room and discuss the case—discuss the evidence in this case, once the evidence proved to you beyond a reasonable doubt that [defendant] committed the crime, there's no presumption of innocence. It's—it goes away as the evidence comes in and the evidence shows you that he's guilty. The presumption of innocence doesn't just stay there forever"]; ***People* v. *Goldberg*** (1984) 161 Cal.App.3d 170, 189 [no misconduct where prosecutor stated "And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you've heard this case, once the case has been proven to you—and that's the stage we're at now—the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. There is no more presumption of innocence. Defendant Goldberg has been proven guilty by the evidence" because the prosecutor was merely restating, "albeit in a rhetorical manner," the noncontroversial point that a defendant is presumed innocent "'until the contrary is proved.'"].)

However, extreme care must be taken in describing the nature of the presumption, lest misconduct occur, and prosecutors should avoid "even remotely imply[ing] the presumption of innocence is lost before the jury returns a verdict." (***People* v. *Romo*** (2016) 248 Cal.App.4th 682, 693.)

In ***People* v. *Roberts*** (2021) 65 Cal.App.5th 469, the prosecutor "told the jury during closing argument that although defendant was presumed innocent, 'that presumption lifts as soon as the evidence supporting it lifts. … When you come in here and you see that he's charged with a crime, that's not evidence; so he's presumed innocent. The moment the first witness testifies, now that presumption is starting to lift.'" (***Id***. at p. 481.) The appellate court held this was a "significant mischaracterization of the law." (***Ibid***.) And while the court did not find it prejudicial, the court stated, "the conduct is unacceptable and must not be repeated" and ordered the opinion be provided to the District Attorney employing the prosecutor. (***Id***. at p. 482.)

In ***People* v. *Cowan*** (2017) 8 Cal.App.5th 1152, during rebuttal argument, the prosecutor told the jury, "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 is gone." (***Id***. at p. 1154.) The ***Cowan*** court held the jury was effectively told the presumption disappeared with the reading of the charges and characterized the argument as "an unfair attempt to lighten the prosecution's burden of proof." (***Id***. at p. 1160.) The court described this argument as striking "at the very heart of our system of criminal justice" and stated: "Even a novice prosecutor should know not to make such a fallacious statement to the jury" (***Id***. at p. 1159).

In ***People* v. *Dowdell*** (2014) 227 Cal.App.4th 1388, the court held it misconduct for a prosecutor to tell the jury "You have the evidence. The presumption of innocence is over." And then later argue that "It's fairly obvious that [the defendant] committed all of the crimes we are accusing him of. The presumption of innocence is over. He has gotten his fair trial." (***Id***. at pp. 1407, 1408-1409.) The ***Dowdell*** court noted that the presumption of evidence continues not only

through the presentation of evidence, but also during deliberations and until a verdict is reached. The court believed the statement that defendant had gotten a "fair trial," "implied that the 'fair trial' was over, and with it, the jury's legal obligation to respect the presumption of innocence." (***Id***. at p. 1408 [but finding error to be harmless at p. 1409].)
In ***Ford* v. *Peery*** (9th Cir. 2021) 999 F.3d 1214, the court held the following rebuttal argument was misconduct (and would have been prejudicial if AEDPA review was de novo instead of deferential): "This idea of this presumption of innocence is over. Mr. Ford had a fair trial. We were here for three weeks where … he gets to cross-examine witnesses; also an opportunity to present evidence information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. He's not presumed innocent anymore." (***Id***. at p. 1217.) The Ninth Circuit stated: "A jury must evaluate the evidence based on the presumption that the defendant is innocent. If the jury concludes beyond a reasonable doubt that the defendant is guilty, then—and only then—does the presumption disappear." (***Id***. at p. 1224.)

In ***United States* v. *Perlaza*** (9th Cir.2006) 439 F.3d 1149, the court held it was misconduct to argue: "[The presumption of innocence], when you go back in the room right behind you, is going to vanish when you start deliberating. And that's when the presumption of guilt is going to take over you….'." (***Id***. at p. 1169.)

☢ WARNING!! Prosecutors seeking to discuss the burden of proof and presumption of innocence should emphasize that the People bear the burden of proof beyond a reasonable doubt. (See *People* v. *Booker* (2011) 51 Cal.4th 141, 186.)

3. Inaccurately Describing or Trivializing the Reasonable Doubt Standard

Attempting to describe "reasonable doubt" can be a risky proposition. "Many courts have admonished prosecutors not to stray from the time-tested description of reasonable doubt embodied in the standardized jury instructions." (***People* v. *Perez*** (2017) 18 Cal.App.5th 598, 624; **see *People* v. *Cortez*** (2016) 63 Cal.4th 101, 131 [it is "improper for the prosecutor to misstate the law generally [citation], 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, 829-830 [same]; ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 831 [same], emphasis added; **cf**., ***People* v. *Johnson*** (2004) 119 Cal.App.4th 976, 985 [*trial court* improperly altered statutory reasonable doubt definition by equating proof beyond a reasonable doubt to everyday decision-making]; ***People* v. *Johnson*** (2004) 115 Cal.App.4th 1169, 1171 [same].)
"Prosecutors should avoid drawing comparisons that risk confusing or trivializing the reasonable doubt standard." (***People* v. *Bell*** (2019) 7 Cal.5th 70, 111.)

a. Use of Diagrams or Visual Aids

"Courts have repeatedly cautioned prosecutors against using diagrams or visual aids to elucidate the concept of proof beyond a reasonable doubt." (***People* v. *Centeno*** (2014) 60 Cal.4th 659, 662.) "[T]he use of "innovative but ill-fated attempts to explain the reasonable doubt standard" by analogies or diagrams presents difficulties, and courts have discouraged their use." (***People* v. *Williams*** (2017) 7 Cal.App.5th 644, 686 citing to ***Centeno*** at p. 667.)

In ***People* v. *Centeno*** (2014) 60 Cal.4th 659, the prosecutor (using a diagram of the outline of the state of California) made the following argument to explain the concept of reasonable doubt: "Let me give you a hypothetical. Suppose for me that there is a trial, and in a criminal trial, the issue is what state is this that is on the Elmo. Say you have one witness that comes in and this witness says, hey, I have been to that state, and right next to this state there is a great place where you

can go gamble, and have fun, and lose your money. The second witness comes in and says, I have been to this state as well, and there is this great town, it is kind of like on the water, it has got cable cars, a beautiful bridge, and it is call Fran-something, but it is a great little town. You have another witness that comes in and says, I have been to that state, I went to Los Angeles, I went to Hollywood, I saw the Hollywood sign, I saw the Walk of Fame, I put my hands in Clark Gable's handprints in the cement. You have a fourth witness who comes in and says, I have been to that state. ¶ "What you have is you have incomplete information, accurate information, wrong information, San Diego in the north of the state, and missing information, San Bernardino has not even been talked about, but is there a reasonable doubt that this is California? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is you are looking at a world of possibilities. There is the impossible, which you must reject, the impossible (sic) but unreasonable, which you must also reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. It has to be a reasonable account. And make no mistake about it, we talked about this in jury selection, you need to look at the entire picture, not one piece of evidence, not one witness. You don't want to look at the tree and ignore the forest. You look at the entire picture to determine if the case has been proven beyond a reasonable doubt." (***Id***. at pp. 665-666.) The California Supreme Court held the argument was reversible error. The court reasoned the "verdict" the prosecutor was talking about in the trial on the hypothetical issue of what was the state in the diagram was not based not on evidence received in the hypothetical trial but on the jurors' existing outside knowledge of what the geographical outline of California looks liked. The court held the visual aid was in no way analogous to the facts at issue in the defendant's case and the use in closing argument of a visual aid about identifying an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, was a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. (***Id***. at pp. 669-671 [and noting the prosecutor's argument was also flawed in that it "strongly implied that the People's burden was met if its theory was "reasonable" in light of the facts supporting it."]; **see also *People* v. *Cowan*** (2017) 8 Cal.App.5th 1152, 1162.)

Similarly, in ***People* v. *Katzenberger*** (2009) 178 Cal.App.4th 1260, the prosecutor used a PowerPoint presentation in which six of eight puzzle pieces were added, one by one, until all of an image of the Statue of Liberty was visible except the face and the torch. (***Id***. at p. 1264.) The prosecutor then argued that everyone would know at this point beyond a reasonable doubt that it was a picture of the Statue of Liberty even without the rest of the pieces. (***Id***. at p. 1265.) The court found this was misconduct (albeit harmless) because: (i) the use of a readily recognizable icon could suggest it was proper to leap to a conclusion on a far smaller quantum of evidence than would satisfy the standard of reasonable doubt and (ii) the use of six of eight puzzle pieces suggested an improper quantitative measure of the concept of reasonable doubt - set at only 75 percent. (***Id***. at pp. 1266-1268 [and also indicating it would be prosecutorial misconduct to suggest reasonable doubt was akin to a 500-piece puzzle with eight pieces missing, or to having 90-95 percent of the pieces of a puzzle].)

And in ***People* v. *Otero*** (2012) 210 Cal.App.4th 865, after noting that a number of cases had come before the court in which prosecutors used diagrams or puzzles in a way trivializing the burden of proof, the court used much of the same rationale used in ***Katzenberger*** to condemn the use of a diagram of California to illustrate the concept of reasonable doubt. (***Id***. at pp. 867, 869-871.) The prosecutor in ***Otero*** utilized a PowerPoint diagram which consisted of the outlines of California and Nevada. There was some correct information printed on the diagram, such as the word "Ocean" printed to the left of California and the word "Los Angeles" printed on the southern part of California. There was also some misinformation, such as the word "San Diego" printed in the northern part of California. At the bottom of the diagram were the words: "Even with incomplete and incorrect information, no reasonable doubt that this is California." The

prosecutor used the diagram in attempt to explain that even with inaccurate and missing information, the jurors could not have a reasonable doubt what was depicted was the state of California. The defense objected, however, before the argument was completed and the judge prevented the prosecutor from further using the diagram. (***Id***. at pp. 869-870.) The ***Otero*** court held the use of the diagram was misconduct (albeit nonprejudicial misconduct) because the presentation was not an accurate analogy to the reasonable doubt standard – as it left the impression that the reasonable doubt standard "may be met by a few pieces of evidence" and invited the "jury to guess or jump to a conclusion, a process completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (***Id***. at p. 872.) Indeed, the court found the misconduct was even more egregious than in ***Katzenberger*** because the diagram "was identifiable using but one of eight pieces of information supplied by the diagram (12.5 percent of the information supplied)," which reduced the standard of proof below the condemned percentage in ***Katzenberger;*** and included inaccurate information, which conveyed that reasonable doubt could "be reached on such slight proof even when some of the evidence is demonstrably false." (***Id***. at p. 873.)

Even *verbally* describing an iconic photograph and explaining that it could be recognized regardless of whether some portions of the photograph are missing may be viewed as implicitly reducing the burden of beyond a reasonable doubt. For example, in the case of ***People* v. *Williams*** (2017) 7 Cal.App.5th 644, the prosecutor in opening statement stated: "A trial is like a jigsaw puzzle. A jigsaw puzzle, let's say an Eiffel Tower .... [¶] The trial will be putting the pieces together. When you have a jigsaw puzzle, you have a box of pieces. They don't go in any particular order. You might look for blue sky to start, and you will see green grass and put that in, and then you go get the blue sky in order. We have over 50 witnesses. We have 29 counts. We have 23 victims. They all can't come in a chronological order. ... [¶] Once you get all the pieces of a puzzle in about two weeks or so ... you'll be able to see if it is the Eiffel Tower. You will see the Eiffel Tower even though some pieces might be missing just like from a jigsaw puzzle. ***You get past two-thirds of it***. You say it is the Eiffel Tower. You know what it is. You will know what it is when you get to the end of trial." She concluded, "Ladies and gentlemen, you're going to get pieces of this puzzle in just a minute. You will put them together at the end. When the puzzle comes to light. You'll see not only the Eiffel Tower, but you will see all 29 counts charged to each of these defendants as listed in your grid. That's the evidence upon which you will deliberate." (***Id***. at p. 685.) Later, in closing argument, the prosecutor said, "You have at this point all the pieces to the puzzle. You can see that Eiffel Tower. Remember I talked about a jigsaw puzzle four weeks ago. When you [are] making a jigsaw puzzle, you may not have all the pieces, and there's even an instruction you heard yesterday that not all the evidence or witnesses need to come forward, as long as you can see what you have got and you have an Eiffel Tower here." (***Ibid***.) The ***Williams*** court stated it strongly discouraged this type of argument even though the prosecutor "did not tell the jury she was defining reasonable doubt" because "her verbal description asked the jurors to imagine a similarly iconic image [and] risked misleading the jury about the standard of proof." (***Id***. at p. 687 [albeit finding defense failure to object to the argument forfeited the issue].)

Editor's note: The holdings in ***Centeno***, ***Katzenberger***, ***Otero,*** should not preclude a prosecutor from arguing that guilt, like a jigsaw puzzle, may be obvious even if there are some pieces missing - so long as it is clear the argument is being used as a metaphorical argument that even if the jurors do not have a complete picture of each offense, they can still understand what happened to a level of certainty that satisfies the reasonable doubt standard or the concept of circumstantial evidence and there is **no reference to how many pieces are in the puzzle and/or are missing**. (**See *People* v. *Otero*** (2012) 210 Cal.App.4th 865, 873, fn. 3 ["We do not address whether the PowerPoint would have been properly used to address other questions such as how circumstantial evidence works or the fact evidence can have some convincing force even if the evidence is flawed]; ***State* v. *Fuller*** (Wash. App. 2012) 282 P.3d 126, 140-142 [prosecutor's argument ("A trial is very much like a jigsaw puzzle. . . . You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?") permissible since it did not equate the burden of proof to making an everyday choice nor quantify the level of certainty necessary to satisfy the beyond a reasonable doubt standard]; ***State* v. *Curtiss*** (2011) 161 Wash. App. 673, 700 [no misconduct in asking jury to imagine a giant jigsaw puzzle of the Tacoma Dome and stating "when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is"]; ***People* v. *Dietz*** [unreported] 2015 WL 3429946, *10 [prosecutor's use of pointillist painting to explain that you have to stand back to get a good view as to how all the dots (i.e., evidence) fit together permissible]; ***People* v. *Mendoza*** [unreported] 2018 WL 343765,*5-*10 [prosecutor properly used photograph of baseball stadium to illustrate how to use circumstantial evidence and show how different conclusions could be reached depending on how a person viewed the photograph, especially if someone focused on one detail to the exclusion of everything else].)

b. Minimizing Reasonable Doubt by Way of Analogy

Many cases have held it improper to equate the prosecution's case being reasonable with being proven beyond a reasonable doubt or to otherwise minimize the burden of proof. The California Supreme Court has repeatedly recognized the "difficulty and peril inherent" in the "use of reasonable doubt analogies" and has discouraged such "experiments" by prosecutors. (***People* v. *Dalton*** (2019) 7 Cal.5th 166, 259.)

In ***People* v. *Centeno*** (2014) 60 Cal.4th 659, the court not only criticized the prosecutor for improperly using a diagram to illustrate reasonable doubt (**see** this outline II-G-3-a at pp. 38-39), it criticized the prosecution for misstating the burden of proof in another way. The prosecutor in ***Centeno*** had argued: "'Is it reasonable to believe that a shy, scared child who can't even name the body parts made up an embarrassing, humiliating sexual abuse, came and testified to this in a room full of strangers *or the defendant abused Jane Doe. That is what is reasonable, that he abused her*. [¶] Is it reasonable to believe that Jane Doe is lying to set-up the defendant for no reason or is the defendant guilty?' . . . 'Is it reasonable to believe that there is an innocent explanation for a grown man laying on a seven year old? No, that is not reasonable. Is it reasonable to believe that there is an innocent explanation for the defendant taking his penis out of his pants when he's on top of a seven-year-old child? No, that is not reasonable. Is it reasonable to believe that the defendant is being set-up in what is really a very unsophisticated conspiracy led by an officer who has never met the defendant *or he['s] good for it? That is what is reasonable. He's good for it*.'" (***Id*** at pp. 671-672.)

The Supreme Court concluded the italicized parts of the prosecutor's argument misstated the burden of proof because they "left the jury with the impression that so long as [the prosecutor's] interpretation of the evidence was reasonable, the People had met their burden." (***Id***. at p. 672.) The ***Centeno*** court believed the prosecutor did not simply urge the jury to accept the reasonable and reject the unreasonable in evaluating the evidence. "Rather, [the prosecutor] confounded the

concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. She repeatedly suggested that the jury could find defendant guilty based on a 'reasonable' account of the evidence. These remarks clearly diluted the People's burden." (***Id***. at p. 673, italics omitted; **see also *People* v. *Meneses*** (2019) 41 Cal.App.5th 63, 72 [interpreting ***Centeno*** as standing for the proposition that while a prosecutor "may argue that defense interpretations of the evidence are unreasonable," a "prosecutor may not argue or even suggest the prosecution's *burden of proof is satisfied* if the prosecution's evidence presents a reasonable account" nor "that deficiencies in the defense evidence can make up for shortcomings in the prosecution's case"], emphasis added.)

In ***People* v. *Delgado*** [unreported] 2018 WL 4275240, the prosecutor stated, inter alia, that (i) reasonable doubt "can't be a mere conflict in the evidence,"; (ii) "Are there two reasonable explanations? If there's two evenly reasonable explanations, that's when you find the defendant not guilty. If there's only one, guilty."; and (iii) "Unless you have a reasonable doubt, then the defendant is guilty." (***Id***. at p. *3.) Although the appellate court did not find these remarks constituted *prejudicial* error, the court held "the prosecutor misstated the law insofar as his remarks suggested to the jurors that "a mere conflict in the evidence" could never generate reasonable doubt, that the People had met their burden of proof if the evidence provided a single "reasonable explanation," and that defendant was guilty unless the jurors had a reasonable doubt. The prosecutor's remarks were misleading since the burden of proof beyond a reasonable doubt remains with the prosecution . . ., a reasonable doubt may arise where the prosecution fails to produce evidence sufficient to satisfy that burden. . . and jurors cannot rely on circumstantial evidence to find a defendant guilty if a reasonable inference can be drawn that a defendant is not guilty or does not have the requisite intent." (***Id***. at p. *6; **cf**., ***People v. Roberts*** (2021) 65 Cal.App.5th 469, 482, fn. 1 [it was *not* misconduct for the prosecutor to say that if the "evidence points to a reasonable conclusion that [defendant] is guilty beyond any reasonable doubt, then he's guilty"].)

In ***People* v. *Mendoza*** (2000) 24 Cal.4th 130, the prosecutor described reasonable doubt as "like being in love," and told the jury: "You can't really describe it but you know it when you see it. It's that feeling that you have, that you feel comfortable with and it's not something mystical, magical at all." (***Id***. at p. 173.) Without saying whether the comment was improper, the court found the comment could not have been prejudicial in light of the fact the court gave the standard instruction on reasonable doubt. (***Ibid***.)

However, as long as it is clear from the argument the prosecutor is not asking the jurors to convict based on something less than proof beyond a reasonable doubt, even arguments that, in isolation, are similar to the arguments criticized in other cases, will be found to be proper.

In ***People* v. *Dalton*** (2019) 7 Cal.5th 166, the prosecution attempted to persuade the jurors not to let defense counsel create a reasonable doubt in their minds. The prosecutor stated: "Those of you that are married, or … living with somebody…. Comes the end of the evening, TV show is over, it's time to go to bed; time to lock up the house, turn out the lights and go to bed. It's your job to do that. You go over and you lock the door, turn the TV off. You switch the lights out. You do it that way every night, because that's your job and you do it. You go up. You get ready for bed. You climb in bed and your wife says, 'Did you turn that light off? Did you turn that light off?' And now you're a big dummy. You never turn it off, you big goof ball. You forgot your socks the other day. You probably didn't turn it out. And all of a sudden, she starts creating a reasonable doubt in your mind, … or it's not reasonable, because when you went to bed you knew you turned it out. Don't let me create that doubt; don't let him create that doubt. The guy goes downstairs and, sure enough, the lights were off and the doors were locked. You knew what you had done. You did it right. You did it conscientiously, just like you'll do it in this case." (***Id***. at p. 258.) The California Supreme Court found the use of this example "troubling" but

ultimately concluded that the prosecutor had "used this analogy as an example of the confidence the jury should feel in its ability to conscientiously consider the evidence to determine whether Dalton was guilty, not as a definition of reasonable doubt." (***Id***. at p. 260 [albeit finding the analogy "ill-advised" because of its "potential to confuse, if not mislead, the jury, which, unlike a reviewing court, cannot leisurely examine the prosecutor's transcribed words."].)

In ***People* v. *Bell*** (2019) 7 Cal.5th 70, the prosecutor used the following illustration to explain what is "reasonable" under the reasonable doubt instruction: "If I take this quarter and flip it in the air over a hard surface, it's possible it could land on heads or it's possible it could land on tails. It's reasonable either way. It's reasonable because it's based on physics, logic and reason. [¶] But if I flip this coin up in the air and expected it to land smack dab on its side and stay standing still, is it possible? Sure, it's possible. Anything is possible, but is it reasonable?" (***Id***. at p. 110.) The Bell court held that "[t]he prosecutor's coin-toss analogy here was somewhat problematic because it is commonly linked to the concept of probability and 50-50 odds." (***Id***. at p. 111.) However, the court observed the prosecutor "did not attempt to quantify reasonable doubt or analogize it to everyday decisions like whether to change lanes in traffic." (***Id***. at p. 111.) Rather, "the prosecutor was attempting to explain the meaning of 'reasonable'" and what constitutes a "possible" or "imaginary" doubt by discussing an unlikely occurrence. (***Ibid***.) Ultimately, the court concluded it was "not reasonably likely the jury would have misunderstood the prosecutor's argument as suggesting they could decide the case by flipping a coin." (***Ibid*** [and noting the prosecutor's argument specifically brought attention to the proper instruction on reasonable doubt].)

In ***People* v. *Potts*** (2019) 6 Cal.5th 1012, the prosecutor responded to a defense argument discussing the various levels of proof: "Defense tried to do this, I don't know, hierarchy of reasonable doubt, and boy, when the defense does the hierarchy it just sounds like preponderance is way down here, and clear and convincing is kind of here, and beyond a reasonable doubt is clear up here, high as Mt. Everest. That's sort of what the inference is, kind of like a bar chart or something. Well, you know, we could do a bar chart the other way, and let's start with beyond a reasonable doubt right down here, and then you could go beyond a shadow of a doubt right there, and beyond any doubt right here, and absolutely certain up here, and then way up here is one hundred percent certain. So you see that's not really very helpful. You can kind of manipulate bar charts any way you want to and that's not helpful. [¶] *But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, 'Gosh, you know, we believed he was guilty, but—.' Don't do that. If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you*." (***Id***. at pp. 1034-1035, emphasis in original.) The California Supreme Court upheld the conviction, noting that "it is not reasonably likely the jury construed the remarks in an objectionable fashion, nor that 'the jury understood the instructions to allow conviction based on' inadequate proof." (***Id***. at pp. 1037–1038.)

In ***People* v. *Cortez*** (2016) 63 Cal.4th 101, the defense counsel told the jurors that "proof beyond a reasonable doubt" is the "amount of evidence" that would enable "[e]ven a mother … to believe [her] child is guilty." (***Id***. at p. 133.) Defense counsel then told the jurors they were reasonable people and thus if they had any doubt about the case, it must be a reasonable doubt. (***Ibid***.) In rebuttal argument, the prosecutor responded: "The court told you that beyond a reasonable doubt is not proof beyond all doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" Defendant's counsel objected that these comments "misstate[d] the law." Before the court ruled on the objection, the prosecutor added, "That's proof beyond a reasonable doubt." The trial court then overruled the objection. (***Id***. at p. 130.) Although the concurring opinion would have found misconduct (albeit nonprejudicial misconduct) based on the belief the prosecutor effectively told the jury that "their belief in guilt need only be nonimaginary, rather than that the

evidence must exclude all reasonable doubts" (***id***. at p. 135), the majority did not find misconduct. However, the majority reached its conclusion on circumstances that may not exist in many other cases, i.e., because (i) it was unlikely the jury interpreted the prosecutor's comments as meaning that a "simple," "nonimaginary" belief "supported by a preponderance of the evidence, or even a strong suspicion" was sufficient to convict; (ii) the remark was ambiguous and courts do not lightly infer the jury drew the most damaging interpretation; (iii) the "trial court properly defined the reasonable doubt instruction in both its oral jury instructions and the written instructions" and courts "presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"; (iv) "defense counsel emphasized the court's instructions on reasonable doubt"; (v) the "prosecution's comments on reasonable doubt specifically referred the jury to the court's instruction on the subject"; and (vi) the "challenged statement was a brief, isolated remark offered in response to defense counsel's misleading comments on the subject." (***Id***. at pp. 131-133.)

In ***People* v. *Meneses*** (2019) 41 Cal.App.5th 63, immediately following the prosecutor's statements on the reasonable doubt standard, the prosecutor argued: "You must reject any unreasonable interpretation. And if there's one reasonable interpretation, you must convict." (***Id***. at p. 69) Although recognizing the argument was somewhat similar to the argument criticized in ***Centeno*** (**see** this outline, II-G-3-b at pp. 41-42) and misstated the law if viewed in isolation, the court held "there was no prosecutorial error because in the context of the entire argument and jury instructions it was not reasonably likely the jury understood or applied the statement in an improper or erroneous manner." (***Meneses*** at p. 73 [and finding two other comments by the prosecutor, one which told the jury there is only "one reasonable interpretation" and the other telling the jury to ask themselves whether the information is reasonable when reviewing the facts, proper].)

In ***People* v. *Perez*** (2017) 18 Cal.App.5th 598, during rebuttal argument, the prosecutor stated: "Reasonable doubt. You already have the description of what reasonable doubt is. But I want to make sure we all know. It is not beyond all possible doubt. It is not I'm 100 percent sure that it happened. ¶ "Because this is not Back to the Future. I can't call Marty McFly and we get into a car and we all look down and see exactly what happened. This is not A Christmas Story where there's Ebenezer Scrooge and we can have an angel taking us to the scene. We weren't there. So reasonable doubt is I'm 100 percent sure it happened. [sic] That is not reasonable doubt. ¶ "You can have doubt and still find someone guilty." (**Id**. at p. 624.) The appellate court rejected the defendant's contention the prosecutor's argument "diluted his burden of proof by essentially suggesting the jurors did not need to be convinced defendant was guilty, and could convict him even if they had a reasonable doubt, because absolute certainty was impossible." (***Id***. at p. 624.) The court held the "prosecutor's reminder, consistent with CALCRIM No. 220, that the evidence need not eliminate all possible doubt, did not mean they could find defendant guilty even if they had a reasonable doubt. Defendant's contention to the contrary is unreasonable." (***Id***. at p. 625.)

In ***People* v. *Jasmin*** (2008) 167 Cal.App.4th 98, a prosecutor compared the standard of reasonable doubt to "extremely important decisions" jurors had made in the past and argued that if "there is but one reasonable choice to make, we, as reasonable people, make that choice[.]" (***Id***. at p. 115.) The court held the prosecutor did not improperly denigrate the reasonable doubt standard since the prosecutor merely stressed the jury's task was akin to making a critical decision which required careful and reasonable review of all available facts, the. (***Id***. at p. 116 [and noting its holding was supported by the fact the jurors were told to base their decision solely on the law and instructions as given by the court].)

c. Use of Charts Describing Levels of Proof

Defense attorneys commonly use charts describing ascending levels of proof to try and convey how "high" the standard of beyond a reasonable doubt is. (**See e.g., *People* v. *Dalton*** (2019) 7 Cal.5th 166, 257; ***People* v. *Redd*** (2010) 48 Cal.4th 691, 742.) Prosecutors sometimes respond to this chart by discussing how the chart is not accurate, or by presenting a chart with beyond a reasonable doubt level near the bottom of the chart with ascending levels of proof that are higher than reasonable doubt (i.e., beyond all possible doubt, beyond any doubt, etc.). Discussing the inaccuracy of the chart should not be a problem. However, care should be taken in utilizing a chart with levels ascending beyond reasonable doubt or in describing a hypothetical chart with levels ascending beyond reasonable doubt.

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, it appeared the defense counsel used a chart depicting various level of certainty with reasonable doubt being the highest of the levels. The court held the prosecutor, in commenting on that chart, could *properly* say that by having the line for reasonable doubt twice as high as preponderance, which is 51% sure, defense counsel was improperly implying the case had to be proved to 100% certainty. (***Id***. at pp. 735-736.)

In ***People* v. *Dalton*** (2019) 7 Cal.5th 166, apparently "using a chart that included the words 'not guilty' on it, defense counsel explained that the instruction meant that if the prosecution demonstrated that the evidence was evenly divided as to guilty or not guilty, then [the defendant] was entitled to a verdict of not guilty. Counsel then discussed the standard of preponderance of the evidence in civil cases, and said that if '[i]t's more likely than not that the defendant committed the crime ... [t]here's still reasonable doubt, and the defendant is entitled to a verdict of not guilty.' Counsel made similar arguments for standards of '[p]robably guilty' and clear and convincing evidence." (***Id***. at p. 255.) The prosecution then responded by introducing his own chart, which he asked the jurors to use like a thermometer. The prosecutor then went through and discussed levels of proof depicted in the chart beyond a reasonable doubt (i.e., beyond a possible doubt, a shadow of a doubt, an imaginary doubt) that the prosecutor explained are beyond what is required that he prove. (***Id***. at p. 257.) The California Supreme Court did not find this was misconduct but stated: "we observe that the beyond a reasonable doubt standard is generally not susceptible to pictorial depiction on a chart or a diagram. Although we have previously stopped short of "categorically disapproving the use of reasonable doubt ... diagrams in argument" (Citation omitted), we caution that the use of such charts or diagrams to explain the standard presents a significant risk of confusing or misleading the jury and that it is better practice not to use such visuals." (***Id***. at p. 260.)

Editor's note: The language used in ***Dalton*** should apply equally to defense counsel's use of a reasonable doubt chart (**see** this outline, section IV at p. 110 [discussing applicability of rules governing closing argument to all counsel]), and prosecutors may want to consider making a motion in limine to preclude the defense from using such a chart in their closing argument. Indeed, in the unreported decision of ***People* v. *Palomar*** (unreported) 2015 WL 1089544, the appellate court expressly held a trial court was within its discretion to exclude such a defense chart on the ground it seemed to define beyond a reasonable doubt "inappropriately." (***Id***. at p. *16.)

d. Equating Reasonable Doubt to Everyday Decisions

In ***People* v. *Cowan*** (2017) 8 Cal.App.5th 1152, the court disapproved of a prosecutor's statement that the jury must make a decision "[j]ust like you make decisions a hundred times a day throughout your day. That's what you are going to do. And you are going to use the standard of beyond a reasonable doubt using your reason." (***Id***. at p. 1161 [albeit finding it was harmless error].)

In ***People* v. *Nguyen*** (1995) 40 Cal.App.4th 28, the prosecutor asserted reasonable doubt was "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." (***Id***. at p. 35.) The appellate court criticized this definition on the ground that the choice of when to change lanes is "almost reflexive" and the decision to marry is wrong "33 to 60 percent" of the time based on divorce rates. Thus, the court held these were poor analogies for the near certainty that reasonable doubt requires in the decision-making process. (***Id***. at p. 36 [albeit finding misconduct was harmless because the prosecutor had referred the jury to the actual instruction, which correctly stated the standard].)

In ***United States* v. *Velazquez*** (9th Cir. 2021) 1 F.4th 1132, the court held it was error to equate reasonable doubt to the decision to eat or drive. (***Id.*** at p. 1137.) Specifically, the prosecutor argued that "[r]easonable doubt is something that you do every single day. So things like getting up, having a meal. You're firmly convinced that the meal you're going to have is not going to make you sick. But it is possible that it might not—that it might actually make you sick. You got in your car or you travel to the court today. It is possible that you may have gotten in an accident, but you are firmly convinced that—the likelihood that you'll be able to get to court safely." (***Id***. at p. 1136.) During rebuttal, the prosecutor again told the jury that reasonable doubt "is something that you use every single day in your life." (***Ibid***.) The ***Velazquez*** court believed this trivialized the reasonable doubt standard since "[s]uch decisions involve a kind of casual judgment that is so ordinary and so mundane that it hardly matches our demand for "near certitude" of guilt before attaching criminal culpability. [Citation omitted.] These decisions do not typically even involve an objective calculation of risk, but rather rest on the fallacious comfort that because these activities did not result in chaos yesterday, they will not today. Such examples are highly inappropriate and misleading." (***Id***. at p. 1138.) The court held the error was prejudicial notwithstanding the fact the prosecutor quoted directly from the court's instruction on the reasonable doubt and the court informed the jury they had to follow the reasonable doubt instruction regardless of what the attorneys said. (***Id***. at pp. 1138-1139.)

e. Indicating Reasonable Doubt Cannot Arise Simply from Insufficient Evidence or When Doubt is Viewed as Unreasonable by the Other Jurors

In ***People* v. *Johnsen*** (2021) 10 Cal.5th 1116, after reading the reasonable doubt instruction, the prosecutor stated: "I'm going to suggest to you that, based on this definition of reasonable doubt, if any one of you feels that he or she might have a reasonable doubt, he or she should be able to do three things. One, they should be able to put the doubt into words; two, they should be able to point to something in the evidence that makes them have that doubt; and, three, that juror should be able to convince his or her fellow jurors that the doubt is reasonable. ¶ If you can't do all three of these things then I suggest to you, ladies and gentlemen, the doubt that you are contemplating is the imaginary or mere possible doubt that is referred to in the Court's instruction." (***Id***. at p. 1162.) After the defense counsel disagreed with the prosecutor regarding whether the third step was required, the prosecutor gave a rebuttal argument: "Reasonable doubt is the burden of proof which the People shoulder. And the operative word is 'reasonable.' If you don't have any method of assessing whether or not any doubt that you have is reasonable or unreasonable, then the instruction is meaningless. The concept is useless. ¶ And you have to test the reasonableness of any doubt. And one of the ways you do that is to discuss any perceived doubt with your fellow jurors, put it into words, test it, and see if anybody else agrees with you that that is a reasonable doubt. That's how you test it. There's no other way to assess any doubt. There's no way to tell whether a doubt is fanciful, imaginary, or just a mere possible doubt." (***Id***. at p. 1163.)

The ***Johnsen*** court did not find the misconduct to be prejudicial. Nevertheless, it held that the prosecutor's statement "that the reasonable doubt standard requires jurors 'to point to something in the evidence that makes them have that doubt' was reasonably likely to mislead the jury in the same way as did the prosecutor's statement in ***People* v. *Hill*** (1998) 17 Cal.4th 800 that reasonable doubt means "you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt"* mislead the jury. (***Johnsen*** at p. 1166, emphasis added.) That is, it "is reasonable to construe the prosecutor's remarks — '[t]here has to be some evidence on which to base a doubt' — to preclude jurors from having reasonable doubt solely based on the insufficiency of the prosecution's evidence." (***Id***. at p. 1166; **see also** this outline, section II-S at pp. 92-96[discussing error of burden shifting].) The ***Johnsen*** court held "[t]he prosecutor's remarks also erroneously suggest that a juror is precluded from considering factors such as common sense and life experience to form a reasonable doubt." (***Ibid*** [albeit finding this misconduct not to be prejudicial].)

The ***Johnsen*** court also held the prosecutor "misstated the law by advising the jury that in evaluating whether a perceived doubt is reasonable, a 'juror should be able to convince his or her fellow jurors that the doubt is reasonable.'" (***Ibid***.) The court noted that a jury must be unanimous and that "[e]mbedded in this right is the well-settled principle that a single juror may validly hold reasonable doubt even if all other jurors disagree." (***Id***. at p. 1167.) "Thus, the prosecutor rendered an incorrect characterization of the reasonable doubt standard by suggesting that any single juror's personally held doubt cannot be "reasonable" unless at least he or she can persuade another juror." (***Ibid*** [and noting this point was undisputed by the Attorney General but still finding the error to be harmless].)

4. Use of "Yellow Light" and Similar Analogies to Discuss Premeditation and Deliberation

In ***People* v. *Son*** (2020) 55 Cal.App.5th 1163, the prosecutor gave two examples of a premeditated decision. Specifically, he stated premeditation is "the difference between shooting someone a single time and pulling the trigger a second time. [¶] The decision a person makes when approaching a yellow light as it may be likely to phase red. A weighing of consequences. Am I going to make it? Am I going to be involved in an accident? Am I going to get a ticket? I look to the left. I look to the right. And I go for it." (***Id***. at p. 698.) The appellate court held there was no error in using the yellow light example. (***Id***. at p. 699.) The court held that second-shot example was on shakier footing since "[a] second shot does not necessarily demonstrate premeditation." (***Ibid***.) However, the court did not find the example to be a complete misstatement of the law since "there are some cases where the number of shots fired, coupled with other circumstances, does suggest premeditation." (***Ibid***.) Because the appellate court believed the example to be "an ambiguous one," it stated: "we would not encourage prosecutors to use in the future without more context." (***Ibid*** [albeit finding error to be harmless].)

In ***People* v. *Azcona*** (2020) 58 Cal.App.5th 504, the court approved of a prosecutor's argument that "the amount of time required for premeditation is no greater than that which would be required to decide whether to stop at a yellow light, or to decide which loaf of bread to buy at a store. (***Id***. at p. 516.) The argument regarding the yellow light was very similar to the argument made in ***People* v. *Wang*** (2020) 46 Cal.App.5th 1055 and ***People* v. *Avila*** (2009) 46 Cal.4th 680 [both discussed immediately below].) The bread aisle argument consisted of the prosecution saying: "Another example is if you're walking down the bread aisle ... and maybe you forget your list and so you call the wife and say, hey, I forgot the bread, I forgot what kind of bread. Get some healthy bread, get some very healthy bread. So you look, look, look, boom, you grab. You've thought about it, you've contemplated it, you deliberated it, and you acted. It can happen as fast as

that." (***Id***. at p. 516.) After recognizing that "[a]nalogies in closing argument have provided fertile ground for reversal," the ***Azcona*** court saw no "suggestion that the decision to kill someone is no more consequential than deciding to drive through a yellow light or which loaf of bread to buy. Rather, the prosecutor's point was that the time required for premeditation is no greater than the time needed to make those other (far less consequential) decisions. And the prosecutor specifically called to the jury's attention the instruction regarding premeditation, which states that it is not the length of time spent considering whether to kill that matters but rather whether there was sufficient reflection and consideration of the consequences. (CALCRIM No. 521.) As the gist of the prosecutor's argument was consistent with that instruction, there was no likelihood of misleading the jury and no prosecutorial misconduct." (***Id***. at pp. 516-517.)

In ***People* v. *Wang*** (2020) 46 Cal.App.5th 1055, the court held a prosecutor's analogizing "premeditation and deliberation" to the type of thought someone has before they decide to drive through a yellow light or stop suddenly was proper argument. Specifically, the prosecutor argued: "You have a decision to make, 'do I step on the accelerator and fly through this intersection because I can't wait, or do I slam on my brakes and stop?' You have to decide, and when you're making that decision—do I go or do I stop—you're evaluating things. 'If I go, are there pedestrians? Is there a cop around? Am I going to get a ticket? Is there a car that's going to pull out in front of me and cause an accident? If I slam on my brakes, am I going to end up in the middle of the intersection, or do I have enough space to stop? Am I going to be okay?' [¶] You may not verbally say this to yourself. That's crazy. No one is going to be driving going, 'Okay. Should I stop? Should I not? I don't know. Let's think.' No. This happens so quickly. It happens so quickly, but in your mind, you quickly evaluate those things, and you decide and you act. That is premeditation and deliberation. It can happen that fast. You just have to consider the consequences. You just have to weigh the pros and cons, things for and against it, and decide to act. That's what premeditation and deliberation ... is." (***Id***. at pp. 1084-1085.) The appellate court rejected the defense allegation that the prosecutor was attempting to "equate the gravity of a decision to kill with a traffic decision" and found the analogy was used "to show that, like a decision to drive through a yellow light, a premeditated and deliberate decision to kill could be made very quickly." (***Id***. at p. 1086.)

In ***People* v. *Avila*** (2009) 46 Cal.4th 680, the court upheld a prosecutor's argument where "the prosecutor used the example of assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.' (***Id***. at p. 715.) The ***Avila*** court did not consider this argument as drawing an equivalence between "the 'cold, calculated' judgment of murder and deciding whether to stop at a yellow light or proceed through the intersection" and noted that immediately after making this argument, the prosecutor stated: "Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here." (***Ibid***.)

5. Comment on How Jurors Should Deliberate

In ***People* v. *Boyette*** (2002) 29 Cal.4th 381, the prosecutor argued the evidence of guilt was quite strong, "[a]nd if there is one of you who can't see what happened in this courtroom, you're [sic] intelligence should be absolutely insulted by all the lying that's gone on here, if one of you can't see that, you['d] better step back, take a deep breath, think about your common sense and listen to your fellow jurors, because you are not seeing the forest through the trees, if you can't see this case. It is overwhelming." (***Id***. at pp. 436-437.) The defense claimed this argument improperly encouraged holdout

jurors to capitulate to the majority in violation of the rule that each juror must independently vote. The court **rejected** the defense claim, finding the "prosecutor did not exhort holdout jurors to submit to the majority's views, but argued the evidence of guilt was so strong that if any juror had doubts, they should step back and use their common sense. The exhortation to 'listen to your fellow jurors' in this context meant to listen to the arguments of one's fellow jurors." (***Id***. at pp. 436-437.)

6. Telling Jurors They Have a Job or Duty to Convict

Although some courts have condemned as misconduct a prosecutor's argument that the jury "do its job" (**see e.g.**, ***United States* v. *Young*** (1985) 470 U.S. 1, 18; ***United States* v. *Ayala-Garcia*** (1st Cir. 2009) 574 F.3d 5, 17-18), what renders that argument impermissible is the suggestion that the job of the jury is to find a defendant guilty irrespective of the evidence or the law – as is illustrated in the two cases below:

In ***United States* v. *Sanchez*** (9th Cir. 1999) 176 F.3d 1214, the prosecutor stated: "And I would ask your consideration, as every jury has done, and that is that after the marshal's service has done their duty and the court has done its duty and lawyers on both sides have done their duty, that you as jurors do your duty and well consider this matter and find these defendants guilty. (***Id***. at p. at 1224.) The ***Sanchez*** court held "it is improper for the prosecutor to state that the duty of the jury is to find the defendant guilty." (***Id***. at p. 1224.) However, the ***Sanchez*** court also noted: "There is perhaps a fine line between a proper and improper 'do your duty' argument. It is probably appropriate for a prosecutor to argue to the jury that 'if you find that every element of the crime has been proved beyond a reasonable doubt, then, in accord with your sworn duty to follow the law and apply it to the evidence, you are obligated to convict, regardless of sympathy or other sentiments that might incline you otherwise.'" (***Id***. at p. 1225.)

And in ***United States* v. *Gomez*** (9th Cir. 2013) 725 F.3d 1121, the prosecutor stated: "Now, the United States has the burden of proof beyond a reasonable doubt. Is the evidence that was presented in this case proof beyond a reasonable doubt? Absolutely. And now it's your duty to say the defendant is guilty of importing methamphetamine." (***Id***. at p. 1131.) The ***Gomez*** court held that unlike in ***Sanchez*** the prosecutor did not refer to the "duty" of any other person, and the prosecutor made the challenged statement immediately after reminding the jury of the prosecution's "burden of proof beyond a reasonable doubt." Read in context, the court held the prosecutor was arguing that, if the jury finds that the prosecution has met its burden of proving the elements beyond a reasonable doubt, then it is the jury's duty to convict. (***Id***. at p. 1132; **see also *People* v. *Harris*** (1934) 219 Cal. 727, 732.)

7. Comment on What Will Happen if There is a Holdout Juror

In ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, the court criticized the prosecutor for implying that if one of the jurors was a holdout, then the defendant would "go home" or go free when, in fact, a defendant may remain incarcerated if there is a hung jury. (***Id***. at p. 1532.) This type of argument might also be characterized as a misstatement of fact. (**See** this outline, section II-DD at pp. 31-32; **but see** section II-K-9 at p. 73 [proper to point out if counsel confuses a single juror, this can prevent a conviction].)

H. MISUSE OF EVIDENCE ADMITTED FOR SINGLE PURPOSE

"[U]rging use of evidence for a purpose other than the limited purpose for which it was admitted is improper argument." (***People* v. *Lang*** (1989) 49 Cal.3d 991, 1022; **accord *People* v. *Perez*** (2017) 18 Cal.App.5th 598, 626; **see also *People* v. *Bloom*** (2022) 12 Cal.5th 1008, 1055 [use of evidence in closing argument for its truth when evidence was only admitted for impeachment purposes may be improper].)

Editor's note: If it is not clear whether the evidence was admitted solely for a particular purpose, prosecutors should clarify with the court the scope of its permissible use before argument.

I. ATTACKS ON DEFENDANT

1. How Derogatory Can a Prosecutor Get in Referring to the Defendant?

"Prosecutors 'are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence' [citation], as long as the comments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury [citation]." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 168.) A prosecutor is not limited to "Chesterfieldian politeness." (***People* v. *Gamache*** (2010) 48 Cal.4th 347, 371.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence." (***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 180; **accord *People* v. *Friend*** (2009) 47 Cal.4th 1, 32; **cf.**, ***People* v. *McDermott*** (2002) 28 Cal.4th 946, 1002 [declining to "condone" use of opprobrious terms in argument while noting they are not necessarily misconduct].) "The cases are clear prosecutors may express, in the most vivid and even emotional terms, their disgust with the conduct of defendants shown by the evidence." (***People* v. *Arredondo*** (2018) 21 Cal.App.5th 493, 496; **see also *People v. Steskal*** (2021) 11 Cal.5th 332, 354 ["'[T]he use of derogatory epithets to describe a defendant is not necessarily misconduct' where, as here, '[t]he prosecutor's remarks ... were founded on evidence in the record and fell within the permissible bounds of argument.'"; **but see** this outline, section II-I-1-a at pp. 51-57.)

"In general, prosecutors should refrain from comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence." (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1361; ***People* v. *Jones*** (1997) 15 Cal.4th 119, 179-180; ***People* v. *Bloom*** (1989) 48 Cal.3d 1194, 1213; **see also *People* v. *Wein*** (1958) 50 Cal.2d 383, 396-397 [comparison to Caryl Chessman improper]; ***People* v. *Jackson*** (1955) 44 Cal.2d 511, 520-521 [misconduct to repeatedly compare conduct of defendant to conduct of defendants in notorious cases of Greenlease, Hart, and Lindbergh].)

However, where the reference to infamous persons or events is used to illustrate a point within the context of the case, such reference will not be deemed improper. (**See *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1361 [prosecutor's comment (that defendant's act of forgoing his right to wear street clothes and appearing before the jury in jail clothes after the guilt phase verdict was an act of contempt for the jury akin to Richard Allen Davis giving the finger to his jury after conviction) was not misconduct because, inter alia it "did not equate defendant to Davis in terms of comparative moral fault, but raised only the side point that both defendants demonstrated contempt for their respective juries" which was

"fair comment on the evidence"]; ***People* v. *Jones*** (1997) 15 Cal.4th 119, 179-180 [no misconduct in referring to Adolph Hitler and Charles Manson while arguing that because a murder was committed for irrational reasons it does not mean the perpetrator is insane]; ***People* v. *McDermott*** (2002) 28 Cal.4th 946, 1003 [no misconduct in comparing defendant to a Nazi working in the crematorium by day and listening to Mozart by night because prosecutor was not comparing defendant's conduct with the genocidal actions of the Nazi regime but simply noting human beings sometimes lead double lives, showing a refined sensitivity in some activities while demonstrating barbaric cruelty in others]; **cf., *People* v. *Jackson*** (2016) 1 Cal.5th 269, 350, 386 [comparison to "highly publicized and unrelated murders and sexual assaults of children such as Polly Klaas was gratuitous at the guilt phase and therefore improper" in guilt phase but permissible in penalty phase to illustrate a larger point about how particularly brutal crimes against the most vulnerable in our society—children and elderly women—must be punished, especially when committed in their homes"].)

a. The Impact of Penal Code Section 745 (The Racial Justice Act) on the Use of Language in Arguments When Referring to Defendants that Might Be Viewed as Racially Incendiary or Racially Coded

With the passage of the California Racial Justice Act of 2020, prosecutors must not describe a defendant in a manner that might be viewed as exhibiting bias or animus towards a defendant because of the defendant's race, ethnicity or national origin. Penal Code section 745, in relevant part, states: "The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following: (1) . . . an attorney in the case . . . exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin. ¶
(2) During the defendant's trial, in court and during the proceedings, . . . an attorney in the case . . . used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect." (Pen. Code, § 745(a)(1)&(2).)

"Racially discriminatory language" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language***, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin***. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory." (Pen. Code, § 745(h)(3), emphasis added.)

The preamble to the Act identifies the Act's concerns when it comes to closing argument:

"Current legal precedent often results in courts sanctioning racism in criminal trials. Existing precedent countenances racially biased testimony, including expert testimony, and *arguments* in criminal trials." (Stats. 2020, ch. 317, § 2(d), emphasis added.)

"Existing precedent tolerates the use of racially incendiary or racially coded language, images, and racial stereotypes in criminal trials. For example, courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are "highly

offensive and inappropriate" (Duncan v. Ornoski, 286 Fed. Appx. 361, 363 (9th Cir. 2008); see also People v. Powell, 6 Cal.5th 136, 182–83 (2018)). Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system (Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, and Matthew Christian Jackson, Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology (2008) Vol. 94, No. 2, 292–293; Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham Law Review, Volume 86, Issue 6, Article 24 3091, 3105–06 (2018))." (Stats. 2020, ch. 317, § 2(e).)

"There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decisionmaking in the criminal justice system. Examples of the racism that pervades the criminal justice system are too numerous to list." (Stats. 2020, ch. 317, § 2(h).)

Racial appeals in closing argument have long been viewed as unconstitutional. (**See e.g.**, ***McCleskey* v. *Kemp*** (1987) 481 U.S. 279, 309 n. 30 [noting "[t]he Constitution prohibits racially biased prosecutorial arguments"].) And the law existing before the enactment of section 745 prohibited prosecutors from comparing a defendant to a beast in argument "for the purpose of dehumanizing him before the jury or in an effort to evoke the jury's racial biases." (***People* v. *Powell*** (2018) 6 Cal.5th 136, 183; **see also *Darden* v. *Wainwright*** (1986) 477 U.S. 168, 180 [prosecution use of the word "animal" to describe defendant was improper]. Consider some of the following cases:

In ***People* v. *Arredondo*** (2018) 21 Cal.App.5th 493, the court held that a prosecutor's "relentless description of the defendants and the other participants in the crime as 'cockroaches' who together with others pose a hidden threat to the community" (***id***. at p. 496) was error, albeit recognizing that a fleeting characterization of defendants as cockroaches would not be error (***id***. at p. 504). It was error because the epithet became, "by virtue of both its repetition and its power, the major theme of the prosecutor's argument" and that theme of "guilt by association" was highly improper. (***Id***. at p. 504; see this memo, section II-U at p. 95 [discussing guilt by association].)

In ***People* v. *Herring*** (1993) 20 Cal.App.4th 1066, the prosecutor, in a sexual assault case, described the defendant as a "primal man in his most basic level. He's [sic] idea of being loved is sex. He wouldn't know what love was. He's like a dog in heat…." "This is primal man. He thinks all I have to do is put a little force on her. Women love this. Every man knows that…." "He's like a parasite. He never works. He stays at people's homes. Drives people's cars. He steals from his own parents to get anything. He won't work for it." (***Id***. at pp. 1073-1074.) The court stated the comments about the defendant (described by the court as biracial) being a primal man were, "at the very least, in bad taste." (***Id***. at p. 1074.) Moreover, the court found the comments that defendant was a parasite, did not work, stayed at people's homes, drives people's cars, etc., "had nothing to do with the crimes alleged and inferred that people who do not work, live with others, and drive other people's cars are bad people and more likely to do criminal acts." (***Id***. at pp. 1074-1075.) The court held the argument was directed at the defendant's "character invited the jury to decide the case based upon its own value judgment and not on the law." (***Id***. at p. 1075 [and finding these while these statements, by themselves, would not necessarily be cause for reversal, they did require reversal in conjunction with other closing argument misconduct].)

In ***People* v. *Travis*** (1954) 129 Cal.App.2d 29, the court found it misconduct (albeit non-prejudicial) to refer to defendants as members of a "rat pack" at a time when the expression was "currently used with great frequency by the local

press as descriptive of gangs of youths that have brought about an era of violence and crime in [the] community." (***Id***. at p. 39.)

In ***People* v. *Hunter*** (1942) 49 Cal.App.2d 243, the court held it was improper (but not prejudicial) for the prosecutor to refer to defendant as a "person of a vicious personality," and compare him to "a vulture, except that he was preying upon the bodies of young girls." (***Id***. at p. 250.)

However, **section 745 prohibits some animal-based analogies or parables that have <u>not</u> previously been viewed by courts as racial appeals in violation of the constitution.**

For example, in the case of ***People* v. *Powell*** (2018) 6 Cal.5th 136, the defendant claimed, "the prosecutor's comments comparing him to a Bengal tiger constituted a 'thinly-veiled racist allusion' that dehumanized him and thus constituted an improper argument regarding his future dangerousness." (***Id***. at p. 182.) The California Supreme Court rejected the claim, noting that it had previously rejected claims based on similar comments – citing to ***People* v. *Brady*** (2010) 50 Cal.4th 547, 585 and ***People* v. *Duncan*** (1991) 53 Cal.3d 955, 976-977.) The ***Powell*** court declared that:

> "It goes without saying that a prosecutor may not compare a defendant to a beast for the purpose of dehumanizing him before the jury or in an effort to evoke the jury's racial biases. The prosecutor may, however, properly remind a penalty phase jury of the circumstances of the offense, including the brutality of the murder, and caution the jury against judging defendant solely based upon his calm demeanor in the courtroom. Here, as in our prior cases, the record makes clear that the prosecutor was using the Bengal tiger analogy only to make the latter point. Under the circumstances of the case, we find no prejudicial misconduct." (***Id***. at p. 183.)

In ***People* v. *Duncan*** (1991) 53 Cal.3d 955, the prosecutor made the following then-permissible argument:

> My last thought, during this entire trial, you have seen the defendant sitting there in a suit, and in the sanitized area of a courtroom, you have jurors, court reporters, people in the audience. You have a bailiff who is armed. Sometimes we lose sight of what it must have been like at a little after midnight on the 13th of November, 1984. [¶] And therefore, I give you this analogy. [¶] You have friends come in from out of town. And so one of the things you do with them, you take them to the San Diego Zoo. [¶] And as you walk along with your friends, these high steel bars and moats, you look back there; there are large striped animals lolling in the sun, looking like kittens. And this little brass plaque up here says, 'Bengal tiger.' [¶] And you tell your friends that that's a Bengal tiger. [¶] Wrong, wrong, wrong. That's a Bengal tiger in captivity, behind bars, and is being fed so much meat every day. [¶] However, if you and your friends were on a houseboat in Pakistan or India, and the boat comes up to the shoreline in the evening; and you get off the boat; you're walking along; and you push a big palm frond aside; and there you see a huge striped animal with blazing eyes, with cubs, that's a Bengal tiger. And that's a Bengal tiger in its natural habitat. [¶] Mr. Cheroske [defense counsel] wants to know why you have to cut up the person that we have once known as Eileen DeBaun. [¶] If you were there that night, you wouldn't see the defendant in his suit, the way you have seen him in this trial. You would see him with a butcher knife, out to get money. You would be seeing him in a very natural habitat." (Id. at p. 976.)

Since the preamble to section 745 expressly referenced both the decision in ***Powell*** and the federal district court decision (***Duncan* v. *Ornoski***, 286 Fed. Appx. 361, 363 (9th Cir. 2008)) which upheld the conviction in one of the cases relied upon by the ***Powell*** court (***People* v. *Duncan*** (1991) 53 Cal.3d 955), it is almost certain that, regardless of a prosecutor's intent, such an argument (and similar arguments) will be found impermissible. Whether this extends to less charged arguments that invoke comparisons to animals (**see e.g**., "you can lead horse to water, but you can't make him drink") is unknown at this time. In the meantime, prosecutors should assume that many of the cases cited immediately below that have upheld arguments comparing the defendant to an animal or as someone less than human <u>will violate section 745.</u>

In ***People* v. *Thompson*** (2022) 83 Cal.App.5th 69, "during *voir dire*, the prosecutor explained that he did not have to prove motive and asked certain prospective jurors whether they could convict without motive evidence if he proved the case beyond a reasonable doubt. All of the prospective jurors questioned indicated that they could follow the law on motive." (***Id***. at p. 92.) The prosecutor began recounting a common fable involving a scorpion who stings a frog. The parable "stresses the scorpion will sting, no matter what, because that is in its nature." (***Id***. at pp. 92-93.)*

Editor's note: The full parable involves a frog (sometimes a turtle) who agrees to ferry a scorpion across a river. Before the frog reaches the other side of the river, it fatally stings the frog - dooming both scorpion and frog. "Why would you do that?" asks the frog, dying. "It is my nature," replies the drowning scorpion, "as you knew yourself when you let me on your back." The parable is commonly used to convey the notion that people will often act in a manner that appears contrary to their own interests or act irrationally, i.e., act, or appear to act, without a motive. Given the context of the prosecutor's statements, this was the apparent purpose in asking the question. (***Id***. at p. 93.)

Before the prosecutor could continue, the defense counsel asked to approach. Based on certain assumptions, the trial court then precluded the prosecutor from continuing down the path he was headed on the ground it constituted a form of "character evidence." Ultimately, the trial court found it was not prejudicial because of its context and because the prosecutor never reached the part of the parable implicating the concern that the parable indirectly impugned defendant's character. (***Id***. at p. *93.) On appeal, the defendant claimed the telling of fable during voir dire "was improper in two respects: (1) it was a character argument; and (2) it was racially discriminatory." (***Id***. at p. 93.)

As to the claim the question amounted to "character argument, the appellate court held that "[t]o the extent the prospective jurors understood the prosecutor's statements to mean that the law allows the consideration of character evidence, the comments were improper." (***Id***. at p. 94.) Nevertheless, because the defense failed to ask for a curative admonishment, the parable was truncated, and the "error" occurred during voir dire, the "character argument" claim was held harmless. (***Id***. at p. 94.)

Editor's note: Use of the parable *in closing argument* is even more likely to generate an objection. Whether use of this parable in closing argument is permissible may turn on specifically how it is used. (*Compare* ***Com.* v. *Thomas*** (Pa. 1998) 717 A.2d 468, 471 [use of scorpion and frog to explain defendants' conduct was "just a force of habit" was proper] *with* ***State* v. *Washington*** (Minn. 1994) 521 N.W.2d 35, 39-40 [use of parable was improper reference to character of defendant when made in conjunction with prosecutor's statements: "just the way the defendant is," "I can't help it, it's my nature," and "he can't help it" – albeit error was harmless].)

As to the claim the statement was racially discriminatory, the court acknowledged that "some jurors who were familiar with the fable, based on their lived experiences and perceptions, could have believed it was race based." (***Id***. at p. 95.) However, because the recitation of the fable was incomplete, and absent a record establishing the breadth of juror familiarity with the fable, [the court held] it would be mere speculation whether "there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (***Id***. at p. 96.) The court did caution that "courts and counsel must be aware of explicit and implicit racial biases" and admonished "judicial officers and counsel to be vigilant in their efforts to ensure compliance with the Racial Justice Act and the provision of fair trials." (***Id***. at p. 96.)

Editor's note: The concurring justice viewed the impact of the statement through a more sinister lens, concluding that "the obvious import of the story was that the jury should consider the character and nature of the defendant … and do something akin to not picking up the scorpion, i.e., convict him." (***Id***. at p. 129 [conc. opn. Lie, J.].) The concurring justice believed that "[t]o anyone on the panel who knew the fable, the prosecutor's invocation of the scorpion and the frog effectively conveyed the message that [the defendant] was—by nature—a deadly threat" and that the "deployment of the fable in the trial of a Black man—particularly one charged with a violent and ostensibly motiveless crime—echoed a durable racist trope of the "other" as intrinsically predatory, subhuman in its irrationality, and prone to repay trust with treachery." (***Ibid***.) Moreover, the concurring justice concluded the failure of the attorneys and the trial court to recognize the fable as a coded racial appeal "allowed the 'moral of the interspecies fable, once set loose . . ., to play on implicit racist preconceptions bred by interracial fear." (***Ibid***.)

In the unreported case of ***People* v. *Johnson*** (unreported) 2022 WL 17986210, an expert witness on pimping, pandering, and sex trafficking discussed the terminology that sex trafficking victims use to describe their pimps, identifying the different methods pimps use and describing a "Romeo pimp" as someone who uses charm and finesse to lure their victims, and a "gorilla pimp" as someone who uses violence to enforce compliance. (***Id***. at p. *16.) One of the defendants in the case, argued on appeal that the expert's language describing "gorilla" pimps controlling a "stable" of young victims violated the Racial Justice Act because it "played on the implicit biases of the jurors based on the historically inaccurate yet stereotypical portrayal of primarily Black pimps victimizing young, vulnerable White females." (***Id***. at p. *20.)

The ***Johnson*** appellate court agreed that the expert's use of the term "gorilla pimp" implicated the Racial Justice Act and warranted scrutiny, noting the term "gorilla pimp" uses animal imagery and "[e]ven when not intended as a coded racial appeal, the word "'gorilla'" suggests racial overtones when used in a trial involving two Black defendants." (***Id***. at p. *33.) Moreover, the court observed that the fact the term "gorilla pimp" appears "not infrequently in cases involving pimping, pandering, and sex trafficking—both in the context of expert testimony and as used by those involved in the trafficking," this did not, alone render the term neutral." (***Ibid***.) Nevertheless, the court ultimately concluded that use of the term, as it was used in the instant case, did not violate the Racial Justice Act as it fell under the exception in section 745, subdivision (a)(2) that permits racially discriminatory language to be used when "the person speaking is describing language used by another that is relevant to the case." (***Id***. at p. *34 [and noting the words of the statute suggest a broad scope for the exception].) The ***Johnson*** court held the use of the term in the context of explaining how human sex trafficking victims describe their pimps was relevant and was not used as "language that compares the defendant to an animal." (***Ibid*** [and noting neither the expert nor the prosecutor attempted to characterize or imply defendants were "gorilla pimps"].) The appellate court cautioned, however, that it was not condoning use of the term by the expert and indicated that on a different record this testimony might well constitute a violation of section 745, subdivision (a)(2). (***Ibid***; **see also *People* v. *Walker*** (unreported) 2023 WL 3267106, at pp. *23-*24 [declining to find prosecutor's statement in argument that "in the gang world, there is predator and there is prey" for failure of the defense to make a timely objection].)

Arguments referring to the defendant that will <u>likely run afoul</u> of section 745 notwithstanding earlier findings by courts that the prosecutor who made the argument did not engage in misconduct:

As someone who was "a despicable excuse for a man," a "despicable individual," "garbage," and "a sucker" (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1021, 1045 [and, in the penalty phase, as "an animal"].)

As "living like a mole or the rat that he is" (***People* v. *Friend*** (2009) 47 Cal.4th 1, 32.)

As someone who "didn't learn how to conduct himself like a human being," but instead acted "like a caveman" (***People* v. *Rundle*** (2008) 43 Cal.4th 76, 163.)

As someone who "lacked humanity," and "was frightening," (***People* v. *Chatman*** (2006) 38 Cal.4th 344, 387 [and also finding prosecutor' telling the jury it had "before you a man, and I use that term 'man' in this context very broadly" was proper].)

As "a mutation of a human being," a "wolf in sheep's clothing," a "traitor," a person who "stalked people like animals," and someone who had "resigned from the human race" (***People* v. *McDermott*** (2002) 28 Cal.4th 946, 1003.)

As a "[t]errorist[]" (***People* v. *Jones*** (1998) 17 Cal.4th 279, 308–309.)

As "laughing hyenas" (***People* v. *Williams*** (1997) 16 Cal.4th 153, 221)

As "mass murderer rapist," a "perverted murderous cancer," and a "walking depraved cancer" (***People* v. *Thomas*** (1992) 2 Cal.4th 489, 537.)

As having "animalistic tendencies" and "felonious tendencies" - where the attack on the victim was "indeed felonious and consistent with animalistic tendencies, i.e., pursuit and vicious attack without provocation" (***People* v. *Jones*** (1970) 7 Cal.App.3d 358, 362; **see also *People* v. *Krebs*** (2019) 8 Cal.5th 265, 341 ["animal who bit his victim"])

As an "animal" and one of the most "vicious gunmen and killers" (***People* v. *Terry*** (1962) 57 Cal.2d 538, 561–562.)

As a "snake in the jungle" (***People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1030)

Analogizing defendant to a "scorpion" who will sting because it is in his nature to do so. (**See *People* v. *Thompson*** (2022) 83 Cal.App.5th 69, at pp. 92-94, 128-129; this outline, II-I-1-a at p. 54.)

Arguments referring to the defendant in negative terms that are clearly targeted to the behavior of the individual and are not uniquely used to characterize individuals belonging to a particular group are less likely, but not certain, to be impermissible under section 745:

As someone who enjoyed killing like "a little kid opening his toys at Christmas," as a "denizen of the night," as an "executioner," as "the terminator of precious life," as "a head hunter," as "the complete and total essence of evil," and as someone with "a cold unyielding heart" (***People* v. *Harrison*** (2005) 35 Cal.4th 208, 244-246.)

As "cold-blooded," "a person with no soul," and someone "with no remorse" (***People* v. *Stanley*** (2006) 39 Cal.4th 913, 953.)

As a "punk" (***People* v. *Fuiava*** (2012) 53 Cal.4th 622, 691-692.)

As a "dangerous sociopath" and "especially evil" (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1172.)

As a "very violent, a maniac," and "just a perverted maniac" (***People* v. *Pensinger*** (1991) 52 Cal.3d 1210, 1251 [and also finding prosecutor's statement that the three jailhouse informants could be under a "possible death sentence for testifying in this case" was proper]

As a "contract killer," "slick," "tricky," a "pathological liar," and "one of the greatest liars in the history of Fresno County" (***People* v. *Edelbacher*** (1989) 47 Cal.3d 983, 1030)

As sharing the same genocidal theories as Adolph Hitler - where there was evidence defendant strongly believed in selective breeding (***People* v. *Hovey*** (1988) 44 Cal.3d 543, 579–580.)

As "cocky" and as having "ice running through his veins" (***People* v. *Reyes*** (1974) 12 Cal.3d 486, 505.)

As a "sadist" - where the evidence showed a brutal sexual attack and intent to inflict pain on victim (***People* v. *Thornton*** (1974) 11 Cal.3d 738, 762-763)

In the unpublished case of ***People* v. *Weathersby*** (unreported) 2023 WL 2399837, the court held a prosecutor's repeated description of the defendant "the monster" in the worst nightmares of these two young women was warranted by the evidence in a case where defendant kidnapped and forcibly sexually assaulted two separate girls, that the term was race-neutral, and that it did not violate the Racial Justice Act. (Id. at pp. *10-*12 [but acknowledging "use could, under certain circumstances, be employed to invoke racist tropes."].)

Arguments describing the nature of what the defendant did (as opposed to describing the defendant) are much less likely (but still not certain) to be impermissible under section 745:

As driving off "like a coward" after shooting victim (***People* v. *Steskal*** (2021) 11 Cal.5th 332, 353)

As a "professional robber" (***People* v. *Mitchell*** (1966) 63 Cal.2d 805, 809)

As "cop killers" (***People* v. *Ketchel*** (1963) 59 Cal.2d 503, 540)

As a "slaughter" of the victims (***People* v. *Caro*** (2019) 7 Cal.5th 463, 514.)

As a "savage beating" (***People* v. *Martinez*** (2010) 47 Cal.4th 911, 957.)

As "serial killing" and "terrorizing and killing" people (***People* v. *Young*** (2005) 34 Cal.4th 1149, 1195.)

As a "terrorist attack" (***People* v. *Jones*** (1998) 17 Cal.4th 279, 308–309.)

As "atrocities" (***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 701; **cf.**, ***People* v. *Benson*** (1990) 52 Cal.3d 754, 794, 795 [comment that crime was "perhaps the most brutal, atrocious, heinous crime" in county and probably state was not misconduct, albeit the court stated "similar remarks should be avoided in the future"].)

Further insight into the legislature's conception of what it means when it refers to "racially coded language, images, and racial stereotypes" may be gleaned from the articles cited in the preamble to the legislation enacting section 745 (AB 2542), which may be found at: https://web.stanford.edu/~eberhard/downloads/2008-NotYetHuman.pdf and https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5533&context=flr

2. Can a Prosecutor Call a Defendant a Liar?

"A prosecutor may honestly urge that a defendant lied. Convincing the jury that he did so is a potent weapon." (***People* v. *Armstrong*** (2019) 6 Cal.5th 735, 797.) "The prosecution may properly refer to a defendant as a 'liar' if it is a 'reasonable inference based on the evidence." (***People* v. *Wilson*** (2005) 36 Cal.4th 309, 338; **accord *People* v.**

Tafoya (2007) 42 Cal.4th 147, 182; ***People* v. *Reyes*** (1974) 12 Cal.3d 486, 505.) Thus, if a defendant's testimony is inconsistent with the testimony of the witnesses or evidence, it is fair to refer to the defendant as a liar. (**See *People* v. *Fernandez*** (2013) 216 Cal.App.4th 540, 561-562.)

3. Can a Prosecutor Argue the Defendant Concocted a Defense?

A prosecutor may argue "on the basis of inference from the evidence that a defense is fabricated." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 433.) Thus, it is permissible to argue that a defendant's statement on the stand that is inconsistent with a prior statement was framed to coincide with an imagined defense. (**See *People* v. *Dykes*** (2009) 46 Cal.4th 731, 768-769 [finding it permissible, as part of an argument that defendant's testimony was concocted, to state defendant "knows the legal niceties here, ladies and gentlemen, he's had two years to study these instructions. He's got two lawyers"]; **see also *People* v. *Williams, Jr***. (2016) 1 Cal.5th 1166, 1177-1178 [prosecutor properly claimed that defendant lied and knowingly put on contradictory evidence].)

4. The Fact Defendant Hired an Attorney is Not Evidence that Defendant Concocted a Defense or Consciousness of Guilt

The mere act of hiring an attorney is not "probative in the least of the guilt or innocence of defendants." (***Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, 1194.) "[U]nder the Sixth Amendment right to counsel, prosecutors may not imply that the fact that a defendant hired a lawyer is a sign of guilt[.]" (***United States* v. *Santiago*** (9th Cir. 1995) 46 F.3d 885, 892.) In ***People* v. *Bain*** (1971) 5 Cal.3d 839, the court held it was misconduct for the prosecutor to argue defendant concocted a story based on the fact defendant hired an attorney. (***Id***. at pp. 845, 847.)

5. Is it Misconduct to "Misgender" the Defendant?

In ***People* v. *Zarazua*** (2022) 85 Cal.App.5th 639 [301 Cal.Rptr.3d 434], the prosecutor repeatedly misgendered defendant by referring to the defendant, who identified as a male, using female pronouns. Although the prosecutor claimed the use of female pronouns was not intentional, the "defendant contended the failure to use masculine pronouns constituted prosecutorial misconduct which, in the absence of a curative admonition, was prejudicial." (***Id***. at p. 436.) The appellate court held that "[p]arties are to be treated with respect, courtesy, and dignity — including the use of preferred pronouns. Failure to do so offends the administration of justice." (***Ibid***.) The court acknowledged "there may be instances when misgendering is so overt, malicious, and calculating" that it could rise to the level of a denial of due process." (***Id***. at p. 440.) However, the court concluded any misconduct was not prejudicial in the case before it. (***Ibid***.)

J. ATTACKS ON DEFENSE WITNESSES

1. In General, Can a Prosecutor Impugn a Defense Witness?

"[H]arsh and colorful attacks on the credibility of opposing witnesses are permissible." (***People* v. *Arias*** (1996) 13 Cal.4th 92, 162; **accord *People* v. *Bryant*** (2014) 60 Cal.4th 335, 455.) "It is legitimate advocacy to disparage the credibility and weight of opposing evidence based on reasonable inferences." (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 455 [proper to say defense expert witness came "up with some convoluted cockamamie theory that is a bunch of psychobabble"]; ***People* v. *Shazier*** (2014) 60 Cal.4th 109, 148-149 [proper to note defense expert's "streak of 289, 289

straight times testifying exclusively for the defense" and sarcastically point out that expert's "brilliance" not appreciated by society, but by "defense attorneys who pay him"]; ***People* v. *Parson*** (2008) 44 Cal.4th 332, 359 [proper to say one defense expert is a "spin doctor"; that another was "just a little too glib, a little too self-assured, a little too cocky ...."; and a third was a "little too grandiose," "really a fish out of water" and "just kind of a glib fellow" whose conclusions amounted to "psychobabble"]; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 948-949 [proper to call defense witness a "weasel"].)

2. Can a Prosecutor Call a Witness a "Liar?"

"Referring to testimony as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief." (***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 180; **accord *People* v. *Arias*** (1996) 13 Cal.4th 92,162 [counsel is "allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie'"]; ***People* v. *Peoples*** (2016) 62 Cal.4th 718, 797 [same and noting that while "characterizing the testimony of defense witnesses as 'bull' is of dubious persuasive value, it falls within the prosecutor's wide latitude to comment on the evidence during closing argument"]; ***People* v. *Dennis*** (1998) 17 Cal.4th 468, 522 [similar]; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 948 [proper to say defense witness was "a perjurer" and another "was not following the script"].)

Thus, in ***People* v. *Sandoval*** (1992) 4 Cal.4th 155, a prosecutor was deemed to have properly called a defense expert a liar where it was established that the witness had testified differently in other cases about the distinction between alcohol and PCP intoxication. (***Id***. at pp. 179-180.) Similarly, in ***People* v. *Mitcham*** (1992) 1 Cal.4th 1027, the prosecutor's argument, "I talked to you earlier about dazzling, you know, dazzle you with BS. Well, they can baffle you with BS; and that's what they're trying to do. They're trying to baffle you with the red herring, PCP" was proper since it was made in reference to a defense expert's testimony that defendant could be under the influence of PCP where there was no actual evidence defendant was under the influence of PCP. (***Id***. at pp. 1081-1082.)

3. Can a Prosecutor Comment on the Fact a Defense Witness Is Getting Paid for Testimony?

"It is within the bounds of proper argument to attack the credibility of defense expert witnesses, and the weight to be given their testimony, based on the witnesses' compensation and the fact of their employment." (***People* v. *Farnam*** (2002) 28 Cal.4th 107, 171; ***People* v. *Babbitt*** (1988) 45 Cal.3d 660, 702; **see also *People* v. *Parson*** (2008) 44 Cal.4th 332, 360 ["counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie'"]; ***People* v. *Arias*** (1996) 13 Cal.4th 92, 162 [same]; **see also *People* v. *Krebs*** (2019) 8 Cal.5th 265, 343 [it is permissible to make remarks that "expose bias in the witness[es] by showing [their] propensity to advocate for criminal defendants even in extreme cases."]; **but see *People* v. *McLain*** (1988) 46 Cal.3d 97, 112 [impermissible for a prosecutor to outright state defense counsel shopped around and found somebody willing to come in and lie."].)

In ***People* v. *Dworak*** (2021) 11 Cal.5th 881, the prosecutor referred to a defense expert who claimed the victim was not raped as a "hired mouthpiece, really, who would say what they pay him to say," characterized his opinion as one "bought by the defense," and added that "[f]or $3,600, defendant bought an outrageous, antiquated and preposterous opinion about rape." (***Id***. at p. 909.) "Further, in mentioning the fact that [the expert] agreed [the victim] suffered injuries premortem yet said he did not see evidence of a violent struggle, the prosecutor said: 'Well, I guess for $3,600, people will say contradictory things.'" (***Ibid***.) The California Supreme Court rejected the claim that the prosecutor had attacked the

integrity of defense counsel by suggested the jury should disregard the expert's testimony because defense counsel had paid him to say what counsel wanted him to say. (***Id***. at p. 910 [and noting that while calling the expert a "hired mouthpiece" was hyperbolic, such language does not, by itself, establish prosecutorial misconduct].)

In ***People* v. *Caldwell*** (2013) 212 Cal.App.4th 1262, the prosecution described the defense expert as "kind of like Walmart for defense attorneys" and characterized hiring the defense expert as "[o]ne stop shopping to try to put reasonable doubt in your minds...." (***Id***. at p. 1272.) The ***Caldwell*** court characterized these comments as proper arguments about the expert's compensation. The court recognized that while the arguments suggested the expert was biased because of her compensation, "they were well within acceptable trial practice, and did not attack or impugn the defense attorney's character by extension." (***Ibid***.)

In ***People* v. *Spector*** (2011) 194 Cal.App.4th 1335, the prosecutor argued: "All told, the defense ended up, basically, changing everything. When it didn't work, they just changed it. If you can't change the facts, change the evidence. If you can't change the evidence, change the science, and if you can't change the science, folks, just go out and ***buy yourself a scientist***. That may work. [¶] There may be some way to convince a jury ... of that. Don't let that happen. See this for what it was. This was a 'pay to say' defense. You pay it; I'll say it, no matter how ridiculous it is. I'll even say blood flies around corners. [¶] The total cost to the defense to hide the truth from you folks, a staggering $419,000. Cogitate on that number for just a second. A staggering 419,000 bucks to hide the truth." (***Id***. at p. 1403.) On appeal, the defense characterized this argument as an attack on the integrity of both the witness and defense counsel. However, the appellate court held there was no misconduct since all the prosecutor did was "accuse the defense of doing was throwing a lot of money at various experts in an attempt to get Spector acquitted." (***Id***. at p. 1406.) The court observed that "[s]ince expert opinions are generally subject to reasonable debate, an attorney's good faith selection of a favorable expert does not reflect adversely on counsel's ethics or integrity. An argumentative reminder that defense counsel may have chosen [the expert] for this reason is not equivalent to an insinuation that counsel suborned perjury or engaged in deception." (***Ibid***.) Similarly, the court **rejected** the argument that the prosecutor committed misconduct when he made the following comments: "You can write a check for $419,000 to hire paid-to-say witnesses to get you out of what you have done." "They [defense experts] are willing, for a price, folks, and wait till you get this price, they are willing to come in and say suicide." "How does a homicide become a suicide? You write a big, fat check." "[J]ust go out and buy yourself a scientist." (***Id***. at p. 1407.)

In ***People* v. *Cook*** (2006) 39 Cal.4th 566, the court rejected the argument that a prosecutor's comment on fees paid to an expert witness who "comes up with something that excuses this man's responsibility" improperly implied that the witness gave false evidence for a fee. (***Id***. at p. 613.)

In ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, the prosecutor discussed a defense expert's substantial fee and her history of testifying only for criminal defendants, remarking: "'See, what you people probably don't understand, because you haven't been around the system, but there's a whole industry of these defense experts that bounce around from trial to trial, state to state, collecting good money for testimony. It is a whole industry. They don't just show up here, this isn't the first case. Next week she'll be talking about somebody else.'" The ***Monterroso*** court held: "The district attorney's characterization of [the expert's] credibility was within the bounds of proper argument." (***Id***. at p. 784.)

In ***People* v. *Ervin*** (2000) 22 Cal.4th 48, a contract killing case, the prosecutor repeatedly commented that the fee paid to a defense expert was more than the defendants received for killing the victim. The court held the prosecutor's remarks,

"though arguably unfair to the [expert], were factually accurate and not so disparaging of the witness as to constitute misconduct." (***Id***. at p. 92.)

In ***People* v. *Arias*** (1996) 13 Cal.4th 92, the prosecutor argued the eyewitness account of a stabbing was more believable than a defense expert's forensic reconstruction of the incident because the eyewitness, unlike the expert, "wasn't paid a hundred dollars for his testimony." The prosecutor also, in rebuttal argument, described the defense expert as a "so-called expert, so-called because a real scientist would never stretch any [principle] for a buck." (***Id***. at pp. 162-163.) The court held these arguments were proper as the prosecutor's argument merely focused on the evidentiary reasons why the purported scientific nature of [the expert's] opinions could not be trusted over [the] eyewitness account. (***Id***. at p. 163.)

4. Can a Prosecutor Comment on the Fact a Defense Alibi Witness Failed to Come Forward Earlier?

Assuming a witness was not an accomplice of the defendant (i.e., the witness has no Fifth Amendment issues of their own), it is permissible for a prosecutor to comment upon the fact that a witness did speak with the police or come forward with exculpatory information before testifying. (**See *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1332-1334; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 948–949; **see also *People* v. *Tauber*** (1996) 49 Cal.App.4th 518, 525 ["the fact a witness is aware of the potentially exculpatory nature of facts but fails to reveal that evidence to the authorities before trial is relevant to the witness's credibility" and "[w]hile there may be no legal obligation to come forward, it is so natural to do so that the failure to promptly present that evidence makes suspect its later presentation at trial."].)

In ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, the defendant presented an alibi defense though his wife and another witness who claimed to be the primary participant in the robbery and murder with which defendant was charged. The wife testified defendant was with her on the night of the crimes, and the other witness stated defendant was not present when the crimes were committed. During closing argument, the prosecutor argued the alibi defense was not worthy of belief because the wife and witness knew the defendant was sitting in custody for a long time but neither the wife nor the witness came forward: "Real alibi witnesses do not sit on their alibi and keep it secret for four-and-a-half years while their allegedly innocent husbands are rotting in jail." (***Id***. at p. 1332.) The defendant later claimed that this closing argument constituted improper comment on his right to remain silent in violation of his constitutional rights under the United States Constitution. (***Id***. at p. 1333.) However, the California Supreme Court rejected the argument on the merits because the gist of the prosecutor's argument was aimed not at defendant's silence, but that of his primary alibi witness, his wife. "Accordingly, the prosecutor's argument was not intended to have the jury draw negative inferences so much from defendant's silence as from [his wife's] silence. Mere witnesses, of course, have no constitutional right to remain silent." (***Id***. at p. 1334.)

In ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, the prosecutor argued the defendant's alibi was incredible because none of the witnesses who gave evidence in support of it had attempted to exonerate defendant with the police or prosecutor before the trial, despite their familiarity with the police department and the prosecution. Defendant claimed the reference to the familiarity of the witnesses with the police department was a reference to matter outside the record, namely, that the witnesses all had criminal records. (**Id**. at p. 948.) The court rejected the idea the jury would think the witnesses had criminal records considering that the trial testimony showed that seven of the ten alibi witnesses had been in contact with the police before trial but failed to mention the alibi. The ***Pinholste***r court then went on to note "that the trial testimony of a witness other than the defendant is less credible for being offered for the first time at trial, is a permissible comment on the state of the evidence." (***Id***. at pp. 948-949.)

K. ATTACKS ON DEFENSE COUNSEL

In general, "[p]ersonal attacks on opposing counsel are improper and irrelevant to the issues." (***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 764; **see also *People* v. *Reyes*** (1974) 12 Cal.3d 486, 506 ["name calling of opposing counsel should be avoided"].)

1. Can a Prosecutor Attack the Integrity of Defense Counsel or Imply or State Defense Counsel Has Fabricated a Defense?

a. In General

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (***People* v. *Hill*** (1998) 17 Cal.4th 800, 832; ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1200.) A prosecutor should not be casting defense counsel as the villain in a case. (***People* v. *Redd*** (2010) 48 Cal.4th 691, 742; ***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 183; ***People* v. *Williams*** (2017) 7 Cal.App.5th 644, 688 [consistent denigration of defense counsel is improper"].)

It is generally misconduct for the prosecutor to accuse defense counsel of fabricating a defense or to imply that counsel is free to deceive the jury. (***People* v. *Williams*** (2016) 1 Cal.5th 1166, 1178 ["It is error for a prosecutor to argue that defense counsel knew his client was guilty but proceeded with a sham defense"]; ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1337-1338 [and finding that by stating defense counsel "put forward" a sham, the prosecutor "improperly implied that counsel was personally dishonest"]; ***People* v. *Bemore*** (2000) 22 Cal.4th 809, 846 ["generally improper for the prosecutor to accuse defense counsel of fabricating a defense . . . or to imply that counsel is free to deceive the jury"]; ***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 183 ["improper for the prosecutor to imply that defense counsel has fabricated evidence"]; ***People* v. *Arias*** (1996) 13 Cal.4th 92, 162 ["argument may not denigrate the integrity of opposing counsel"]; ***People* v. *Cummings*** (1993) 4 Cal.4th 1233, 1302 ["If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established"]; ***People* v. *McLain*** (1988) 46 Cal.3d 97, 112 [improper to state defense investigators "shopped around" and "found somebody who was willing to come in and lie" but not prejudicial where instruction given and prosecutor retracted any implication of fabrication by the defense]; ***People* v. *Bain*** (1971) 5 Cal.3d 839, 847 ["The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct"]; ***People* v. *Herring*** (1993) 20 Cal.App.4th 1066, 1076 ["improper . . . to imply that defense counsel has fabricated evidence or to otherwise malign defense counsel's character"].)

"Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 183; **accord *People* v. *Bemore*** (2000) 22 Cal.4th 809, 846.) A "defendant's conviction should rest on the evidence, not on derelictions of his counsel." (***People* v. *Thompson*** (1988) 45 Cal.3d 86, 112.)

"An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1338; ***People* v. *Hill*** (1998) 17 Cal.4th 800, 832; ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1200; **see also *People* v. *Pettie*** (2017) 16 Cal.App.5th 23, 74–75 [prosecutor's comments that he did not underestimate the jury but defense counsel did or would did not rise to level of due process violation but were "not exemplary"].)

However, vigorously attacking defense counsel's tactics, shaky legal arguments or mischaracterization of the evidence is permissible. (**See** this outline, section II-K-3, at pp. 66-69.) Similarly, merely pointing out that the defense is attempting to confuse the issues is not improper. (**See** this outline, section II-K-4 at pp. 70-71.)

b. Actual Evidence of Fabrication

Courts sometimes use language that appears to indicate that there is an unqualified bar against accusations that defense counsel fabricated evidence. For example, in ***People* v. *Zambrano*** (2011) 41 Cal.4th 1082, the court referred to the tactic of accusing defense counsel of fabricating a defense or factually deceiving the jury as "forbidden." (***Id***. at p. 1154.) However, both cases ***Zambrano*** cited for this proposition qualified the rule. (**See *People* v. *Stitely*** (2005) 35 Cal.4th 514, 560 [referring to prosecutorial tactic of "*falsely* accusing counsel of fabricating a defense or otherwise deceiving the jury" as forbidden]; ***People* v. *Bemore*** (2000) 22 Cal.4th 809, 846 ["it is *generally* improper for the prosecutor to accuse defense counsel of fabricating a defense"].) The true rule is that "[a] prosecutor is not permitted to make *false or unsubstantiated* accusations that counsel is fabricating a defense or deceiving the jury." (***People* v. *Krebs*** (2019) 8 Cal.5th 265, 343, emphasis added.)

Moreover, if there ***is*** actual evidence of fabrication, it may be fair to allege defense fabrication. "A prosecutor's suggestion or insinuation that defense counsel fabricated the defense is misconduct only when there is 'no evidence to support that claim." (***People* v. *Earp*** (1999) 20 Cal.4th 826, 862; ***People v. Rundle*** (2008) 43 Cal.4th 76, 163; **see also *People* v. *Mitcham*** (1992) 1 Cal.4th 1027, 1081 [highlighting fact that a prosecutor should not imply that defense counsel fabricated a defense *"where there is no evidence to support that claim*"].)

In ***People* v. *Rundle*** (2008) 43 Cal.4th 76, the court rejected a defense claim the prosecutor engaged in misconduct by mentioning that defendant met with defense counsel and the defense psychiatrist to "clear up and get to the true version of what happened," and then arguing that defendant's version of the killings was "designed to avoid criminal responsibility for [various charged offenses] and for no other reason." (***Id***. at p. 163.) The court observed that the "[d]efendant admitted he had learned before trial it would be beneficial to his defense if it was established he did not form the intent to have sexual intercourse with the victims until after they were dead" and thus, "[t]he prosecutor's statements constituted fair comment upon the evidence regarding the supposed need for defendant, who was the only living person who witnessed the killings, to meet with others to determine the truth of what happened, and a reasonable suggestion of a possible motive for defendant to lie about the murders." (***Ibid***.) The court concluded that "prosecutor did not directly accuse defense counsel of encouraging defendant to lie, but even to the extent the statements swept counsel up in defendant's asserted lies, this was not an improper comment in the context of this case, in which defendant's story changed drastically during trial preparations." (***Ibid***.)

In ***People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, the court cited the conclusion in ***Randle*** in finding no misconduct where the prosecutor, in the process of commenting upon the fact that defendant changed his story at trial, argued the defendant would not say where he got the gun used in a shooting but then "his attorney comes forward and he says[,] Well, I'd better tell you, I got it from Casper…." (***Id***. at p. 1371 [and also expressing doubt that the reference communicated to the jury that the prosecutor was accusing defense counsel of encouraging defendant to make false statements].)

However, when there are accusations of fabrication, the evidence to support the accusation must be concrete. For example, as illustrated in the case of ***Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, the fact that a witness has changed her story after speaking with defense counsel may not, by itself, be sufficient evidence of an attempt by defense counsel to fabricate a defense.

In ***Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, the prosecutor argued that after a witness' initial statement to the police was given, "a lot of events started taking place.... All of the sudden lawyers start getting involved in the case. [¶] And the next thing you know the following day when the (witness) comes in to testify, all of a sudden everything got turned around and that's no longer the case." (***Id***. at p. 1194, fn. 1.) The prosecutor later argued, "Have you ever seen anything to compare with the machinations? Talk about puppets, talk about malleable, talk about pressure! [¶] That lady was brought down to a lawyer's office across the street from this building that very night, and spoke with the lawyer who represents her daughter (who was living with the defendant at the time of the murder). She spoke with Mr. Serra who represents Mr. Bruno in this case. And what happens? The next day she has a lawyer of her own, recommended by Mr. Serra. Does that all tell you what happened to that poor lady? What kind of pressures did they exert on her? ...." (***Id***. at p. 1194, fn. 2.) The Ninth Circuit reversed for prosecutorial misconduct, noting that "the prosecutor had labelled defense counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support his accusations." (***Id***. at p. 1194.)

c. Commenting on Fact *Defendant* Was Informed by Attorneys of Legal Defenses Does Not Suggest Attorneys Fabricated a Defense

In ***People* v. *Dykes*** (2009) 46 Cal.4th 731, the court held that the prosecutor's statement that defendant "knows the legal niceties here, ladies and gentlemen, he's had two years to study these instructions. He's got two lawyers," made as part of an argument that defendant's story on the stand was concocted "did not suggest that defense counsel had participated in fabricating a defense for defendant, nor did it constitute a personal attack upon counsel or counsel's credibility." (***Id***. at pp. 768-769.)

d. Commenting on Defense Being Adverse to the Truth

A prosecutor will be given some leeway to characterize the defense as "adverse to the truth" if there is evidence that will support such a characterization. One not atypical defense tactic that will provide support for this characterization is misleading defense cross-examination. For example, in ***People* v. *Spector*** (2011) 194 Cal.App.4th 1335, the prosecutor attacked the defense hiring of a very expensive expert. In the course of making this attack, the prosecutor implied that the defense was trying to hide the truth from the jury. The defense argued this was not supported by any evidence, but the court pointed out that in cross-examining a prosecution witness, the defense counsel quoted from an e-mail of the victim which indicated the victim was suicidal ("I am truly at the end of this whole deal. I'm going to tidy up my affairs, and chuck it because it's really all too much for just one girl?"). Defense counsel left off a portion of the e-mail that immediately followed the quoted statement ("Don't worry, not before I pay you back") that created a very different, much more jocular cast to the statement. The court held defense counsel's framing of the question could be grounds for arguing the defense was trying to hide the truth." (***Id***. at pp. 1406-1407.)

e. Commenting on Fact Defense at Trial is Different than What Defendant Told Police

In ***People* v. *Williams*** (2016) 1 Cal.5th 1166, the defense at trial was different than what the defendant told police. The prosecutor noted that the jury had been presented with three theories: one, consistent with guilt, one that he had nothing to do with the charged murder and one that he had sex with the victim but someone else killed her. After describing the first theory (which stemmed from defendant's statement to the police) as a lie, the prosecutor then pointed out that in his opening statement, defense counsel described the third theory and stated: "What can we find, because that first one he wants to use doesn't work. We got to scramble to find something else. And that's what we heard about from the defense, the second best defense. Jesus, Williams, why didn't you come up with the best one the first time. I thought I did. But he didn't." (***Id***. at pp. 1187-1188.) The defendant claimed the prosecutor "committed misconduct each time he referred skeptically to defendant's defense, or pointed out the discrepancies in defendant's police interview and subsequent statements during trial." (***Id***. at p. 1188.) However, the California Supreme Court held there was no error as the comments did not cast aspersions on defense counsel or imply that he was dishonest, but instead focused on defendant's changing story. (***Id***. at pp. 1188–1189.)

f. Commenting on Defense Selectively Choosing Witnesses

It is not misconduct "to tell the jury that as the opposing party was deliberate and selective in its presentation, the jury should be aware of the fact and judge the case accordingly." (***People* v. *Krebs*** (2019) 8 Cal.5th 265, 343 [condoning prosecutorial statement: "You think they just pick these witnesses out of a hat? You think a lot of this defense was orchestrated?"]; **accord *People* v. *Davis*** (1995) 10 Cal.4th 463, 538-539 [rejecting claim that the prosecution improperly accused the defense of "manipulating witnesses and suppressing testimony of uncooperative witnesses" when it suggested that the defendant's brother, unlike his sisters, did not testify because " 'he knew what they wanted and wasn't willing to do it' "].) Nor is it misconduct to provide "an 'argumentative reminder' that defense counsel selected expert witnesses whose opinions were favorable to defendant's case is not an insinuation of deceit." (***People* v. *Clark*** (2011) 52 Cal.4th 856, 961.)

2. Can a Prosecutor Attack the Generic Role of Defense Counsel?

It is improper to attack the role of defense attorneys as a class. (**See *People* v. *Perry*** (1972) 7 Cal.3d 756, 789–790 [misconduct for prosecutor to argue that, in contrast to prosecutors, defense attorneys were free to obscure the truth and confuse the jury]; ***People* v. *Hawthorne*** (1992) 4 Cal.4th 43, 59 [error for prosecutor to quote from dissenting opinion in ***United States* v. *Wade*** (1967) 388 U.S. 218 to the effect that law enforcement has an obligation to ascertain "the true facts surrounding the commission of the crime" while defense counsel do not]; ***People* v. *Gionis*** (1995) 9 Cal.4th 1196, 1217 [finding misconduct in prosecutor using quote, "You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody" even though it was directed at attorneys generally, and thus to the prosecutor himself as well as defense counsel]; ***People* v. *Herring*** (1993) 20 Cal.App.4th 1066, 1076 [characterizing prosecutor's argument as unsworn testimony improperly implying prosecutor was aware of facts not in evidence and that all those accused of crimes whom defense counsel represented were necessarily guilty of heinous crimes where prosecutor compared himself to defense counsel and stated, "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"].)

It is not "accurate to state that defense counsel, in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned." (***Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, 1195; **see also *United States* v. *Santiago*** (9th Cir. 1995) 46 F.3d 885, 892 ["under the Sixth Amendment right to counsel, prosecutors may not imply that . . . all defense counsel are programmed to conceal and distort the truth"]; **see also *People* v. *Fierro*** (1991) 1 Cal.4th 173, 212-213 [prosecutor's statement that defense counsel "has given you a very typical presentation of a defense attorney who has nothing of substance to say" derided as ad hominem attack]; ***People* v. *Talle*** (1952) 111 Cal.App.2d 650, 674 [prosecutor engaged in misconduct when, in reference to a defense counsel named Davis, said, "if counsel ever comes to Santa Clara County to defend a man 'there will be three hundred thousand people in our County who will know that we've got another guy just as guilty as [defendant], and will know it from no other reason than because Mr. Davis is down here to defend him'" and also by saying Davis was lacking in "manhood"].)

However, brief comments about how the job of defense counsel is to confuse the issues, in contrast to the prosecutor's duty to reduce that confusion, or statements about the defense counsel's duty to defend his client will not be deemed misconduct where the comments would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel. For example, in ***People* v. *Cunningham*** (2001) 25 Cal.4th 926, the court rejected the argument that a prosecutor committed misconduct by telling the jurors, in reference to the defense attorney, "And what is their job? Their job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. So let's do that." (***Id***. at p. 1002.) And in ***People* v. *Powell*** (2018) 6 Cal.5th 136, the court noted it "is not misconduct to comment on the role of defense counsel as an advocate" when rejecting defense claim that prosecutor acted improperly by saying that defense counsel "doesn't care about a just verdict. He cares about the defense of his client, which he's supposed to. That's his professional duty. But don't buy for a second that he just wants a just verdict." (***Id***. at p. 172.)

☢ Bottom line: It is permissible to observe the duty of defense counsel is to present a defense- but stay away from characterizing defense attorneys, in contrast to prosecutors, as having any duty to mislead the jury.

3. Can a Prosecutor Criticize a Defense Counsel's Shaky Legal Tactics, Dubious Arguments, or Mischaracterization of Facts?

The rule prohibiting attacks against the integrity of counsel does not mean prosecutors are prohibited from attacking shaky or dubious defense tactics and arguments of counsel. "Doing so is proper and is, indeed, the essence of advocacy." (***People* v. *Thornton*** (2007) 41 Cal.4th 391, 455.) A prosecutor may attack defense counsel's *argument* and use "colorful language to permissibly criticize counsel's tactical approach." (***People* v. *Stitely*** (2005) 35 Cal.4th 514, 560.)

Case law establishes "a prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (***People* v. *Bemore*** (2000) 22 Cal.4th 809, 846.) For example:

In ***People* v. *Roberts*** (2021) 65 Cal.App.5th 469, the court stated it was not misconduct for the prosecutor to comment "on defense counsel's strategy and suggest[] counsel was trying to distract from the issues." (***Id***. at p. 482, fn. 1.)

In ***People* v. *Krebs*** (2019) 8 Cal.5th 265, the court upheld the prosecutor's use of pungent language, calling defense strategy a "blame game," "guilt trip," or "abuse excuse." (***Id***. at p. 343.) The ***Krebs*** court also did not find the prosecutor's comment that the defense had the defense witnesses interview defendant together "to get all the ducks in a row" to be misconduct: "[t]he prosecution implied that the defense coordinated its experts but stopped short of insinuating that the experts lied." (***Id***. at p. 343.)

In ***People* v. *Winbush*** (2017) 2 Cal.5th 402, the prosecutor reminded jurors that in the guilt phase of a special circumstances case, defense counsel had argued defendant was innocent and had falsely confessed. The prosecutor then observed, "Now you are being told by the same attorney for the same defendant, oh, well, he did do it. Okay. You guys are right. We tried to fool you last time." Still speaking in the role of defense counsel, the prosecutor said, "It's as though it is whatever we can say to try and fool you and beat you. Whatever we can say to try and trick you into making a mistake as a jury, to get you to make the wrong decision that will favor the defendants. [¶] We will say anything to you, anything whatsoever." (***Id***. at p. 483.) The California Supreme Court seemed to indicate that the remarks, while harsh, were not necessarily error – and definitely not harmful error. (***Id***. at p. 484.)

In ***People* v. *Shazier*** (2014) 60 Cal.4th 109, the court held the prosecutor's fleeting claim of "deceptive" argument by defense counsel was not an attack on counsel's personal integrity but "a fair response to counsel's tactic of providing only selective excerpts of a jury instruction." (***Id***. at p. 150.)

In ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, the court held that prosecutor did not engage in misconduct by referring to defense counsel's argument as "an incredible job of salesmanship[.]" (***Id***. at p. 1230.)

In ***People* v. *Linton*** (2013) 56 Cal.4th 1146, the court found nothing improper in the prosecutor "urging the jury not to be distracted by defense counsel's tactic of blaming others for the seriousness of the situation defendant faced, a strategy of making other people 'the bad guy.'" (***Id***. at p. 1207.)

In ***People* v. *Tate*** (2010) 49 Cal.4th 635, the court held a prosecutor did not improperly impugn defense counsel in rebuttal argument by telling the jury that, when preparing for her just completed argument, counsel had "created" a "preposterous" defense involving a nonexistent "phantom killer," and said that counsel "wants you to start guessing about a phantom killer." (***Id***. at pp. 692-693.) Rather, the court held the prosecutor "merely argued, as he was allowed to do, that there was no evidence for counsel's theory." (***Id***. at p. 693.)

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the court held it was proper for the prosecutor to argue "that statements by counsel concerning the events were speculation, such speculation was intended to aid their client, and the jury should consider the source of any inferences it drew, in order to ensure that the inferences were based upon evidence rather than upon impermissible speculation." (***Id***. at pp. 734-735.) The ***Redd*** court also held the prosecutor properly commented (regarding defense counsel's use of what sounds like the classic chart with reasonable doubt being the highest of like a thousand levels) that, "the easy thing to do would be to read to you from the instructions, like I did. I wrote the instructions out word for word. [¶] But [defense counsel] didn't do that. He decided to create his own chart. Something from his mind." (***Id***. at p. 735.) In addition, the ***Redd*** court observed that "[a] prosecutor is not prohibited from challenging an inference raised by a question merely because defense counsel thereby may be cast in a poor light for having posed the question." (***Id***. at p. 738 [stating this principal in upholding a prosecutor's inference that defense counsel asked a question in order to convey that the victim "got what he deserved for trying to help his friend"].)

In ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, the court held a prosecutor did not impugn defense counsel by pointing out the defense failed to call an investigator (who the defense had insinuated had taken statements impeaching a prosecution witness) when the prosecutor argued, "You can conclude from the fact that the defense investigator wasn't presented to you that these insinuations are false, and all they can do possibly is mislead you as to what the evidence is in this case," since, according to the court, the "statement challenge[d] the insinuations—not the character—of defense counsel." (***Id***. at p. 1305.)

In ***People* v. *Stanley*** (2006) 39 Cal.4th 913, the court held a prosecutor's argument to be "intemperate in tone" but not misconduct where, in rebuttal argument, the prosecutor stated defense counsel "imagined things that go beyond the evidence," "had told them a 'bald-faced lie' and was on an "imaginary trip" when he summarized the testimony of a witness. (***Id***. at pp. 952-953.)

In ***People* v. *Young*** (2005) 34 Cal.4th 1149, the court held that the prosecutor's comments describing defense counsel's discussion of the law as "unintelligible gibberish" and "garbage" were not misconduct as the prosecutor "was merely determined to correct" defense counsel's erroneous description of the law[.]" (***Id***. at p. 1192.)

In ***People* v. *Taylor*** (2001) 26 Cal.4th 1155, the court found the prosecutor's reference to defense "tricks" or "moves" was not misconduct. (***Id***. at pp. 1166–1167.)

In ***People* v. *Frye*** (1998) 18 Cal.4th 894, the court held a prosecutor did not commit misconduct by accusing counsel of making an "irresponsible" third party culpability claim. (***Id***. at pp. 977–978.)

In ***People* v. *Medina*** (1995) 11 Cal.4th 694, the court found no misconduct where the prosecutor said counsel can "twist [and] poke [and] try to draw some speculation, try to get you to buy something." (**Id.** at pp. 977–978.)

In ***People* v. *Gionis*** (1995) 9 Cal.4th 1196, the court held the prosecutor's statement that counsel argued out of "both sides of his mouth" and that doing so was an example of "great lawyering" which "doesn't change the facts, it just makes them sound good use" was proper. (***Id***. at p. 1216.) The court also found the following quotes, taken in context, "simply pointed out that attorneys are schooled in the art of persuasion; they did not improperly imply that defense counsel was lying": (i) "Lawyers and painters can soon change white to black. Danish Proverb"; (ii) "If there were no bad people there would be no good lawyers. Charles Dickens"; (iii) "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"; and (iv) "In law, what plea so tainted and corrupt but being seasoned with a gracious voice, obscures the show of evil" (Shakespeare). (***Id***. at pp. 1216-1217; **but see *People* v. *Wise*** [unreported] 2003 WL 22535043, *3 [stating it did not take approval of these quotes in ***Gionis*** "as a green light for counsel to use these quotations-or similar ones-as a matter of routine argument"].)

In ***People* v. *Lloyd*** (2015) 236 Cal.App.4th 49, the court held it was proper argument for the prosecutor to tell the jury, "not to be fooled" by defense counsel's "dramatics" and not to "be fooled by the big, loud voice." (***Id***. at p. 60.)

In ***People* v. *Davis*** (1995) 10 Cal.4th 463, the court held it was not misconduct when the prosecutor said the defense strategy was "'to attack and smear everybody they could in the hopes of somehow deflecting or diffusing blame'" and "'to try to lay a guilt trip on you'"". (***Id***. at p. 539.)

In ***People* v. *Haslouer*** (1978) 79 Cal.App.3d 818, the court held it was not misconduct to attribute "to the defense a technique of smearing the victims and their parents" - though such comment was "unkind." (***Id***. at p. 834.)

a. Anticipatory Attacks

A prosecutor may preemptively attack anticipated flaws in defense counsel's argument based on the evidence introduced. (**See *People* v. *Dykes*** (2009) 46 Cal.4th 731, 770; ***People* v. *Thompson*** (1988) 45 Cal.3d 86, 113.)

However, it was arguably misconduct for the prosecutor to tell the jury that "[a] matter of general or common knowledge is that at the time of final argument [defense counsel] cries, so when that happens—" I want you to understand that it's nothing unique to this case." (***People* v. *Doolin*** (2009) 45 Cal.4th 390, 444-445.) The defense claimed the prosecutor improperly referred to "facts not in the record" and attacked the integrity of defense counsel by suggesting he "was a dishonest charlatan, an attorney without integrity, who would resort to theatrical gestures to sway a jury" but the ***Doolin*** court found the "prosecutor's brief remark" harmless in light of instructions that statements of counsel were not evidence and not to be swayed by sentiment. (***Id***. at p. 445.)

b. Attacks Implying that *Permissible* Defense Tactics Are Improper May be Misconduct

In ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, the court characterized a statement by the prosecutor that, "Defense is objecting because the defense believes that I'm painting too graphic a picture," as an attack on the integrity of counsel where defense counsel had made a valid and sustained objection. The court stated that the intent of the statement was to suggest that "defense counsel was [improperly] endeavoring to present the jury with a sanitized version of the crime." (***Id***. at pp. 1200-1201.)

In ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, the court held the prosecutor improperly disparaged defense counsel by improperly suggesting that the defense attorney failed to meet her obligation by putting on evidence. (***Id***. at p. 112.)

In ***People* v. *Lindsey*** (1988) 205 Cal.App.3d 112, the court held a prosecutor's comments improperly disparaged defense counsel by implying that counsel was incompetent in failing to reveal an alibi before trial (and thereby secure defendant's release from jail) because the comments were unfairly "based on the premise—perhaps plausible to nonlawyers but absurd to any knowledgeable attorney—that the prosecutor would simply have dropped all charges merely because defendant's mother claimed he was home in bed during the robbery." (***Id***. at p. 117.)

In ***Matthews* v. *Neven*** (D. Nev. 2017) 250 F.Supp.3d 751, the court held that the prosecutor committed misconduct in argument by arguing that defense counsel's legitimate advocacy in challenging the evidence of gunshot residue on a red glove found about a block from where the defendant was apprehended ("If we have the wrong guys and it's not them, why do they care so much about gunshot residue being found on the gloves?") because "[a] defendant has the right to challenge the evidence against him" and "it is improper for a prosecutor to disparage legitimate defense tactics." (***Id***. at p. 762, 764.)

4. Can a Prosecutor Point Out that Defense Counsel is Attempting to Confuse the Issues or Distract the Jury from the Evidence?

"It is not misconduct for a prosecutor to argue that the defense is attempting to confuse the jury." (***People* v. *Kennedy*** (2005) 36 Cal.4th 595, 626.) "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (***People* v. *Cummings*** (1993) 4 Cal.4th 1233, 1302, fn. 47.) In response to defense arguments that try to take the jury's focus away from the evidence, a prosecutor may make arguments that serve to remind "the jury that it should not be distracted from the relevant evidence and inferences that might properly and logically be drawn therefrom[.]" (***People* v. *Breaux*** (1991) 1 Cal.4th 281, 306; **see also *People* v. *Powell*** (2018) 6 Cal.5th 136, 171–172 [fair comment to point out the "witnesses were able to be manipulated by the defense attorneys with these leading type questions."].)

Arguments along the lines of "defense counsel is throwing sand in the eyes of the jury" are impermissible only where such argument "could be understood as suggesting that counsel was obligated or permitted to present a defense dishonestly." (***People* v. *Breaux*** (1991) 1 Cal.4th 281, 306.)

Thus, while it is impermissible to suggest that an attorney is "obligated or permitted to present a defense ***dishonestly***," it is permissible to point out that it is the proper job of an attorney to "focus on areas which tend to confuse." (***People* v. *Bell*** (1989) 49 Cal.3d 502, 538; **see also *People* v. *Winbush*** (2017) 2 Cal.5th 402, 484 ["We have upheld prosecutorial arguments suggesting defense counsel's 'job' is to confuse the jury and say anything necessary to obtain a favorable verdict."].)

The old "defense counsel is throwing up a smoke screen" argument

In ***People* v. *Marquez*** (1992) 1 Cal.4th 553, the court determined that the prosecutor's comment 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. (***Id***. at p. 575-576; **see also *People* v. *Kennedy*** (2005) 36 Cal.4th 595, 626-627 ["defense counsel's 'idea of blowin' smoke and roiling up the waters to try to confuse you is you put everybody else on trial'"]; ***People* v. *Stitely*** (2005) 35 Cal.4th 514, 559 [prosecutor's argument that jurors should view defense "counsel's argument as a 'legal smoke screen'" was not misconduct]; ***People* v. *Frye*** (1998) 18 Cal.4th 894, 978 [calling defense theory "ludicrous" and "a smoke screen" proper and not attack on defense counsel].)

The old "defense counsel is like an octopus (or squid)" argument

In ***People* v. *Cummings*** (1993) 4 Cal.4th 1233, the court held a prosecutor's argument accusing the defense of attempting to hide the truth, and his argument employing an 'ink from an octopus' metaphor, would be understood as nothing more than urging the jury not to be misled by the evidence. (***Id***. at p. 1302; **accord *People* v. *Cunningham*** (2001) 25 Cal.4th 926, 1002.)

The old "if you don't have the law or facts on your side, pound the table" argument

In ***People* v. *Breaux*** (1991) 1 Cal.4th 281, the court found it was not misconduct for the prosecutor to compare the trial with a law school trial tactics class where students are taught "that if you don't have the law on your side, argue the facts.

If you don't have the facts on your side, argue the law. If you don't have either one of those things on your side, try to create some sort of a confusion with regard to the case because any confusion at all is to the benefit of the defense" since, "in context, the prosecutor could only have been understood as cautioning the jury to rely on the evidence introduced at trial and not as impugning the integrity of defense counsel." (***Id***. at pp. 305-306; **accord *People* v. *Gionis*** (1995) 9 Cal.4th 1196, 1217.)

The old "defense counsel is throwing sand in your eyes" argument

In ***People* v. *Bell*** (1989) 49 Cal.3d 502, the prosecutor argued, "It's a very common thing to expect the defense to focus on areas which tend to confuse. That is—and that's all right, because that's [defense counsel's] job. If you're confused and you're sidetracked, then you won't be able to bring in a verdict." (***Id***. at p. 537.) The prosecutor also said: 'It's his job to throw sand in your eyes, and he does a good job of it, but bear in mind at all times, and consider what [defense counsel has] said, that it's his job to get his man off. He wants to confuse you." (***Ibid***.) The ***Bell*** court held the argument was proper insofar as the "remarks could be understood as a reminder to the jury that it should not be distracted from the relevant evidence and inferences that might properly and logically be drawn therefrom" but that "to the extent that the remarks might be understood to suggest that counsel was obligated or permitted to present a defense dishonestly, the argument was improper." (***Ibid***; **see also *People* v. *Meneley*** (1972) 29 Cal.App.3d 41, 60 [proper for prosecutor to say defense wasn't honest with you; he is "trying to throw dust in your eyes. That is his job"].)

5. Can a Prosecutor Point Out the Defense Attorney Is a Skilled Lawyer or Will Be a Hard Charging Advocate?

"A prosecutor's description of defense counsel as being a highly trained and skilled lawyer is not misconduct." (***People* v. *Kennedy*** (2005) 36 Cal.4th 595, 626.) In ***People* v. *Cummings*** (1993) 4 Cal.4th 1233, the court held a prosecutor's statement that "a skillful lawyer, a lawyer that is persuasive as Mr. Rucker is, could maybe get [a witness] to say almost anything," was a comment on the witness' obvious confusion and difficulty in understanding and responding to questions that reflected on the witness' lack of recall or comprehension, and could not have been reasonably understood to be an assertion that defense counsel sought to elicit perjured testimony from the witness. (***Id***. at p. 1303.)

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the court held the following statements of the prosecutor did **not** make "fun of defense counsel and denigrated their roles as advocates": "'Nothing I say this morning or ever in this trial is meant to reflect poorly on the defense attorneys.' He added that he had 'to be willing to get in there and hit hard, I cannot be namby-pamby and do my job, but I won't be critical of them.' He further explained that 'I will be critical of defense position. I'll be critical of [defendant's] conduct, but nothing I say is meant to reflect on [defense counsel]. [¶] I want to get that straight from the start but they know, they are both big boys and they know I'll hit them hard and I expect them to hit me hard. [¶] We know these type of cases, murder cases, death penalty cases are going to be very hotly contested so I expect them to let me have it. I want them to give me their best shot. That's what makes the system work. [¶] They are here to be diligent advocates. I appreciate that and I'm here to do the same thing. No hard feelings. After this we shake hands and go on to our next cases.'" (***Id***. at p. 734.)

6. Can a Prosecutor Comment on the Fact There Are Discrepancies Between Defense Counsel's Opening Statement and Defendant's Testimony?

A "prosecutor may highlight the discrepancies between counsel's opening statement and the evidence." (***People* v. *Bemore*** (2000) 22 Cal.4th 809, 846; **accord *People* v. *Chatman*** (2006) 38 Cal.4th 344, 385; ***People* v. *Gionis*** (1995) 9 Cal.4th 1196, 1217; **see also *People* v. *Kennedy*** (2005) 36 Cal.4th 595, 627 [proper for prosecutor to point out defense failed to call witness it said would be called in opening statement].)

7. Can a Prosecutor Claim Defense Counsel Does Not Believe in His or Her Own Case?

It improper for the prosecutor to argue that defense counsel believes his client is guilty or that defense counsel does not believe in his client's defense. (***People* v. *Chatman*** (2006) 38 Cal.4th 344, 385; ***People* v. *Bell*** (1989) 49 Cal.3d 502, 537; ***People* v. *Thompson*** (1988) 45 Cal.3d 86, 112; **see also *People* v. *Tully*** (2012) 54 Cal.4th 952, 1020; **see also *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1337 [finding "prosecutor crossed the ethical line when she suggested defense counsel did not personally believe his client's story and, in fact, believed that defendant personally shot" the victim].) "Such argument directs the jury's attention to an irrelevant factor and might in some contexts be quite prejudicial." (***People* v. *Thompson*** (1988) 45 Cal.3d 86, 112; **accord *People* v. *Herring*** (1993) 20 Cal.App.4th 1066, 1075 [whether "appellant's counsel believed appellant's testimony is irrelevant"].)

A prosecutor's argument that a defense counsel does not believe in his own defense cannot be justified on the ground it is responsive to a defense argument that defendant was not the perpetrator of an offense but that no matter who committed the crime, the elements of the crime were not met. (**See *People* v. *Bell*** (1989) 49 Cal.3d 502, 537.) However, a prosecutor who informs the jury that he or she does not expect the defense to spend a lot of time asking the jury to believe defendant's version of events or try to justify defendants' inconsistent stories is not necessarily violating the rule against arguing counsel does not believe his client. (**See *People* v. *Thompson*** (1988) 45 Cal.3d 86, 112 [finding such argument not to be misconduct, but noting the prosecutor ventured "onto dangerous ground in phrasing his remarks as he did" since defense counsel may have to argue in a particular way as a result of his ethical duties and should "not be penalized when, based on facts unknown to the prosecutor or the court and which he cannot disclose, he undertakes to handle argument in a particular manner"].)

8. Can a Prosecutor Discuss the Fact the Jury Should Not Be Influenced by the Fact the Defendant is Representing Himself?

In ***People* v. *Dale*** (1978) 78 Cal.App.3d 722, the prosecutor stated that "every man has a right to represent himself and refuse a lawyer," but that "the People's lawyer has to appear," and that "juries often times are very concerned that a man is being taken advantage of." (***Id***. at p. 733.) These comments were held excusable, but the court found the prosecutor "got carried away" when he stated, in reference to his concern the jury would think a pro per defendant might be taken advantage of, that "no one takes advantage of anybody in a criminal courtroom, no prosecutor, because of the higher

standards of ethics that he is held to," and that his "license, my ethics and my career are in the judge's hands," and that there is "no way that one defendant is worth taking advantage of, ever." (***Id***. at pp. 733-734.)

9. Can a Prosecutor State all Defense Counsel Has to Do is Confuse One Juror?

A common argument made by prosecutors is that it only takes one juror to thwart a verdict, or that if defense counsel succeeds in confusing only a single juror, the defendant can avoid a conviction. In ***People* v. *Caro*** (2019) 7 Cal.5th 463, this argument was incorporated into a larger argument that the defense counsel was trying to confuse the jury. Specifically, the prosecution argued it had to "prove to 12 jurors beyond a reasonable doubt the truth of the allegations against a defendant," while all the defense had to do was "*confuse one of you*." The prosecutor went on to say, "That's the tactic that many defense attorneys employ. Confusion. Throw up smoke. Try and mislead jurors. And maybe, by chance, *they'll get lucky and get one*." The prosecutor later said, "I just ask that you *not be the one* that the defense is trying to target for confusion." (***Id***. at p. 512, emphasis added.) The California Supreme Court declined to find this was misconduct, noting no objection was made and that, "[i]n any event, we do not forbid prosecutors from arguing that the defense case seeks to confuse the jury." (***Ibid***; **but see** this outline, section II-G-7 at p. 49.)

L. RESPONDING TO DEFENSE COUNSEL'S MISCONDUCT

"'Prosecutors 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. *Hill*** (1998) 17 Cal.4th 800, 819- 820, emphasis added.)

1. When Will the Defense "Open the Door" to Otherwise Improper Prosecutorial Argument?

a. <u>In General</u>

In general, a defense counsel's misconduct does not justify prosecutorial misconduct in response. (***People* v. *Terry*** (1962) 57 Cal.2d 538, 569; ***People* v. *Kirkes*** (1952) 39 Cal.2d 719, 724; **see also *United States* v. *Young*** (1985) 470 U.S. 1, 11 ["two improper arguments-two apparent wrongs-do not make for a right"]; ***People* v. *Rodriguez*** (2020) 9 Cal.5th 474, 484 ["Impermissible vouching — where counsel relies on evidence not available to the juror or invokes his or her personal prestige or depth of experience — does not become permissible simply because the speaker claims to be responding to something opposing counsel said"]; ***People* v. *Bell*** (1989) 49 Cal.3d 502, 539 [even if defense counsel's remarks that the senseless nature of the crime might be accounted for by a third party's use of cocaine were improper, it did not justify the prosecutor's response about the effects of cocaine that were not introduced into evidence or common knowledge]; ***People* v. *Bain*** (1971) 5 Cal.3d 839, 849 ["A prosecutor's misconduct cannot be justified on the ground that defense counsel 'started it' with similar improprieties"]; ***People* v. *Alvarado*** (2006) 141 Cal.App.4th 1577, 1583-1585 [improper for prosecutor to claim that she would not prosecute a case if she had a doubt about whether the crime occurred - even in response to a defense argument attacking the prosecutor's credibility]; ***People* v. *Hall*** (2000) 82 Cal. App. 4th 813, 817-818 [misconduct for prosecutor, in response to the defense counsel's argument drawing the jury's attention to the fact that the prosecution called only one of the two arresting officers as a witness, to state the second officer's testimony

would have been repetitive of the first officer's testimony since the effect was to tell the jury that the second officer would have testified exactly as the first officer did, in a manner favorable to the prosecution]; ***People* v. *Taylor*** (1961) 197 Cal.App.2d 372, 383 ["It is no answer to state that defense counsel also used questionable tactics during the trial and therefore the district attorney was entitled to retaliate"].)

"The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court and have it stopped." (***People* v. *Kirkes*** (1952) 39 Cal.2d 719, 724.) Alternatively, a prosecutor at the close of defense summation can object to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury. (**See *United States* v. *Young*** (1985) 470 U.S. 1, 13.)

b. Some Leeway to Respond in Rebuttal

On the other hand, courts give prosecutors some leeway when responding to improper defense arguments. "There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper, when such comments are fairly responsive of defense counsel." (***People* v. *Sandoval*** (1992) 4 Cal.4th 155, 193.)

"Indeed, 'even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, do[es] not constitute misconduct.'" (***People* v. *Thomas*** (2021) 64 Cal.App.5th 924, 954.)

However, even when responding to improper defense arguments, prosecutors may not refer to evidence outside the record. (**See *People* v. *Hill*** (1967) 66 Cal.2d 536, 562 ["a prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and *are based on the record*", emphasis added]; ***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, 74 [same]; **see also** this outline, section Y at p. 103.) Moreover, "despite such leeway, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its ... obligation to overcome reasonable doubt on all elements [citation].'" (***People* v. *Marshall*** (1996) 13 Cal.4th 799, 831; ***People* v. *Thomas*** (2021) 64 Cal.App.5th 924, 954.)

Some examples of permissible response:

In ***United States* v. *Robinson*** (1988) 485 U.S. 25, the defendant did not testify, but his counsel argued that the Government had not permitted defendant to tell his side of the story. The Court held, under these circumstances, the prosecutor was entitled to point out that defendant could have testified. (***Id***. at pp. 31-32; **see also** the ***Doyle*** and ***Griffin*** Error Outline -available upon request.)

In ***People* v. *Thomas*** (2021) 64 Cal.App.5th 924, defense counsel for one defendant improperly argued a GSR test (which was not done) would have shown the co-defendant fired a firearm. In rebuttal argument, the prosecutor stated: "If you're being asked to question 'What if,' or consider things that we don't know, or wonder if facts could have been proved, the"re asking you to speculate, to go beyond what you have in evidence. They're asking you to imagine facts and circumstances. If you have to image it or guess about it, it is not evidence and should not be considered or discussed. It is an imaginary doubt, not a reasonable doubt." (***Id***. at p. 953.) The appellate court held that was not an attempt to lessen the reasonable doubt standard by claiming it could not be based on lack of evidence. Rather, it was a proper response to an improper defense argument that invited the jurors to speculate about scientific evidence. (***Id***. at pp. 955-956.)

In ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, the court held it was not error for the prosecutor to ask the jurors*, in response to a defense argument* that placed the jurors in the victim's shoes, to further consider how, viewing the circumstances through the eyes of the victims, the victims might have believed cooperating lessened the chance of the victims being harmed. (***Id***. at p. 1406.)

In ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, the defense counsel argued there was a secret prosecutorial deal with a witness. In response, the prosecutor argued that if the defense thought there was such a deal, they could have called "her, a logical witness, to the stand to examine her about it." The court held such argument proper. (***Id***. at p. 949.)

In ***People* v. *Pensinger*** (1991) 52 Cal.3d 1210, the court held it was proper rebuttal argument for a prosecutor to say "I like to win cases and this is a big case … there were certain things [i.e., suborn perjury] I wasn't going to do or compromise in order to win cases" where the prosecutor was rebutting the defense argument that he had prepared a witness to commit perjury. (***Id***. at p. 1251.)

In ***People* v. *Powell*** (1980) 101 Cal.App.3d 513, one defense counsel embellished his argument by telling of a psychology professor's classroom experiment on identification in a stress situation and then read from three newspaper clippings about mistaken identity in specific criminal investigations and cases; the other defense counsel told a story about how the brother of John Wilkes Booth unfairly lost work because of his association with his brother. (***Id***. at p. 520.) In response, the prosecutor stated: "You must realize that defense attorneys have to do the best with what they have to work with. And often defendants are guilty. And consequently it is easy to, you know, get off into these tangents and argue about the kind of makebelieve cases because you know the hard reality of the present case is too much for them. So they are kind of prone, you know, talking about things that really don't pertain to the case that we have." (***Id***. at p. 530.) Later, the prosecutor stated: "So I think this is a strong case and I think if you just understand the position of the defense attorneys, that, you know, these little stories they use in every case because every case that ever comes to a courtroom to a jury has an identification problem. Even if it is a rear ender where you have to identify who was driving the car that ran into you. They can pull out these little excerpts to every jury from now until they die. But they are not going to fool they fool you sometimes, but they are not going to fool you all the time. And this is too smart a jury to be fooled by these two defense attorneys." (***Id***. at p. 521.) The court held neither of the prosecutor's arguments were misconduct as it was "apparent that the prosecutor was simply rebutting the embellishments presented by defense counsel in their summations." (***Id***. at p. 522.)

In ***People* v. *Haslouer*** (1978) 79 Cal.App.3d 818, defense counsel, after discussing how children during the Salem witch trials caused adults to be tortured and killed, began waving around a newspaper article claiming it showed how children still made up stories about adults. After an objection by the prosecutor to use of the article, the court "told defense counsel it was improper to read the newspaper article but that he could go ahead and argue that innocent people were being convicted as long as he did not refer to specific facts or unauthenticated accounts. Defense counsel then took a cheap shot: 'Thank you, your Honor. I'm not able to read from newspaper articles to you, ladies and gentlemen, about innocent people being convicted.'" (***Id***. at p. 834.) After another objection by the prosecutor and a jury admonishment that counsel was being prohibited from reading specific facts and instances of such circumstances, counsel went on to argue "that it was a matter of common knowledge that innocent people get convicted and sent to prisons on child molest crimes because several children made up allegations and because it was hard for juries to believe that young children would make up such stories." (***Id***. at p. 834.) In response to this, the prosecutor said, "I would merely point out to you it's also common

knowledge that guilty child molesters get off, too . . . It's common knowledge that guilty people get off on this kind of crime, too, particularly in a child molest case where the eyewitnesses, as we said at the beginning, are little kids whose vocabulary is not as extensive as ours, whose ability to communicate is not as good as ours, kids who may use the wrong word in trying to convey something particularly when they have to testify so many times." (***Id***. at pp. 834-835.) The ***Haslouer*** court concluded, "taken in context, there was nothing improper in the district attorney's remark. It was simply tit-for-tat that some guilty men are acquitted and some innocent men are convicted." (***Id***. at p. 835.)

In ***People* v. *Hernandez*** (1962) 209 Cal. App. 2d 33, the prosecutor was permitted to say a pro per defendant was trying to make a mockery of the court and the judicial system and was trying to gain the sympathy of the jury as an appropriate reply to the defendant's argument in which he sought the jury's sympathy because he was without counsel, despite the fact that he had himself discharged the public defender. (***Id***. at pp. 36-37.)

In ***People* v. *Perkin*** (1948) 87 Cal.App.2d 365, a police chief was charged with bribery. Defendant's counsel constantly referred to the defendant as a man of good reputation and character, appealed to the jury not to permit him to be robbed of his good name, and challenged the district attorney to say whether the defendant would be willing to be convicted solely on the testimony of two self-confessed criminals. The district attorney, despite interruptions, managed to reply that there was nothing in the record to show defendant's good character. The court held the response was not improper, stating the "remarks were made under the greatest provocation, and if there ever was a case where comment on the character and reputation of the defendant was invited this is that case." (***Id***. at p. 368.)

In ***People* v. *Mount*** (1939) 30 Cal.App.2d 286, the defense claimed it was improper for the prosecution to argue: "I might say a word as to [defendant's] character. Counsel said to you there wasn't one iota of evidence against his character. The law of the State of California does not permit the district attorney to put any evidence in against the character of the defendant unless he himself first produces evidence of good character. Of course that wasn't done, so ladies and gentlemen, that issue is not in the case at all. We don't know anything about his past, except what he told us about how many bars he frequented. That is all we know about his past." (***Id***. at pp. 288–289.) The ***Mount*** court recognized t is generally improper for the prosecuting attorney to argue that the state cannot introduce evidence of bad character until the defendant has introduced evidence of his good character but found no error. The court found no error largely because there was a lack of objection and no prejudice but it also suggested it was not error because "counsel for the appellant had somewhat opened the door for this argument by himself arguing that there was no evidence against the character of his client." (***Id***. at p. 289.)

Editor's note: **See** also this outline, section Y, at pp. 103-104 discussing the parameters of rebuttal argument.

c. Responding to *Defendant*'s Misconduct

In ***People* v. *Manson*** (1976) 61 Cal. App. 3d 102, one of the infamous defendants interrupted the prosecutor's closing argument by shouting and then walking to the rostrum and grabbing the prosecutor's notes. The prosecutor then stated to the defendant, "You little bitch." The court characterized this exclamation as a reaction produced by the misconduct of defendant and dismissed the defense claim the prosecutor engaged in misconduct: "This incident is no basis for complaint. While the prosecutor must be fair, he cannot be expected to be a saint." (***Id***. at p. 213.)

Editor's note: Appellate courts may not be so forgiving when the defendants are not infamous killers.

M. APPEAL TO SYMPATHY FOR VICTIM

1. In General

"[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt." (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1342; ***People* v. *Kipp*** (2001) 26 Cal.4th 1100, 1130; ***People* v. *Arias*** (1996) 13 Cal.4th 92, 160; ***People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1057.) In ***People* v. *Laanui*** (2021) 59 Cal.App.5th 803, the prosecutor asked the jury to "remember" the victim, noted his death deprived his family of a loved one, and urged the jury to "do justice" for the victim and his family. The court held these comments inappropriately played to the jury's sympathy for the victim and his family. (***Id***. at p. 814 [but finding comments not prejudicial]; **but see *People* v. *Roberts*** (2021) 65 Cal.App.5th 469, 482, fn. 1 [not misconduct for prosecutor to tell the jury that "the only real path to not guilty" is to say the victim is "not worth it"]; ***People* v. *Steskal*** (2021) 11 Cal.5th 332, 351 [referring to deceased victim as a "hero" was not an appeal to sympathy where description was based on conduct of the victim].)

The rule does not apply equally to argument in the penalty phase of trial. "Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision. [Citations.] Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment.' [Citation.]" (***People* v. *Jackson*** (2009) 45 Cal.4th 662, 692; ***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1418.)

However, if the evidence itself paints a sympathetic picture of the victim, it is not misconduct for a prosecutor to discuss that evidence in a manner likely to induce sympathy. For example, in ***People* v. *Holmes*** (2022) 12 Cal.5th 719, the court *rejected* a claim the prosecutor improperly appealed to sympathy for the victims where the prosecutor referring to photographs of the victims, which had remained on display during arguments and showed "dead children; big children, but dead children." (***Id***. at p. 788.) In ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, the prosecutor described the victim as a bridegroom who was focused on renting tuxedos and preparing for his wedding the next day when defendant robbed, kidnapped and murdered him, and commented that his bride's gift of a Movado watch was a "trophy" of a murderer in both opening and closing statement. (***Id***. at p. 1343.) The ***Seumanu*** court held this was proper because the prosecutor could "reasonably have anticipated the jury would be presented with evidence that police found the victim's engagement ring and his Movado watch, inscribed with his wedding date, in defendant's shirt pocket when he was arrested" and with evidence the victim's jacket (which was identified as belonging to the victim because of his wedding "to do list" in the pocket) was found in defendant's residence. (***Ibid*** [and noting the evidence served to link defendant to the crimes against the victim].) In ***People* v. *Panah*** (2005) 35 Cal.4th 395, the court rejected defendant's claims that by referring to the victim's age, height, and weight, the prosecutor drew an implied contrast between the victim's stature and the defendant's in an appeal to the jury's prejudices and passions because they were facts in evidence and a prosecutor is "not required to discuss his view of the case in clinical or detached detail." (***Id***. at p. 463.)

2. Asking Jurors to Put Themselves or Loved Ones in Position of Victim

a. In General

It is well-settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct because to do so appeals to the jury's sympathy for the victim. (***People* v. *Fayed*** (2020) 9 Cal.5th 147, 205; ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, 766; ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1344; ***People* v. *Leon*** (2015) 61 Cal.4th 569, 606; ***People* v. *Lopez*** (2008) 42 Cal.4th 960, 970; ***People* v. *Fields*** (1983) 35 Cal.3d 329, 362; ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1187 [and referring to such argument at the "Golden Rule" argument]; ***Michaels* v. *Davis*** (9th Cir. 2022) 51 F.4th 904, 954 ["the prosecutor here also violated the 'golden rule' by asking the jurors to step into the mindset of the victim].) A "prosecutor generally may not appeal to sympathy for the victims by exhorting the jurors to step into the victim' shoes and imagine their thoughts and feelings as crimes were committed against them." (***People* v. *Shazier*** (2014) 60 Cal.4th 109, 146; **accord *People* v. *Fayed*** (2020) 9 Cal.5th 147, 205; ***People* v. *Leon*** (2015) 61 Cal.4th 569, 606.) **cf**., ***Edwards* v. *City of Phila.*,** (3d Cir. 1988) 860 F.2d 568, 574 [criticizing counsel in civil case for asking jury to put themselves in defendant's shoes albeit finding "Golden Rule" arguments are rendered harmless by immediate curative instruction].) This is true even when the appeal is only indirect. (**See *People* v. *Sanchez*** (2019) 7 Cal.5th 14, 66 [albeit finding no prejudice].)

Some examples of such improper appeals:

"Imagine begging for your life, begging to be let go, being held captive at the end of a shotgun by these four frightening men, and they get mad at you because you only have a little cash." (***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1343.) "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." (***Id***. at p. 1344 [albeit finding error to be harmless].)

"Imagine in that last millisecond before the lights go out, when you hear the report of the gun, when you feel the wetness … the small vapor of blood that is blown out the back or the side of their head and they fall to the floor, and in their last moment of consciousness, they think, I misjudged this man." (***People* v. *Leonard*** (2007) 40 Cal.4th 1370, 1406 [but finding no error in the prosecutor asking the jurors*, in response to a defense argument that placed the jurors in the victim's shoes*, to further consider how, viewing the circumstances through the eyes of the victims, the victims might have believed cooperating lessened the chance of the victims being harmed].)

"Do you remember the thing he said to little Sandra just before he executed her with a gun at her head? Can you imagine the terror that this child is going through, and that all the people are going through? Certainly the children. Can you imagine that terror? It's not in the courtroom. We're not here doing some scientific experiment. Imagine yourselves at the scene." (***People* v. *Mendoza*** (2007) 42 Cal.4th 686, 704.)

"Think what she must have been thinking in her last moments of consciousness during the assault" and "Think of how she might have begged or pleaded or cried." (***People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1057.)

"Suppose instead of being Vickie Melander's kid this had happened to one of your children." (***People* v. *Pensinger*** (1991) 52 Cal.3d 1210, 1250.)

"Picture, if you will, the last words that [the victim] heard before the defendant shot him in the back and to make sure he was dead shot him in the chest. What were the last things he heard? What's the reasonable inference of what was going on in that precise moment the second before he's mortally wounded? Fuckin' scrap. You fuckin' wetback. Can you imagine the terror and the fear … [the victim] must have felt as he's cowering into the phone as [the defendant] told you kind of bending into the phone to try [to] avoid this person, to not have any issue, to just try [to] get home and lead his life. Fuckin' scrap. Wetback. He died because he was born in Mexico and he made the mistake of wearing a number 8 jersey on Leavesley Avenue in the city of Gilroy and made the mistake of being at 7–Eleven the same night the defendant was partying five blocks away. What a way to exit this world." (***Zapata* v. *Vasquez*** (9th Cir. 2015) 788 F.3d 1106, 1112–1113 [and finding error on other grounds, **see** this outline, section II-N at pp. 83, 84].)

"In order for you as jurors to do your job, you have to walk in Dipak Prasad's shoes. You have to literally relive in your mind's eye and in your feelings what Dipak 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." (***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1194, 1199.)

"A primal fear we all have, the idea of waking up and having somebody in our bedroom who might hurt us, a stranger. Only it's two men; one of them is a stranger, Popik. The other is a beast, Michaels." (***Michaels* v. *Davis*** (9th Cir. 2022) 51 F.4th 904, 954 [albeit finding no violation of due process].)

"It could have been my little girl that was in that store, a witness eliminated. It could have been you. It could have been your children. It could have been any one of us, if we decided that we wanted to buy something from Bob Bell, at nine fifty-eight on July 5, 1980, we would have been dead." (***Johnson* v. *Bell*** (6th Cir. 2008) 525 F.3d 466, 484; **see also *Garcia* v. *Burton*** (N.D. Cal. 2021) 536 F.Supp.3d 560, 602 [misconduct when describing crime to say, "this could happen to anyone," "anyone could be" the victim, and "it could have been anyone"].)

Examples of what does **not** constitute asking the jurors to put themselves in the place of the victim:

In ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, the prosecutor criticized various defense experts by rhetorically asking the jurors if they would want one of the experts to interpret their scan if they had a brain problem or if they would want another of the experts to be their psychologist. Moreover, in responding to defense claims that the "world would be a better place" if more people were like one of the defense witnesses and defense criticisms of a prosecution witness for calling the police on the defendant and the defense witness, the prosecutor asked the jurors how they would like having to live next to the defense witness and the defendant. Finally, in responding to defense claims that a police officer mistreated the defense witness, the prosecutor rhetorically asked, "If you were gonna be cited for some misdemeanor mild conduct, wouldn't you want to be treated like he treated [the witness]." (***Id***. at pp. 767-768.) The California Supreme Court held none of these comments improperly invited the jury to view the case through the victim's eyes. (***Id***. at p. 768.)

In ***People* v. *Lopez*** (2008) 42 Cal.4th 960, the court held it was not misconduct for a prosecutor, in an attempt to illustrate why victim would not remember details, to describe a hypothetical scenario where she beat up "Juror number 12" in the jury deliberation room and then to postulate that four years later the juror would not remember the details of the room but would of the beating. Nor was it misconduct for the prosecutor to describe how "Juror number 5" could randomly guess at items in the prosecutor's bedroom but would not be able to describe unusual items unless the juror had been in the room in attempting to illustrate why a victim's memory of unique details showed the victim could not have made up being in a particular location. (***Id***. at p. 970.)

Use of the term "you" when arguing to the jury is not improper when it is used rhetorically and not specifically to invoke sympathy from the jury. (**See *State* v. *Thach*** (Wash. Ct. App. 2005) 106 P.3d 782, 793.)

b. Exceptions to General Rule

It is permissible to discuss events from the perspective of the victim when the victim's perceptions are an element of the crime or are otherwise relevant.

Victim's Mental State is Element of Crime or Bears on Issue in Case

In ***People* v. *Arias*** (1996) 13 Cal.4th 92, a case involving a forcible sexual assault, the prosecutor remarked, "I mean, this woman was going through hell. At one point she even said, I wish he'd have killed me." Shortly thereafter, he stated that defendant "[had] this woman scared to death, pleading at one point for death in her own mind." (***Id***. at p. 160.) The court held the rule against asking jurors to sympathize with, or view the crime through the eyes of, the victim, did not apply to the prosecutors' remarks because "[w]hen discussing sex and kidnapping offenses involving the elements of force, fear, and lack of consent, the prosecutor was entitled to argue the existence of those elements in vigorous terms." (***Id***. at p. 160.)

In ***People* v. *Chatman*** (2006) 38 Cal.4th 344, the prosecutor asked the jurors to think about the pain the victim in a special circumstances torture murder case must have felt and how desperate the victim must have been. The prosecutor stated, "And I want you to think then what it's like then to be down on the ground. Your hands have been slashed open. How useless. How helpful are they now? And you are slashed repeatedly. And what are you thinking? When is it going to end? Am I going to die? Is this it? And if I'm going to die, why doesn't he just cut my throat? Why doesn't he knock me out? That doesn't happen." (***Id***. at p. 388.) The California Supreme Court found the argument was specifically directed to the torture issue and that "[w]hile the victim's awareness of pain [was] not an element of the torture-murder special circumstance," it was not "irrelevant" either. (***Id***. at p. 389.) Thus, the court held "[a]sking the jury to consider the victim's pain was directly relevant to a disputed issue." (***Ibid***.) The court did find, however, "that the rhetorical questions at the end of this discussion might have moved from appropriate argument regarding torture to an improper attempt to invoke sympathy." (***Ibid***.)

Victim's Physical Characteristics

A "prosecutor is not prohibited from identifying traits that made the victim particularly vulnerable to attack where such facts bear on the charged crimes and are not otherwise inadmissible on their face." (***People* v. *Millwee*** (1998) 18 Cal.4th 96, 137; **see also *People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1199, fn. 12 [prosecutor may properly ask jury to consider the victim's age and mental development in evaluating her credibility, or the victim's physical characteristics].) Thus, in ***People* v. *Millwee*** (1998) 18 Cal.4th 96, it was held proper to discuss the physical disability and age of the victim where it was helpful to show, inter alia, that a cane that was taken from victim would have been in her immediate presence during a robbery and that the victim felt vulnerable and unsafe around defendant as a result of her disability and thus would not have asked or allowed the defendant inside the house - a fact significant to establishing a burglary charge. (***Id***. at p. 138; **see also *People* v. *Redd*** (2010) 48 Cal.4th 691, 732 [victim's physical state relevant where defendant charged with inflicting great bodily injury, but not fact victim suffered post-traumatic disorder].)

Penalty Phase

The California Supreme Court has repeatedly held "that it is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1045; ***People* v. *Slaughter*** (2002) 27 Cal.4th 1187, 1212; **accord *People* v. *Jackson*** (2009) 45 Cal.4th 662, 691 [noting rule against asking jurors to place themselves in the shoes of the victim does not apply equally in penalty phase of trial and finding no misconduct for prosecutor to ask jurors "how they would feel if someone they loved dearly died 'in a gutter; like the victim did, 'choking on his own blood'"].)

3. Vindicating the "Rights" of the Victim

It is generally improper to talk about the "rights" of the victim as a counterbalance to the rights of the defendant in closing argument. For example, in ***People* v. *Arias*** (1996) 13 Cal.4th 92, the prosecutor commented on the fact that defense counsel talked a lot about the defendant's constitutional rights and then asked to the jury to think about the right of the victim to conduct his business without being murdered. The ***Arias*** court found the prosecutor engaged in improper rebuttal argument because a jury deciding guilt "is not to balance the defendant's right to a fair trial against the victim's right to life or safety." (***Id***. at p. 161 [albeit also finding misconduct non-prejudicial]; **see also *People* v. *Daveggio and Michaud*** (2018) 4 Cal.5th 790, 865 [finding prosecutor's statement: "We are gathered here for one reason, and that is for [the victim]" to be an improper appeal to sympathy].)

4. Referring to the Victim as the "Client" of the Prosecution

In ***People* v. *Seumanu*** (2015) 61 Cal.4th 1293, the prosecutor noted that the jury had been introduced to the two defense attorneys and their client, the defendant. The prosecutor then stated: "I have a client too. The chair next to me appears to be empty, but his name is Nolan. And I would like to introduce you to him. [¶] This is Nolan Pamintuan." (***Id***. at p. 1344.) The California Supreme Court held this to be error because "[t]he nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. 'The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (***Id.*** at p. 1345 [albeit finding the argument forfeited and harmless even if not forfeited].)

5. Speaking in the Voice of the Victim

In ***Drayden* v. *White*** (9th Cir. 2000) 232 F.3d 704, the court held a prosecutor engaged in misconduct during murder trial when he sat in witness chair and delivered a lengthy soliloquy in the role of the victim explaining the evidence and even "arguing" in the voice of the victim. (***Id***. at p. 712.) The Ninth Circuit held this was improper because (i) the soliloquy "obscured the fact that [the prosecutor's] role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim"; (ii) "the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by "testifying" in the voice of the character as if he had been a percipient witness"; and (iii) the prosecutor risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve

his dismal fate." (***Id***. at p. 713 [albeit not finding the conduct to be a violation of due process]; **see also *Zapata* v. *Vasquez*** (9th Cir. 2015) 788 F.3d 1106, 1114 [this outline, section II-N-1 at p. 84.)

Editor's note: The holding in ***Drayden*** is not binding on California courts. (**See *People* v. *Pineda*** (unreported) 2012 WL 1131987, at *17 [describing ***Drayden*** as "a Ninth Circuit case that is not binding on this court"].) However, at least one unpublished California decision has cited to ***Drayden*** for the principle that it is "misconduct to conduct a soliloquy in the voice of the deceased victim." (***People* v. *Davidson*** (unreported) 2012 WL 1534352, at *14.)

However, in ***United States* v. *Kootswatewa*** (9th Cir. 2018) 2018 WL 1439610, the Ninth Circuit held a prosecutor did not improperly "speak in the voice of the minor victim" even though the prosecutor began her closing argument by briefly quoting or paraphrasing the key statements, in the first person, that the victim made to testifying witnesses describing the sexual conduct: "He tried to rape me. He took me into an abandoned trailer. … Put fingers inside. The man in the red house." (***Id***. at p. *5.) In finding no misconduct, the Ninth Circuit noted that the prosecutor "accurately recited the trial testimony recounting what [the victim] told others about the abuse and immediately disclosed the source of the statements. (***Ibid***.)

And in ***Allen* v. *Woodford*** (9th Cir. 2005) 395 F.3d 979, the court held it was not improper for prosecutor to describe what victim would say from beyond the grave where it was meant to summarize the evidence presented. (***Id***. at p. 997.)

6. Impact of Crime on the Victim's Family and Victim

It "is misconduct for a prosecutor to argue that the jury in a non-capital case—or in the guilt phase of a capital case—should consider the impact of the crime on the victim's family." (***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1193, citing to ***People* v. *Jackson*** (2009) 45 Cal.4th 662, 691-692; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 151–152; ***People* v. *Taylor*** (2001) 26 Cal.4th 1155, 1171.) Thus, in ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, it was held improper for the prosecutor to argue the defendant's actions crushed the hope of the victim's family and friends and to point out how defendant's violence touched the victim's loved ones. (***Id***. at p. 1196.)

Similarly, the impact of the crime on a living victim, *when irrelevant*, should not be discussed. (**See *People* v. *Redd*** (2010) 48 Cal.4th 691, 732.)

However, the rule is different in the penalty phase of a trial. In the penalty phase of trial, "a prosecutor may ask the jurors to put themselves in the place of the victim's family to help the jurors consider how the murder affected the victim's relatives." (***People* v. *Jackson*** (2009) 45 Cal.4th 662, 691-692***;* accord *People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1199.)

N. APPEALS TO THE PASSION OR PREJUDICES OF THE JURY

"An argument by the prosecution that appeals to the passion or prejudice of the jury is improper." (***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 694.) It is improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." (***People* v. *Covarrubias*** (2016) 21 Cal.5th

838, 894; ***People* v. *Fuiava*** (2012) 53 Cal.4th 622, 693; ***People* v. *Redd*** (2010) 48 Cal.4th 691, 742; ***People* v. *Padilla*** (1995) 11 Cal.4th 891, 956–957; ***People* v. *Vance*** (2010) 188 Cal.App.4th 1182, 1192.)

For example, in ***People* v. *Holmes, McClain and Newborn*** (2022) 12 Cal.5th 719, the court stated that a "prosecutor's assertion that jurors were the only thing standing between defendants and their next victims improperly appealed to jurors' fear of violence, suggesting they decide the case based on this emotion rather than a critical and neutral evaluation of the evidence." (***Id***. at p. 789 [but finding no violation of due process because an objection was sustained and was followed by a curative instruction].)

In ***People* v. *Fuiava*** (2012) 53 Cal.4th 622, the prosecutor had a deputy sheriff whose partner was killed testify in the blood-stained uniform the deputy wore on the night of the murder. The deputy wept during his testimony. During closing argument, the prosecutor reminded the jury of emotional moment on the stand by stating that the deputy "stood up here and bared his soul to you. There was no holding back. [¶] Do you think he wanted to cry up here? Do you think it made him feel good in front of his fellow co-workers? [¶] These guys don't wear their emotions on their sleeve. They are very deep inside. They can't let their emotions come out." (***Id***. at p. 693.) The California Supreme Court stated it was "quite troubled" by the prosecutor's presentation of the deputy in the blood-stained uniform in conjunction with closing argument. The court said the prosecutor had "improperly engaged in inflammatory conduct that appealed to the passions of the jury." (***Id***. at p. 693 [and finding the prosecutor had also, by his comments, discussed facts not evidence, i.e., how the officer (and officers) felt].)

And in ***Zapata* v. *Vasquez*** (9th Cir. 2015) 788 F.3d 1106, the court held a prosecutor's argument urging the jury to picture the "last words that [the victim] heard," were "fucking scrap" and "wetback" was held not only to be speculative (because the actual words were not known) but was found to be "both inflammatory and wholly extraneous to any issue properly before the jury.... The prosecutor could have no reason for mentioning it other than to inflame the jury's sentiments. There was simply no occasion for the jury to contemplate the victim's subjective experience at the time of his murder, even if there had been an evidentiary basis to do so. By deliberately drawing the jury's attention to that irrelevant and improper consideration, the prosecutor committed serious misconduct." (***Id***. at p. 1113; **see also** this outline, section II-M-2 at p. 79.)

A prosecutor is, however, allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, ***as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury***.' [Citation.]" (***People* v. *Young*** (2005) 34 Cal.4th 1149, 1195, emphasis added.) For example, while crimes of violence are almost always upsetting, "[d]iscussing the manner in which they are committed is fair comment. There is no requirement that crimes of violence be described dispassionately or with philosophic detachment." (***People* v. *Holmes*** (2022) 12 Cal.5th 719, 788; ***People* v. *Leon*** (2015) 61 Cal.4th 569, 606.)

Editor's note: The rules are different when it comes to argument in the penalty phase. In the penalty phase "[c]onsiderable leeway is given for appeal to the emotions of the jury as 'long as it relates to relevant considerations" and "[i]t is not improper to urge the jury to show the defendant the same level of mercy he showed the victim." (***People* v. *Collins*** (2010) 49 Cal.4th 175, 228, 230-231.)

1. Racial or Ethnic Appeals

It is prosecutorial misconduct to imply that a defendant is guilty of a crime because he belongs to a racial group that is prone to committing the crime with which the defendant is charged (**see *People* v. *Rideaux*** (1964) 61 Cal.2d 537, 540; ***People* v. *Simon*** (1927) 80 Cal.App. 675, 680-681) or to imply that a defendant will lie in court because of his membership in a particular ethnic group (***People* v. *Singh*** (1936) 11 Cal.App.2d 244, 255). (**See also *McCleskey* v. *Kemp*** (1987) 481 U.S. 279, 309 fn. 30 [noting "[t]he Constitution prohibits racially biased prosecutorial arguments"].) In ***Zapata* v. *Vasquez*** (9th Cir. 2015) 788 F.3d 1106, the Ninth Circuit found it improper for the prosecutor to speculate that the defendant used racial slurs against the victim because the use of the slurs was "improperly designed to appeal to the passions of the jury. That the slurs were directed at a specific ethnic group particularly risked sparking visceral outrage among members of the jury and encouraged them to convict based on emotion rather than evidence." (***Id***. at p. 1114 [albeit the emotions inflamed were presumably against the defendant for *using* the racial slurs].)

With the passage of the California Racial Justice Act of 2020, there is now also an express statutory bar against making an argument appealing to bias based on race, ethnicity, or national origin. Penal Code section 745, in relevant part, states: "The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following: (1) . . . an attorney in the case . . . exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin. ¶ (2) During the defendant's trial, in court and during the proceedings, . . . an attorney in the case . . . used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect." (Pen. Code, § 745(a)(1)&(2).)

Although previous decisions have held that using language likening defendants and their conduct to that of a beast or animal does not invoke racial overtones (**see e.g.**, ***People* v. *Duncan*** (1991) 53 Cal.3d 955, 977), such language is going to run afoul of section 745. (**See** this outline, section II-I-1-a at pp. 51-57 [discussing the California Racial Justice Act and use of racially discriminatory language].)

It should be permissible to respond to a defense counsel's *false* accusation the prosecutor is engaging in an appeal based on race or ethnicity or to point out when *defense counsel* is engaging in an improper racially-based argument. For example, it is not misconduct for a prosecutor to argue that defense counsel is "playing the race card" in response to defense counsel's suggestion that the prosecution had attempted to play on the all-White jury's emotions and racial prejudice. (***People* v. *Dykes*** (2009) 46 Cal.4th 731, 771.)

2. References to Notorious Historical Events or Cases

Reference to notorious cases is generally acceptable in a prosecutor's closing argument. (***People* v. *Carpenter*** (1979) 99 Cal.App.3d 527, 533.) It is permissible to invoke examples of notorious cases "to illustrate a general point about the operation of the law." (***People* v. *Ghobrial*** (2018) 5 Cal.5th 250, 290 [finding brief references to Osama bin Laden, Al Qaeda, and the terrorists who perpetrated the September 11 attacks to illustrate that a defendant's mental illness does not

always negate culpability were not improper where the prosecutor never suggested the defendant's crime was somehow comparable to those attacks or that defendant was culpable for his crimes because of any connection with September 11, the terrorists, or their racial or national background].)

However, in ***People* v. *Zurinaga*** (2007) 148 Cal.App.4th 1248 [discussed in this outline, section II-C-7 at pp. 27-28], the court held a prosecutor's extensive discussion of the facts of the 9/11 flight incident in conjunction with the prosecutor asking the jurors to imagine the terror the victims of the charged crime constituted inflammatory argument that had the effect of improperly placing the jury in the shoes of the 9/11 victims and "crossed the line." (***Id***. at pp. 1259-1260.)
In ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, the prosecutor argued that defendant's crimes were not unique historically, noted history was "replete with atrocities", asked the jury to remember what happened during World War II and the Korean War, and said if the jurors looked at history they could maybe get a grasp of something they saw in the charged case. (***Id***. at p. 696-697.) The court noted that while the prosecutor's linking of "atrocities" with World War II might call to mind Hitler's "Final Solution," the reference was mild and only arguably misconduct. (***Id***. at p. 701 [albeit finding remainder of argument replete with prejudicial misconduct]; **see also *People* v. *Sanchez*** (2016) 63 Cal.4th 411, 485 [characterizing a robbery operation is a military operation and stating the defendants came into a lounge like "stormtroopers" did not improperly refer to any particular historical figures].)

3. Criticizing the Justice System

A prosecutor should not criticize the legal system in an attempt to arouse the passions of the jury.

In ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, a prosecutor argued "only in America are defendants accorded trials even in the face of overwhelming evidence," mentioned she had to try cases where defendants were caught in the act of raping victims, and told the jury the defendants "are entitled to their trial and they have had it. It's time to put an end to this farce, ladies and gentlemen." (***Id***. at pp. 949-950.) The court did not find this was prejudicial error, but said, "Any suggestion that when there is overwhelming evidence of guilt, it is a farce to provide a trial is obviously improper." (***Id***. at p. 950.)

In ***People* v. *Patino*** (1979) 95 Cal.App.3d 11, the prosecutor read to the jury a quote purportedly from a "famous judge" explaining how "[o]ur procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. (¶) What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime." (***Id***. at p. 29.) The court condemned use of quote as "an attack upon our criminal justice system and the laws regulating that system which have been set forth both by the constitutional, legislative and decisional law" and stated it did not constitute a fair comment on the evidence or the law. (***Id***. at p. 39 [albeit finding misconduct non-prejudicial].)

In ***People* v. *Haslouer*** (1978) 79 Cal.App.3d 818, the court held a prosecutor's comment that "it is difficult to get justice any more because of the technicalities of the law" was improper. (***Id***. at p. 834 [but also finding it was "far from prejudicial"].)

4. Emphasizing the Importance of Jury Duty and Jurors' Responsibility to Do Justice

It is not improper to stress the significance and importance of jury duty and inform the jury that a conviction would be consistent with doing justice. In ***People* v. *Rivera*** (2019) 7 Cal.5th 306, the court rejected the defense claim that either of the following comments were improper appeals to passion and fear. First, by stating: "On the homefront, one of the most important acts of citizenship that any person can be asked to perform is now being performed by you in your service as jurors; and more so, in a murder trial in which the penalty being sought is death." Second, by stating, in rebuttal, to "bring a verdict into this courtroom that honors its more than 150-year tradition of justice." (***Id***. at pp. 336.) The ***Rivera*** court held the "prosecutor's statement merely reminded the jurors about the importance of the civic duty in which they were engaged. It did not ask the jury to act on the basis of fear or to decide the case in *a particular way in light of that duty*." (***Id***. at p. 337; **see also *People* v. *Cornwell*** (2005) 37 Cal.4th 50, 92-93 [finding no prosecutorial misconduct for prosecutor's appeal to "'the duty'" that is "'essential to our society'" where "the prosecutor's argument did not urge the members of the jury to act on the basis of their fear of chaos and crime in the community, but to act with an understanding of the importance of law in the abstract"].)

5. Discussing Facts of Common Knowledge

Although theoretically a prosecutor could use facts of common knowledge to "inflame the passions of the jury," statements by a prosecutor "that people are often killed on the streets of Oakland, and that one often reads about remorseless 'teenage kids' intending to kill people" were held to mere unobjectionable "rhetoric." (***People* v. *Boyette*** (2002) 29 Cal.4th 381, 486.)

6. Displays of Emotion (Crying)

It is not misconduct for a prosecutor to shed genuine tears during argument where the tears are not shed to inflame the passions of the jury or deliberately to impact the outcome of the case but result from an uncontrollable surge of emotion. (***Soloway* v. *Commonwealth*** (unreported) 2017 WL 1536467, at p.*5.) "Trials are conducted by humans, who often show indignation, anger or sadness. This does not mean that real emotion is misconduct." (***Ibid***.)

O. CREATING UNDUE PRESSURE TO CONVICT BASED ON APPEALS TO THE JURORS' SELF-INTEREST

It "is improper to appeal to the self-interest of jurors or to urge them to view the case from a personal point of view." (***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 696.)

1. Argument that Jurors Must Avoid Retrial

In a case filled with tons of prosecutorial misconduct, an appellate court found the most egregious example of misconduct was the prosecutor's argument that all the defense needed was one vote to block a conviction and that if the prosecution failed to persuade only eleven jurors, "it wipes out six months, folks. It's as though it never existed." (***People* v. *Pitts***

(1990) 223 Cal.App.3d 606, 695.) The court recognized that "[i]t is proper for a prosecutor to urge jurors to do their best to reach a verdict, even though such urging may contain a passing reference to retrial." (***Id***. at p. 696.) Nevertheless, the court found the remarks went "far beyond proper bounds" by placing personal pressure on each juror to vote to convict or risk "nullifying a great deal of hard work and rendering vain the personal sacrifice of all." (***Id.*** at p. 696.)

2. Appeal to Jurors by Stating or Implying Only Fools or Those Without Common Sense Would Vote to Acquit

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the court held the prosecutor did **not** invite the jury to render a verdict based upon their personal pride by telling the jurors that while he knew most of them had common sense, he lay awake at night worrying that one of jurors might not "get it." (***Id***. at p. 743.)

On the other hand, in ***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, the court held the prosecutor committed misconduct when he argued that defendant hopes that "one of you" will be "gullible enough," "naïve enough," and "hoodwinked" by the defense arguments so that he "can go home and have a good laugh at your expense." (***Id***. at pp. 1529-1530.) The ***Sanchez*** court concluded the comments "planted the idea that anyone who accepted the defense attorney's 'ridiculous arguments' would be a sucker who could be easily manipulated, or 'hoodwinked'" and "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. (***Id***. at p 1531; **see also** this outline, section II-C-3&4 at pp. 21-24 [discussing other reasons for why saying the "defendant can go home and have a good laugh at your expense" was inappropriate].)

P. APPEAL TO PUBLIC OPINION

"It is, of course, misconduct for a prosecutor to suggest that jurors disregard instructions and consider public opinion in determining the guilt phase of a criminal trial." (***People* v. *Morales*** (1992) 5 Cal.App.4th 917, 928 [and suggesting, but not actually, finding the prosecutor's invitation to the jury to consider what their spouses or significant others would say if they did not find the defendant (who had confessed to the crime) guilty was misconduct].)

In the case of ***People* v. *Shazier*** (2014) 60 Cal.4th 109, the California Supreme Court held that a prosecutor's proposal that the jurors imagine a conversation in which they tried to justify a defense verdict to their family and friends was prosecutorial misconduct, since the argument improperly suggested that a finding for defendant would subject the jurors to ignominy within their community and violated the precept that the jury must not be influenced by, among other things, public opinion or public feeling" and must "reach a just verdict regardless of the consequences." (***Id***. at p. 144; **see also** ***Trillo* v. *Biter*** (9th Cir. 2014) 769 F.3d 995, 1000, 1001 ["jurors should not be urged to vote to convict simply because they might be uncomfortable with a vote to acquit" when discussing case with their neighbors].) However, it is permissible to ask the jury to "*[w]rite a verdict you can be proud of,* a verdict that you know is the correct verdict under the law and evidence in this case...." (***United States* v. *Allen*** (7th Cir. 2001) 269 F.3d 842, 847 [and noting that the prosecutor's comment, "while appealing to community sentiment, merely called on the jury to consider the evidence and render a decision based on the law and evidence."].) And in ***People* v. *Redd*** (2010) 48 Cal.4th 691, the court held the prosecutor did not invite the jury to render a verdict based on public opinion by telling the jurors that while he knew most of them had common sense, he lay awake at night worrying that one of jurors might not "get it." (***Id***. at p. 743.)

Q. ASKING JURY TO "SEND A MESSAGE," UPHOLD COMMUNITY VALUES, OR PRESERVE PUBLIC SAFETY

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (***United States* v. *Weatherspoon*** (9th Cir. 2005) 410 F.3d 1142, 1149; **accord *United States* v. *Audette*** (9th Cir. 2019) 923 F.3d 1227, 1239.) The rationale behind this rule is that "the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. 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. "The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." (***Weatherspoon*** at p. 1149; ***United States* v. *Leon-Reyes*** (9th Cir.1999) 177 F.3d 816, 822; **see also *Sinisterra* v. *United States*** (8th Cir. 2010) 600 F.3d 900, 910 ["Prosecutors may not encumber an individual defendant with the responsibility for the nation's drug problems, in addition to the defendant's personal crimes and misdeeds."].)

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the California Supreme Court cited to ***United States* v. *Monaghan*** (D.C.Cir.1984) 741 F.2d 1434, to illustrate the difference between asking the jury to condemn defendant for his conduct and asking the jury to send a message or uphold community values: "[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. 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.... [¶] But a request that the jury 'condemn' an accused for engaging in illegal activities is not constitutionally infirm, so long as it is not calculated to excite prejudice or passion." (***Redd*** at p. 743, fn. 25, quoting ***Monaghan*** at pp. 1441–1442; **see also *People* v. *Covarrubias*** (2016) 1 Cal.5th 838, 895 [discussed below at p. 90].)

It is even more egregious misconduct to point to a particular crisis in our society and ask the jury to make a statement. (***United States* v. *Weatherspoon*** (9th Cir. 2005) 410 F.3d 1142, 1149.) The prosecution may not "fan the flames of the jurors' fears by predicting that if they do not convict, a crime wave or some other calamity will consume their community . . ." (***Bedford* v. *Collins*** (6th Cir. 2009) 567 F.3d 225, 234.)

However, it "is permissible to comment on the serious and increasing menace of criminal conduct and the necessity of a strong sense of duty on the part of jurors." (***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 513; ***People* v. *Escarcega*** (1969) 273 Cal.App.2d 853, 862–863; **see also *People* v. *Holmes*** (2022) 12 Cal.5th 719, 789 [finding no misconduct in urging the jury to solve the social problems of gangs and violence by returning convictions because such argument was tantamount to asking the juror to serve as the conscience of the community – a proper argument as discussed below].) "Nothing prevents the government from appealing to the jurors' sense of justice . . . or from connecting the point to the victims in the case." (***Bedford* v. *Collins*** (6th Cir. 2009) 567 F.3d 225, 234; ***People* v. *Holmes*** (2022) 12 Cal.5th 719, 789 [not misconduct for the prosecutor to request convictions so that the victims could rest in peace.].)

Comparing the jury to "the conscience of the community," is a common argument that has been "routinely upheld as proper." (***People* v. *Holmes*** (2022) 12 Cal.5th 719, 789 [citing to ***People* v. *Gamache*** (2010) 48 Cal.4th 347, 388–

389.) The Ninth Circuit has repeatedly stated a prosecutor may ask the jury to act as a "conscience of the community" unless such a request is "'specifically designed to inflame the jury.'" (***United States* v. *Audette*** (9th Cir. 2019) 923 F.3d 1227, 1239; ***United States* v. *Leon-Reyes*** (9th Cir. 1999) 177 F.3d 816, 823; ***United States* v. *Williams*** (9th Cir. 1993) 989 F.2d 1061, 1072; **but see *Sinisterra* v. *United States*** (8th Cir. 2010) 600 F.3d 900, 910 ["the prosecution puts too significant a burden on a single defendant when it instructs the jury to act as the conscience of the community and send a message from one case to another."].)

Cases Finding Improper Appeals to Community Values, Preserve Order, or Deter Future Lawbreaking

In ***United States* v. *Barragan*** (9th Cir. 2017) 871 F.3d 689, a case charging several members of the Mexican Mafia with various crimes, the prosecutor argued: "But for these defendants, for what they did to the community in 2010 and 2011, it's finally the chance to stand up and say no more. No more robbery. No more dealing and pedaling your meth to raise your money to buy your guns. No more committing extortion. No more beating the people of this community and firing guns down the street. No more. No more passing funds. No more meeting up and coordinating who's going to be able to tax who in what territory, so that you can then coordinate who gets the guns, who goes to the hotels and the 7–Elevens, who goes up to the AM/PM in the middle of the day to jack a drug dealer as he sits there with his one-year-old, but not a drug dealer. There's just no more, and it's the only reason that we are here today." (***Id***. at p. 706.) The Ninth Circuit rejected the (quite reasonable) government argument that these remarks simply asked the jury to hold the defendants accountable for their actions. (***Id***. at p. 708.) The Ninth Circuit found these statements "crossed the line" and "invited the jury to convict for a non-evidentiary reason: to protect the community against future violence." (***Id***. at pp. 707-708.) The Ninth Circuit ultimately held this was not reversible error but warned prosecutors that, "[o]n a different record, we will not hesitate to reverse or even suggest sanctions"].)

In ***Trillo* v. *Biter*** (9th Cir. 2014) 769 F.3d 995, the court cited to two other federal cases as examples of prosecutors improperly implying that jurors should convict a defendant because failure to do so would endanger their neighbors: ***United States* v. *Johnson*** (D.C. Cir. 2000) 231 F.3d 43, 47 [holding that "the prosecutor's argument in this case improperly suggested that the jury should convict the defendant in order to protect others from drugs") and ***Gonzalez* v. *Sullivan*** (2nd Cir. 1991) 934 F.2d 419, 424 [prosecutor's "reference to the community's cry for safer streets" improper].)

In ***United States* v. *Sanchez*** (9th Cir. 2011) 659 F.3d 1252, the prosecutor asked the jury to "send a memo to all 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 at primary and secondary, they'll get away with it if they just say their family was threatened." (***Id***. at p. 1256.) The Ninth Circuit held this statement (which told the jury that if they acquitted, they would send a message to other drug couriers to use the duress defense) was improper because it appealed to the passions, fears and vulnerabilities of the jury by suggesting that an acquittal would make it easier for drugs to come into the United States. (***Id***. at 1257.)

In ***United States* v. *Polizzi*** (9th Cir. 1986) 801 F.2d 1543, the court held it was improper for the prosecutor to urge the jury to join the war on crime because doing so suggests the jury has an obligation other than weighing the evidence. (***Id.*** at p. 1558 [albeit impropriety was cured by instructions on what jury could properly consider].)

In ***United States* v. *Williams*** (9th Cir. 1993) 989 F.2d 1061, the court held it was improper for the prosecutor to ask the jury, by its verdict to tell an out of state defendant to take his "keys and send them back to Denver" and that "we do not

want crank in Montana" because it was "an attempt to capitalize on whatever parochial inclinations the jurors might have, particularly with respect to [the] out-of-state defendant." (***Id***. at p. 1072.)

In ***United States* v. *Moreno*** (1st Cir. 1993) 991 F.2d 943, the court held it was improper for a prosecutor to state: "[T]he evidence will show that [the police officers] were doing their jobs protecting the community that has been plagued by violence, senseless violence, shootings and killings. That's why they were there and that's why we're here today." (***Id***. at p. 947 [and noting there was no evidence of "senseless violence" or "shootings and killings"].)

Cases Finding No Improper Appeals to Community Values, Preserve Order, or Deter Future Lawbreaking

In ***People* v. *Covarrubias*** (2016) 1 Cal.5th 838, the prosecutor told the jury, "Again, as I mentioned, your job and your responsibility as jurors is to act as the litmus test, to apply the laws of our society, and to determine what our community will and will not tolerate." (***Id***. at p. 893.) The California Supreme Court held "[t]here was nothing in the prosecution's remarks that urged the jurors to act on their passions or prejudice" as the argument "permissibly reminded the jurors that they had to take responsibility for completing the arduous task of sifting through the evidence to determine the story each item told, consider the charges, and ultimately decide whether defendant had violated any laws." (***Id***. at p. 895.)

In ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, the prosecutor repeatedly told the jury it could, by its verdict, restore a sense of order and law to the block where the victim was killed. The prosecutor stated the block in question "had no concept of law and order" but the jury could "restore justice to that street. That street on that day was without justice.... [¶] ... [¶] You, as jurors in this case, have taken an obligation and oath to uphold the law. Believe in the law. Restore the law to the [block in question], those are the only true and correct verdicts in this case[.]" (***Id***. at p. 511-512.) The court held the "prosecution's references to the idea of restoring law and order to the community were an appeal for the jury to take its duty seriously, rather than efforts to incite the jury against defendant. Thus, they were not misconduct." (***Id***. at p. 513.)

1. Future Conduct of Defendant

In the guilt phase of a criminal trial, it is misconduct to argue that if defendant is not convicted, he will commit future crimes - if there is no evidence to support such a conclusion. (**See *People* v. *Caldwell*** (2013) 212 Cal.App.4th 1262, 1269, citing to ***People* v. *Lambert*** (1975) 52 Cal.App.3d 905; **see also *People v. Holmes, McClain and Newborn*** (2022) 12 Cal.5th 719,789 [a "prosecutor's assertion that jurors were the only thing standing between defendants and their next victims improperly appealed to jurors' fear of violence, suggesting they decide the case based on this emotion rather than a critical and neutral evaluation of the evidence" albeit finding no violation of due process because an objection was sustained and was followed by a curative instruction].)

In ***People* v. *Whitehead*** (1957) 148 Cal.App.2d 701, the court held it was improper for the prosecutor to argue, in sexual molestation case, "unless [defendant] is convicted I'm sure he's going to do it again, because that is just the history of what we in the District Attorney's office have learned to call 288'ers." (***Id***. at p. 705 [and characterizing the error as one of bringing before the jury facts from the prosecutor's own experience].)

Certainly, an argument can be made that comment upon a defendant's future dangerousness is improper because it is irrelevant to whether defendant is guilty of the crime charged and tends to inflame the passions of the jury. In fact, arguments concerning future dangerousness in the guilt phase are considered improper by the Ninth Circuit for this very reason. (**See *United States v. Barragan*** (9th Cir. 2017) 871 F.3d 689, 708 ["While commentary on a defendant's future dangerousness may be proper in the context of sentencing, it is highly improper during the guilt phase of a trial"]; ***United States* v. *Weatherspoon*** (9th Cir. 2005) 410 F.3d 1142, 1149, fn. 5 [same]; ***Com. of Northern Mariana Islands* v. *Mendiola*** (9th Cir. 1992) 976 F.2d 475, 486-487 [prosecutor's closing remark that "[i]f you say not guilty, he walks right out the door, right behind you" was improper where comment was coupled with the insinuation that the defendant, if acquitted, would recover a missing murder weapon and pose a threat to the general public but prosecutor knew a prosecution informant had hidden the weapon].)

However, California courts seem to be okay with the argument – *if* it is based on evidence presented in court.

In ***People* v. *Brown*** (2003) 31 Cal.4th 518, the prosecutor stated that an acquittal would lead to defendant "being out in the street with the jury." The defendant argued the prosecutor committed misconduct by urging the jury to consider his future dangerousness in the guilt phase of argument. However, the California Supreme Court held there was no misconduct since the unprovoked and vicious attack defendant perpetrated provided sufficient evidence to support the argument. (***Id***. at pp. 552-553 [and favorably citing to ***People* v. *Hughey*** (1987) 194 Cal.App.3d 1383].)

In ***People* v. *Hughey*** (1987) 194 Cal.App.3d 1383, the defendant attempted to suffocate his infant daughter but was prevented from doing so by his wife and the arrival of the police. The attempt was preceded by defendant's statements "Don't tell me that baby's mine or I'll kill you," and "[y]ou're making the biggest mistake of your life. When I get out of [jail] I'm going to kill you…." (***Id***. at p. 1396.) In addition, there was evidence defendant and his wife had previously been involved in physical fights. (***Ibid***.) In argument, the prosecutor stated "You want this case a few months from now and the next time somebody is dead? …" (***Ibid***.) The ***Hughey*** court upheld the argument since "[s]uggesting that a defendant will commit a criminal act in the future is not an inappropriate comment when there is sufficient evidence in the record to support the statement." (***Ibid***.)

In ***People* v. *Lambert*** (1975) 52 Cal.App.3d 905, the court held it was improper for a prosecutor to comment that the reason defendant lied was so that he could be found not guilty, walk back on the streets, and *shoot someone else*. (***Id***. at p. 910.) However, the ***Lambert*** court the noted that "[w]hile such comments are not improper when the evidence shows a systematic pattern of activity similar to that with which the defendant is charged, they are improper when, as here, no such pattern exists." (***Ibid.***)

Moreover, in the penalty phase of a capital case, evidence-based arguments about the defendant's potential for future violence are clearly not prohibited. (**See *People* v. *Montiel*** (1993) 5 Cal.4th 877, 946; ***People* v. *Payton*** (1992) 3 Cal.4th 1050, 1063–1064; ***People* v. *Bell*** (1989) 49 Cal.3d 502, 549.)

R. APPEAL TO RELIGIOUS AUTHORITY

There is nothing wrong, per se, with quoting from the Bible in final argument, or with arguing that such conduct occurred even in biblical times. (***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 705, citing to ***People* v. *Williams*** (1988) 45 Cal.3d 1268, 1325.) However, it is improper to appeal to the religious prejudices of the jury by referring to religious texts in an

attempt to show God's law favors a particular verdict or governs the case. (**See *People* v. *Hill*** (1998) 17 Cal.4th 800, 836-837, fn. 6 ["to ask the jury to consider biblical teachings when deliberating is patent misconduct"]; ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 705 [misconduct for prosecutor to quote from New Testament to the effect that people who behave like defendant will not inherit the kingdom of God].)

There are special rules governing when reference to religious authority is permissible in the context of the penalty phase of a capital case. "The line between permissible argument and misconduct in this area is difficult to draw." (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1051.) On the one hand, "[i]t is misconduct for a prosecutor to argue that biblical authority supports imposing the death penalty, because it suggests to the jurors that they may follow an authority other than the legal instructions given by the court. [Citation.]" (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1051, citing to ***People* v. *Cook*** (2006) 39 Cal.4th 566, 614.) On the other hand, "it is not impermissible to argue, for the benefit of religious jurors who might fear otherwise, that application of the death penalty according to secular law does not contravene biblical doctrine [citations], or that the Bible shows society's historical acceptance of capital punishment." (***People* v. *Tully*** (2012) 54 Cal.4th 952, 1051, citing to ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1169.)

S. BURDEN SHIFTING

1. In General

As noted earlier (**see** this outline, section II-G-2 at pp. 36-37), "[a] defendant is presumed innocent until proven guilty, and the government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense." (***People* v. *Booker*** (2011) 51 Cal.4th 141, 184, citing to Pen. Code, § 1096.)

Thus, a prosecutor may not "shift the burden" to the defense by stating or implying the defense has an obligation to produce evidence in order to avoid a conviction. (**See *People* v. *Weaver*** (2012) 53 Cal.4th 1056, 1077 ["it is improper for the prosecutor . . . 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, 831 [misconduct for the prosecutor to remark, "There has to be some evidence on which to base a [reasonable] doubt" since it was reasonably likely the remark was understood by the jury to mean the defendant had the burden of producing evidence to demonstrate that a reasonable doubt existed]; ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 831 [same]; ***People* v. *Williams*** (2017) 7 Cal.App.5th 644, 688 [prosecutor *arguably* shifted the burden of proof by stating that the defense counsel did not have the facts or the law on their side and instead "just argued" and "never came up with one fact that disproved they are not part of these robbery kidnappings" - albeit finding any error forfeited and/or harmless in light of lack of a timely objection and court instructions on the burden of proof]; ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, 112 [prosecutor improperly shifted burden when he argued defense failed to put on witness to support defense attack on officer and stated "she is obligated to put the evidence on from that witness stand"].)

Editor's note: As to whether commenting upon a defendant's failure to produce witnesses or evidence violates the Fifth Amendment right against self-incrimination (i.e., whether there has been ***Griffin*** error), **see** IPG's ***Doyle*** and ***Griffin*** Error Outline (available upon request).

2. Commenting Upon Failure of Defense to Call Witnesses or Produce Evidence

The rule against burden-shifting does not mean that a prosecutor may not comment on the fact the defense has failed to produce evidence or witnesses that it would be reasonable to expect the defendant to produce in support of his or her defense. To the contrary, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (***People* v. *Steskal*** (2021) 11 Cal.5th 332, 352; ***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340; **accord *People* v. *Thomas*** (2012) 54 Cal.4th 908, 939.)

It is absolutely permissible for a prosecutor to point out that the defendant failed to produce evidence or witnesses when to do so would be reasonable and also to ask the jury to draw a negative inference from that failure. This does not constitute "burden shifting." (***People* v. *Holmes*** (2022) 12 Cal.5th 719, 788; ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, 130; **see also *People* v. *Boyette*** (2002) 29 Cal.4th 381, 434 [for a prosecutor to point out there is no corroboration of defendant's testimony is not burden shifting; it is simply an argument that defendant's story is less believable because of lack of corroboration]; ***People* v. *Gaines*** (1997) 54 Cal.App.4th 821, 825 ["a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story"]; ***People* v. *Varona*** (1983) 143 Cal.App.3d 566, 570 [same]; **see also *People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, 1370 [noting such comment is "permissible because a prosecutor generally is permitted to remark on the state of the evidence at closing argument"].)

For example, in ***People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, the prosecutor, after noting the only evidence the shooting was an accidental discharge was defendant's own self-serving statement, stated: "And when [defense counsel] gets up here and argues to you, you ask for him to fill in this part of it, ask for him to fill this in with the facts, with the evidence that proved that." (***Id***. at p. 1370.) Later, the prosecutor argued: "[W]e don't have any evidence showing that there's an accident. There is no issue. [W]here is the evidence? Where is the evidence for the column on the right-hand side[?]" (The prosecutor was referring to what appears to have been a display in the courtroom that showed the prosecution's summation of the state of the evidence.) (***Ibid***.) Finally, the prosecutor argued: "[I]f there actually was evidence of an accident, [defense counsel], as good an attorney as he is, would have presented it, but there is no evidence. We [don't] hear any evidence that there was an accident, because it was not there, because it was not an accident." (***Ibid***.) The ***Jasso*** court rejected the argument that these comments amounted to misconduct and improper burden shifting. (***Id***. at p. 1371.)

In ***People* v. *Weaver*** (2012) 53 Cal.4th 1056, the court held it was not misconduct for a prosecutor in a court trial to make several comments in a closing argument to the effect that he was waiting for defense counsel to explain, in light of the evidence, how someone other than defendant could have murdered the victim. (***Id***. at pp. 1076-1077.)

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the prosecutor repeatedly challenged the basis for the defense theory, stating "I have a blank paper because I'm not sure exactly what the defense is yet. I'm going to sit here like you and listen to [defense counsel]. I don't know what he's going to say." (***Id***. at p. 739.) Later, the prosecutor jibed that he was "waiting to hear what the defense was." (***Ibid***.) The ***Redd*** court rejected a claim that the foregoing remarks shifted the burden of proof to the defendant, noting the "prosecutor's comments merely highlighted his observation that there seemed to be no coherent defense to the charges[.]" (***Id***. at p. 740.)

In ***People* v. *Lewis*** (2009) 46 Cal.4th 1255, defense counsel cross-examined a prosecution witness about statements defense counsel insinuated the witness had made to a defense investigator (i.e., "do you recall telling a defense investigator . . .") that would have presumably helped defendant establish an alibi. The investigator was never called. In closing argument, the prosecutor commented on the insinuations and then pointed out that had the witness "actually said these things to a defense investigator, don't you think they would have produced the defense investigator to say, 'Yeah. I interviewed her. Here's what she said.' [¶] You can conclude from the fact that the defense investigator wasn't presented to you that these insinuations are false, and all they can do possibly is mislead you as to what the evidence is in this case." (***Id***. at pp. 1301-1302.) The ***Lewis*** court held there was no burden shifting since the "comments merely established that, contrary to insinuations made during cross-examination, [the witness'] testimony was unimpeached. There is no reasonable likelihood the jury would have understood the . . . remarks to suggest that defendant had the burden to establish his own whereabouts that evening." (***Id***. at p. 1304.)

In ***People* v. *Panah*** (2005) 35 Cal.4th 395, the court rejected the claim the prosecution had engaged in burden-shifting where defense counsel argued that "the prosecution had neglected to collect vital evidence, such as any fingerprints on the suitcase in which the victim's body was found or DNA evidence, and suggested the reason was because it did not want to risk linking someone else to the crime" and the prosecution responded in rebuttal argument that the defense could also have conducted these experiments." (***Id***. at p. 464.)

In ***Demirdjian* v. *Gipson*** (9th Cir. 2016) 832 F.3d 1060, after explaining the prosecution had the burden of proof, the prosecution commented on defense failure to attack the prosecution with "real evidence, with competent evidence" and commented upon counsel's failure to explain away certain inculpatory facts by "competent, reliable, admissible evidence." (***Id***. at p. 1071.) The Ninth Circuit found it "problematic" the prosecution only referred to its burden one time but acknowledged that, under the ADEPA standard of review, the prosecutor could be viewed as merely highlighting "that the defense had challenged the prosecution's case with innuendo and accusation, not exculpatory evidence" and that the state appellate court could reasonably have concluded no burden shifting had occurred. (**Id**. at pp. 1071-1072.)

☢ Editor's note: Keep in mind, commenting upon failure of the defense to produce witnesses or evidence is permissible only where a defendant might reasonably be expected to produce such evidence. (*People* v. *Varona* (1983) 143 Cal.App.3d 566, 570.) Moreover, when making an argument that the defense has failed to produce evidence or witnesses, it is a good idea to make it clear during argument that the defendant is not *required* to produce evidence and the People have the burden of proving guilt. (See *People* v. *Redd* (2010) 48 Cal.4th 691, 741; *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1340; *People* v. *Ratliff* (1986) 41 Cal.3d 675, 691.)

a. Argument on Failure to Call Witnesses Cannot Extend to What Witness Actually Would Have Said

However, while a prosecutor can safely claim that the defense would have called the witness if the witness would have aided the defense, a prosecutor cannot affirmatively state what the witness actually would have said. For example, in ***People* v. *Gaines*** (1997) 54 Cal.App.4th 821, a defendant accused of robbery claimed a witness who was in the courtroom audience would help corroborate that he was not involved in the robbery. The witness was never called. Defense counsel basically told the jury that it was the prosecutor's duty to produce the witness. In response, the prosecutor told the jury that defense counsel did not put on the witness after the defendant testified because the witness

was going to say things that were contrary to what defendant said, the defense "got [the witness] out of here before he could damage them," and it was the People who were trying to find the witness. (***Id***. at pp. 823-824.) As there was no actual evidence presented to establish these claims, the court found the prosecutor's argument was prejudicial misconduct. (***Id***. at p. 825; **see also *People* v. *Fuiava*** (2012) 53 Cal.4th 622, 728 [noting trial court overruled objection to prosecution's comment that defendant's wife was not called as witness in penalty phase, but sustained objection to prosecutor's subsequent suggestion that the failure to call her might have been because "they are afraid that they couldn't argue lingering doubt when I asked her what he told her"]' ***People* v. *Hall*** (2000) 82 Cal.App.4th 813, 816 [discussed in this outline, section II-L-1-a, at pp. 73-74]; ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, 115 [discussed in this outline, section II-B-2 at pp. 16-17)].

b. Argument on Failure to Call Witnesses Improper if Prosecution is Aware Witness Could Not Be Called

If the prosecutor ***knows*** the defendant actually attempted to produce the evidence or the witness or that the reason for the unavailability of the witness was beyond the control of the defense, it is improper to argue the defense did not produce the evidence because it would have undermined the defense case. (**See *People* v. *Bryant*** (2014) 60 Cal.4th 335, 428 [improper to suggest that a failure to produce the records showed a witness's testimony was not true where the prosecutor knew or should have known the records would actually corroborate the defense witness- albeit finding error harmless]; ***People* v. *Klor*** (1948) 32 Cal.2d 658, 663-664 [in light of the law providing that a spouse was not a competent witness against his or her spouse, the prosecutor's comments concerning the failure of the defendant's wife to testify were improper]; ***People* v. *Varona*** (1983) 143 Cal.App.3d 566, 570 [prosecutor committed misconduct when, after successfully excluding evidence of the fact the victim in a sexual assault case was a prostitute, argued to the jury the lack of any evidence the victim was a prostitute]; ***People* v. *Frohner*** (1976) 65 Cal.App.3d 94, 109 [unfair to comment on failure to call informant where prosecutor knew informant had made himself unavailable as witness].)

3. Expressing Confusion Over the Defense and Posing Questions for Defense Counsel to Answer in Argument

In ***People* v. *Redd*** (2010) 48 Cal.4th 691, the prosecutor repeatedly expressed wonder as to what the "defense" would be in the case and then posed a series of questions he said he would be waiting to hear answered by defense counsel. Based upon these comments, the defendant claimed the prosecutor shifted the burden of proof to the defendant. The California Supreme Court rejected this argument, finding the comments did not indicate the defendant bore the burden of proof, but "merely highlighted his observation that there seemed to be no coherent defense to the charges." (***Id***. at pp. 739-740 [and noting any impression the burden was on the defendant would have been dispelled by the instructions and the numerous reminders by both the prosecutor and court that the People bore the burden of proving defendant's guilt].)

4. Describing "Presumption of Innocence" or "Reasonable Doubt" as a Shield to Protect the Innocent Not as a Sword to Free the Guilty

There is a split in the cases on the propriety of arguing that the presumption of innocence or burden of proof beyond a reasonable doubt is a shield to protect the innocent and not a sword to free the guilty. (**See *Leavitt* v. *Arave*** (9th Cir. 2004) 383 F.3d 809, 820 [noting split as to whether instruction to same effect is improper]; *compare* ***Floyd* v.**

Meachum (2nd Cir. 1990) 907 F.2d 347, 351-354 [improper] and ***State* v. *Mara*** (Hawaii 2002) 41 P.3d 157, 171-173 [improper] *with* ***People* v. *Mouton*** [unreported] 2002 WL 126089, *29 [proper] and ***People* v. *Benson*** [unreported] 2006 WL 3708077, *8 [proper].) Accordingly, it is safer to avoid this argument.

5. Urging Jurors to Accept the Reasonable and Reject the Unreasonable Interpretation of the Evidence

"It is permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory." (***People* v. *Centeno*** (2014) 60 Cal.4th 659, 672; accord ***People* v. *Dalton*** (2019) 7 Cal.5th 166, 260.) The prosecutor may "urge the jury to '"accept the reasonable and reject the unreasonable"' in evaluating the evidence before it." (***People* v. *Meneses*** (2019) 41 Cal.App.5th 63, 71.) Making this argument does not lessen the prosecution's burden of proof. (***People* v. *Romero*** (2008) 44 Cal.4th 386, 416; ***People* v. *Meneses*** (2019) 41 Cal.App.5th 63, 71.)

T. REFERENCE TO PUNISHMENT OR SENTENCE

"A defendant's possible punishment is not a proper matter for jury consideration." (***People* v. *Thomas*** (2011) 51 Cal.4th 449, 486; ***People v. Martinez*** (2010) 47 Cal.4th 911, 958; ***People* v. *Holt*** (1984) 37 Cal.3d 436, 458; **accord *People* v. *Honeycutt*** (1977) 20 Cal.3d 150, 157, fn. 4.) A "jury is not allowed to weigh the possibility of parole or pardon in determining the guilt of the defendant." (***People* v. *Thomas*** (2011) 51 Cal.4th 449, 486; ***People* v. *Holt*** (1984) 37 Cal.3d 436, 458.) Thus, it is generally misconduct for the prosecutor in the guilt phase of trial to discuss penalty.

1. Commenting Upon Fact the Evidence Showed Defendant Was Guilty of a Crime Greater than the Crime Charged

Sometimes a case will be retried after an acquittal on a greater charge, or the evidence presented to the jury will show that a more egregious crime was committed than the crime with which the defendant is charged. Is it improper for a prosecutor to point out that the evidence proved a greater crime than was charged? In ***People* v. *Frandsen*** (2019) 33 Cal.App.5th 1126, the court did not find a prosecutor acted improperly when she told the jury she had not only proved the charged offenses (second degree murder and involuntary manslaughter) beyond a reasonable doubt, but that the evidence showed the defendant's true culpability for the deaths of the victims was even greater than that with which he was charged. The defense counsel did not specifically argue that the prosecutor's statements were a reference to punishment. Rather, the claim was that the remarks implied that the charges had been reduced and thus leniency had already been extended. (***Id***. at pp. 1151.) However, the holding in ***Frandsen*** suggests that simply pointing out the defendant was guilty of a greater offense than that with which he was charged will not be viewed as an improper comment suggesting the jury consider the crime's penalty.

2. Suggesting the Defendant Will be Freed or Not Justly Punished if Convicted of a Lesser Offense

In ***People* v. *Peau*** (2015) 236 Cal.App.4th 823, characterized the doctrine of imperfect self-defense as a "loophole" that did not apply and stated: "So you see, self-defense doesn't apply. Imperfect self-defense doesn't apply. The defendant is

not walking out of these doors using this excuse, and the defendant is not getting anything less than murder, based on the lies that he's told." (***Id***. at p. 832.) The ***Peau*** court held it was error for the prosecutor to use the term "loophole" to describe imperfect self-defense because it "suggested that the doctrine provides an illegitimate 'out' for a defendant who should otherwise be convicted of murder." (***Id***. at p. 833.) Thus, "the use of the word 'loophole' was inaccurate and improper to the extent it might have dissuaded the jury from finding that [the defendant] acted in imperfect self-defense. The ***Peau*** court also believed it was wrong for the prosecutor to imply that the defendant would be freed or "get away with murder" if they found defendant acted in imperfect self-defense. (***Ibid*** [albeit finding defendant forfeited right to complain of this error on appeal because he did not object]; **see also *People* v. *Ramirez*** (2019) 40 Cal.App.5th 305, 309 [indicating it is wrong to imply conviction of lesser included would allow defendant to escape all punishment]; ***People* v. *Babbitt*** (1988) 45 Cal.3d 660, 704 [misconduct for prosecutor to "suggest[ ] that when an accused is found insane he is let free"].)

In ***People* v. *Najera*** (2006) 138 Cal.App.4th 212, the prosecutor stated: "Manslaughter is a legal fiction in which the courts—or the law—allows somebody who has actually intended to kill somebody, gives them a break and says, you know what? You acted as a reasonable person in such a heat of passion that we're going to give you the break." In arguing this was not a heat of passion case, the prosecutor stated, this "is not the type of case that the law is referring to to throw the defendant a bone, if you will." (***Id***. at p. 220.) The court held "[t]he prosecutor's comment about giving the [defendant] a break or throwing him a bone can be excused as vigorous argument." (***Ibid.***) But then went on to say, "describing voluntary manslaughter as a legal fiction "misleadingly suggested it is not a real crime" because "[t]he jury likely would not have understood the concept of a legal fiction or the difference between a legal fiction and a fiction as understood in everyday life" and "could have led the jury to believe it was not a real crime and should not be considered seriously." (***Id***. at pp. 220-221; **see also *People v. Ramirez*** (2019) 40 Cal.App.5th 305, 309 [indicating that implying jury would be giving defendant "a break" if they reduced murder to manslaughter is not improper].)

TT. COMMENTING ON LACK OF DEFENDANT'S REMORSE

"Unless a defendant opens the door to the matter in his or her case-in-chief, . . . his or her remorse is irrelevant at the guilt phase." (***People* v. *Powell*** (2018) 6 Cal.5th 136, 173 citing to ***People* v. *Jones*** (1998) 17 Cal.4th 279, 307; **accord *People* v. *Riggs*** (2008) 44 Cal.4th 248, 301; **see also *People* v. *Houston*** (2012) 54 Cal.4th 1186, 1223 [finding it was misconduct (albeit nonprejudicial) for the prosecutor to ask the jury to note non-testifying defendant's lack of crying because, in context, it implied defendant lacked remorse].) However, in an earlier opinion, the California Supreme Court held that a prosecutor's characterization of the defendant as someone "with no remorse" was <u>not</u> misconduct "given the brutal and violent nature of the stabbing murder and attempted murder, and other violent crimes of which defendant was convicted. (***People* v. *Stanley*** (2006) 39 Cal.4th 913, 953.)

An example of defendant opening the door occurred in ***People* v. *Powell*** (2018) 6 Cal.5th 136, where the defense argued that defense was pressured into shooting the victim by others. The court held comment upon defendant's lack of remorse was proper because "[e]vidence that he displayed no remorse in the aftermath of the killing was relevant to rebut that theory." (***Id***. at p. 173.)

U. ARGUING GUILT BY ASSOCIATION

To argue guilt by association constitutes prosecutorial misconduct. (***People* v. *Lopez*** (2008) 42 Cal.4th 960, 967; ***People* v. *Castaneda*** (1997) 55 Cal.App.4th 1067, 1072; ***People* v. *Galloway*** (1979) 100 Cal.App.3d 551, 563; ***People* v. *Chambers*** (1964) 231 Cal.App.2d 23, 28.) "There is no place in our system of justice for the notion of guilt by association or guilt for the acts of others." (***People* v. *Arredondo*** (2018) 21 Cal.App.5th 493, 504.) "[P]rosecutors may not suggest to the jury that a guilty verdict is required because of the need to punish a group with whom the defendants are associated or because of some uncharged and unspecified crimes the defendants or others may have committed." (***Id***. at p. 496.)

In ***People* v. *Arredondo*** (2018) 21 Cal.App.5th 493, the court held it was misconduct for the prosecutor to repeatedly refer (11 times) to the defendants and apparently the other participants as cockroaches. This was because the epithet, by virtue of both its repetition and its power was the major theme of the prosecutor's argument and use of the "prosecutor's relentless description of the defendants and the other participants in the crime as "cockroaches" who together with others pose a hidden threat to the community, plainly suggested in powerful terms . . . guilt by association and responsibility for uncharged acts." (***Id***. at p. 496.) "The clear message conveyed by the prosecutor's repeated reference to the defendants and apparently the other participants as cockroaches [was] 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." (***Id***. at p. 504.)

In ***People* v. *Galloway*** (1979) 100 Cal.App.3d 551, the court held it was misconduct for a prosecutor to argue to the jury that the third person who participated in a robbery was a woman named Zeno and then use the fact defendant was friends with Zeno to help show defendant participated in the robbery because (i) the evidence did not establish Zeno was the person who participated in the robbery and (ii) the prosecutor argued the defendant was guilty because of his mere "association" with Zeno. (***Id***. at p. 564.)

In ***People* v. *Lopez*** (2008) 42 Cal.4th 960, the court held the prosecutor did not attempt to establish the guilt of a priest on trial for child molestation through use of "guilt by association" where the prosecutor's comments regarding priests that "[t]hey commit crimes, and they commit horrendous crimes" were made to support the prosecutor's request not to give defendant *favorable* treatment just because he happened to be a priest." (***Id***. at p. 967.)

UU. ASKING JURORS TO ADVISE THE COURT IF A JUROR IS REFUSING TO DELIBERATE OR ENGAGING IN OTHER MISCONDUCT

In ***People* v. *Engelman*** (2002) 28 Cal.4th 436, the California Supreme Court exercised its supervisory powers to order trial courts to cease giving an instruction to the jury which stated: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (***Id***. at pp. 441–442, 445.) The ***Engelman*** court explained that "it is inadvisable and unnecessary for a trial

court to create the risk of intrusion upon the secrecy of deliberation or of an adverse impact upon the course of deliberations by giving such an instruction." (***Id***. at p. 445.) However, the ***Engelman*** court also held that giving of the instruction did **not** constitute a violation of the constitutional right to trial by jury nor was giving it error under state law. (***Id***. at p. 444; **see also *People* v. *Banks*** (2014) 59 Cal.4th 1113, 1171 ["We have repeatedly affirmed ***Engelman***'s holding that CALJIC No. 17.41.1 does not violate a defendant's right to a fair trial."].) But whether a trial court should give such an instruction and whether a prosecutor may ask the jury to let the judge know if another juror was not following the law *are two different questions*.

In ***People* v. *Barnwell*** (2007) 41 Cal.4th 1038, the court rejected a challenge to the trial court's comments telling prospective jurors *during voir dire*: "'Now, if such a thing were to happen that a juror refused to deliberate, would you be strong [enough] to remind that juror that they were violating their oath?' The jurors answered yes. The court continued: 'Would you be strong enough to bring it to my attention if that behavior persisted?' The jurors again answered yes." (***Id***. at p. 1055.) Even though the case was tried before the instruction in ***Engelman*** was adopted, the ***Barnwell*** court found no error under ***Engelman*** because "even the giving of a formal jury instruction on these topics would not have infringed upon defendant's federal or state constitutional rights by jury or his state constitutional right to a unanimous verdict. [Citation.] Moreover, the remarks made by the court and prosecutor did not invite the jurors to act as though they had 'a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others.'" (***Barnwell*** at p. 1055.)

That said, in the recent case of ***People* v. *Morales*** (2021) 67 Cal.App.5th 326, the court found comments admonishing the jurors to send out a note if somebody is refusing to deliberate or follow the law to be "inappropriate in light of our Supreme Court's clear statement that telling a jury to report misconduct by fellow jurors is unnecessary and risks intruding into the deliberative process." (***Id***. at p. 338 [albeit declining to decide whether the comments rose to the level of misconduct or whether counsel's failure to object constituted ineffective assistance of counsel because there was no prejudice].) Specifically, the prosecutor argued: "Finally, ladies and gentlemen, before I wrap up, we watch you. We see you in the halls. We watch you coming in and stuff like that. And my sense is you get along just fine. [¶] But if somebody is not obeying the rules of the road, we got to know that. ¶ "Here are the two ways sometimes this happens. Sometimes a juror makes an instant decision and her Honor's going to give you a closing instruction that says, Don't express strong opinions too quickly, because that's not usually productive in jury deliberations. [¶] But sometimes somebody just says: Nope, I'm refusing to deliberate, made up my mind. [¶] That's illegal. Can't do that. We got to know about that, if somebody decides that. Right? [¶] And the other one is if somebody just doesn't want to follow the law as it's stated, we got to know about that too. ¶ "Her Honor made this point a dozen times in voir dire, maybe more, but it's that we are not legislators here. Our job is to follow the law. Right? [¶] The jury's job is to follow the law. If somebody is not doing that, somebody is refusing to deliberate or follow the law, you got to send out a note and let us know. I say that every time. Almost never happens. All right." (***Id***. at pp. 336-337.)

In contrast, in the unpublished case of ***People* v. *Camacho*** (unreported) 2017 WL 4020596, the court held it was **not** improper for the prosecutor to tell the jury: "If there's one of you who is not following the law in doing your duty, the judge needs to know about it. If there's one of you who is not doing your duty, the judge needs to know about it." (***Id***. at p. *16.) The ***Camacho*** court held that "when the prosecutor encouraged jurors to tell the judge if a fellow juror was not deliberating, he did not commit misconduct." (***Id***. at p. *17.) The ***Camacho*** court noted that the jurors had been

"specifically instructed that they were required to 'follow the law' (**see** CALCRIM No. 200) and that they had a 'duty to talk with one another and to deliberate in the jury room' (**see** CALCRIM No. 3550)." (***Ibid***.) The court stated "[t]he prosecutor's comments reinforced these requirements. The prosecutor's suggestion that jurors report any juror who was refusing to deliberate did not carry the weight of a more formal trial court instruction, and the jury was specifically told to follow the court's instructions if they conflicted with 'the attorneys' comments on the law.'" (***Ibid***.)

And in ***People* v. *Izaguirre*** (unreported) 2018 WL 300376, the court rejected a defendant's claim the prosecutor tainted deliberations when she asked a prospective juror during voir dire if the juror would "feel comfortable informing the court that that person is just making up facts and not deliberating the way they're supposed to be deliberating?" (***Id***. at p. *10.)

On the other hand, ***People* v. *Grant*** (unreported) 2018 WL 3100248, the court found that it was "inadvisable" but not prejudicial error for a prosecutor to remind jurors they had "promised to leave [their] biases outside" followed by a statement that: "You promised that, if someone wasn't following the law and was bringing up biases and things they didn't disclose—fully disclose or was refusing to consider the evidence, based on some sort of prejudice for one side [sic] the other, that you would tell." (***Id***. at p.*11-12.)

Editor's note: It *is* important to let the jurors know that refusal to follow the law is improper. However, in light of what the appellate court in ***People* v. *Morales*** (2021) 67 Cal.App.5th 326 said, it is respectfully recommended that prosecutors are safer not counseling jurors to report misconduct. If a prosecutor wants to risk going beyond telling the jurors what constitutes misconduct, the comments should be limited to saying no more than something along the lines of: "All of you have a duty to follow the court's instructions. If you find that one or more of you is refusing to follow the court's instructions by, for example, refusing to deliberate, you are *permitted* to bring this to the attention of the court." This alerts the jury they have the ability to report misconduct without suggesting they have an obligation to do so.

V. FAILURE TO ABIDE BY COURT'S RULING

Once a court has ruled that evidence is not admissible or ordered the prosecutor not to touch upon a particular issue in closing argument, a prosecutor must abide by that ruling . . . even if the ruling may be legally incorrect. (**See *People* v. *Pigage*** (2003) 112 Cal.App.4th 1359, 1374.) "[T]he correctness of the court's decision is not the issue. 'It is the imperative duty of an attorney to respectfully yield to the rulings of the court, ***whether right or wrong***. [Citations.]' [Citation.] As an officer of the court, [the prosecutor] owes a duty of respect for the court. (Bus. & Prof.Code, § 6068, subd. (b).) ... [The prosecutor's] decision to defy the court's order is outrageous misconduct." (***Ibid***, original italics.)

☢ Editor's note: If the prosecutor believes circumstances have sufficiently changed so that the earlier ruling may no longer be applicable, the prosecutor should inform the court of any intended conduct that might run afoul of the original order rather than assuming the order no longer applies.

W. COMMENTING ON THE LACK OF EVIDENCE WHEN THE EVIDENCE HAS BEEN EXCLUDED

It is not permissible for a prosecutor to argue inferences that a prosecutor knows or should know are not true. (**See** this IPG, section II-DD at pp. 31-32.) And if evidence has been *erroneously* excluded, it is improper for the prosecutor to seek

to capitalize on that exclusion. (**See *People v. Peterson*** (2020) 10 Cal.5th 409, 466 [listing cases involved prosecutorial misconduct based on taking advantage of erroneously excluded evidence or a prosecutor deceiving the jury into making inferences the prosecutor knew to be untrue].) The following cases illustrate that principle:

In ***People* v. *Armstrong*** (2019) 6 Cal.5th 735, the court found misconduct after a prosecutor persuaded the trial court to exclude defense evidence of what the victim said before she was attacked — evidence that should have been admitted — and then attributed to the victim a different statement nowhere supported in the record. (***Id***. at pp. 785–787, 796–797.)

In ***People* v. *Cunningham*** (2001) 25 Cal.4th 926, the court indicated that while it is normally permissible for a prosecutor to comment on defendant changing his appearance as evidence of consciousness of guilt, it would be improper to do so if the prosecutor was aware that such changes were motivated solely by medical necessity. (***Id***. at p. 1001.)

In ***People* v. *Ochoa*** (1998) 19 Cal.4th 353, the court found a prosecutor improperly commented on the failure of the defense expert to testify defendant's cocaine use could have caused him to commit the crimes where the expert was essentially precluded from doing so by statute. (***Id***. at pp. 430-431.)

In ***People* v. *Daggett*** (1990) 225 Cal.App.3d 751, the court held it was error for a prosecutor in a child molestation case to ask the jury to draw an inference that if it was true victim molested other children, the victim must have learned how to do so from defendant - where the prosecutor had successfully but erroneously got the court to exclude evidence that victim had been molested by persons other than defendant. (***Id***. at p. 757.)

In ***People* v. *Varona*** (1983) 143 Cal.App.3d 566, the court held it can be proper to comment upon the fact that the defense failed to produce evidence corroborating the defense story, but found it was misconduct for the prosecution to argue the defense did not produce any evidence the victim of a sexual assault was a prostitute after the prosecutor successfully excluded such evidence and exclusion was erroneous. (***Id***. at p. 570.)

However, courts draw a distinction between trying to capitalize on an evidentiary gap in the defense *when the evidence is properly excluded* and when it is improperly excluded. "[I]t is not misconduct for the prosecutor to argue in closing that there was no evidence supporting a particular proposition after the trial court has ***properly*** excluded evidence the defense had sought to introduce on that point." (***People* v. *Peterson*** (2020) 10 Cal.5th 409, 465, emphasis added.) This distinction is illustrated in the cases of ***Peterson*** and ***People* v. *Lawley*** (2002) 27 Cal.4th 102.

In ***People* v. *Peterson*** (2020) 10 Cal.5th 409, the prosecution theorized that the defendant had dumped the body of his victim off his boat into the Bay. (***Id***. at p. 425.) In an attempt to "portray the prosecution's theory as physically impossible, the defense . . . sought to introduce video of a demonstration with a weighted 150-pound dummy in a boat on the bay in which a defense firm employee, trying to dump the dummy out, sank the boat." (***Id***. at p. 426.) For a number of different reasons, including that the demonstration was not conducted under substantially similar conditions to those of the actual occurrence, the trial court excluded the video under Evidence Code section 352. (***Id***. at pp. 460-461.) The California Supreme Court agreed the video was properly excluded. (***Id***. at pp. 461-462.) During closing argument, the prosecution addressed the defense insinuation that the defendant could not have dumped the body of the boat because it would have capsized if the defendant had tried to push the victim's body overboard. The prosecution stated, "there's no evidence [the boat] would have done that." (Id. at p. 464.) The prosecutor recounted the testimony of witnesses

indicating the boat was stable enough to pull heavy fish on or push heavy weights off and concluded, "There's no evidence to contradict that whatsoever." (***Ibid***.) The defense claimed these comments were reversible misconduct because they improperly took advantage of the exclusion of the defense's evidence about the boat's instability." (***Ibid***.) The California Supreme Court observed the defense had introduced no evidence to contradict the prosecution evidence about the boat's stability and held "[t]he prosecution's observations about this omission were thus fair comment on the state of the evidence." (***Id***. at p. 465.) The court rejected the argument that the prosecution is always "barred from ever remarking on an evidentiary gap after successfully moving to exclude evidence that would have filled that gap." (***Id***. at pp. 465-466 [and distinguishing cases relied upon by the defense "because each involved erroneously excluded evidence or a prosecutor deceiving the jury into making inferences the prosecutor knew to be untrue."].)

In ***People* v. *Lawley*** (2002) 27 Cal.4th 102, the defendant sought to introduce evidence of third-party culpability. The trial court *properly* excluded it at the prosecution's urging. (***Id***. at pp. 151–155.) The prosecutor then argued in closing that no one but the defendant had a motive to kill the victim. The defendant urged this as misconduct, but the California Supreme held the prosecution's argument was fair comment on the record as it stood. (***Id***. at p. 156.)

WW. ARGUING INCONSISTENT THEORIES

"[F]undamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where . . . the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained." (***In re Sakarias*** (2005) 35 Cal.4th 140, 155–156.)

However, where the circumstances highlighted in ***Sakarias*** are not present, no error is likely to be found. Thus, in ***People* v. *Ramirez*** (2022) 13 Cal.5th 997, the California Supreme Court rejected a claim the rule laid out in ***Sakarias*** applied where the prosecutor introduced evidence of defendant's involvement as the shooter in an uncharged murder offered as a circumstance in aggravation in defendant's trial even though this was not necessarily consistent with how liability was argued in separate earlier trials of defendant's accomplices. (***Id***. at pp. 1135, 1144-1145.)

Specifically, in ***Ramirez***, the evidence relating to the uncharged murder showed that defendant and two other persons (Flores and Cipriano) confronted the victim of that murder and one of the three fatally shot him. The shooter's identity turned, in part on the witnesses' descriptions of the clothing the three men wore – with the shooter likely being the person identified as wearing a white hat. However, the evidence was ultimately ambiguous as to the shooter's identity. (***Id***. at pp. 1135-1138.)

Before defendant Ramirez' trial, Flores and Cipriano were each separately tried and convicted of that uncharged murder. In the trial of Flores, the prosecutor took the position that Flores was the shooter. However, the jury found not true an allegation that Flores had personally used a firearm. In the trial of Cipriano, the prosecutor conceded Cipriano was not the shooter and argued Flores was the shooter. However, Cipriano testified that defendant Ramirez was the shooter. (***Id***.

at p. 1136.) In the penalty phase of defendant's trial, the prosecution put on witnesses to establish defendant's guilt of the uncharged murder but "did not seek to introduce any evidence directly establishing that defendant was the shooter." (***Id***. at p. 1143.) Rather, in cross-examining the first prosecution to the uncharged murder, defense counsel elicited the "critical evidence of who wore the white cap in an attempt to portray Flores as the shooter." (***Id***. at pp. 1142-1143.) To rebut this evidence, the prosecution then called witnesses to "counter a theory of third-party culpability first introduced by the defense that was contrary to the jury's finding in the Flores case." (***Id***. at p. 1144.) "During the penalty phase closing argument, the prosecutor argued that 'the evidence points strongly to the fact that the defendant was the shooter'." (***Id***. at p. 1139.)

The California Supreme Court in ***Ramirez*** declined to find error in defendant's trial and distinguished the case of ***Sakarias*** for three reasons. First, unlike in ***Sakarias***, none of the defendants charged with the victim's murder was "necessarily convicted or sentenced ... on a false factual basis." (***Id***. at p. 1141.) Second, unlike in ***Sakarias***, where the evidence pointed clearly to defendant Sakarias' accomplice as having inflicted the fatal blow, the California Supreme Court held evidence in ***Ramirez*** was ambiguous or inconclusive, and noted several federal cases standing for the proposition that "uncertainty in the evidence justifies the prosecutor's use of alternate theories in separate cases." (***Id***. at p. 1142) Third, unlike in ***Sakarias***, where the prosecutor manipulated the evidence for the purpose of pursuing inconsistent theories, thus establishing the prosecutor's bad faith (a factor described as central to ***Sakarias***'s holding), the prosecutor in ***Ramirez*** did not evince bad faith: the supposed inconsistency was produced when the "prosecutor introduced known impeachment evidence to counter a theory of third-party culpability first introduced by the defense that was contrary to the jury's finding" in the other defendant's (Flores) case. (***Id***. at pp. 1142-1143.)

X. ANTICIPATORY ARGUMENT

A prosecutor may comment in opening argument upon an anticipated argument by defense counsel. (**See *People* v. *Dykes*** (2009) 46 Cal.4th 731, 770; ***People* v. *Thompson*** (1988) 45 Cal.3d 86, 113; **see also** this outline, section II-K-3-a at p. 69].)

Y. REBUTTAL ARGUMENT

1. Responding to Defense Argument

"[R]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel." (***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, 74; ***People* v. *Bryden*** (1998) 63 Cal.App.4th 159, 184; **see also *People* v. *Moore*** (2016) 6 Cal.App.5th 73, 97 [characterizing as "questionable" the proposition that a prosecutor's rebuttal is limited by the scope of the facts and evidence argued in the defendant's closing argument].) Indeed, *so long as the prosecutor's remarks do not go beyond the record*, "even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, does not constitute misconduct." (***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, 74 citing to ***People* v. *McDaniel*** (1976) 16 Cal.3d 156, 177 and ***People* v. *Hill*** (1967) 66 Cal.2d 536, 560–561.)

Editor's note: For a more extensive discussion of what type of otherwise impermissible argument may be raised during rebuttal in response to an improper defense argument, see this outline, section L-1-b at pp. 73-76.)

2. Loading Up Rebuttal Argument

It may be misconduct for the prosecutor to "sandbag" the defense by making an excessively short opening argument followed by an excessively long rebuttal argument. Although a prosecutor may waive the right to open the argument without waiving the right to close it (**see *People* v. *Martin*** (1919) 44 Cal. App. 45, 47), Penal Code section 1093(e) "does not permit the prosecutor to give a perfunctory (three and one-half reporter transcript pages) opening argument designed to preclude effective defense reply, and then give a 'rebuttal' argument —immune from defense reply—ten times longer (35 reporter transcript pages) than his opening argument." (***People* v. *Robinson*** (1995) 31 Cal.App.4th 494, 505.)

However, just because rebuttal argument exceeds in length opening argument does not mean improper "sandbagging" has occurred. In ***People* v. *Moore*** (2016) 6 Cal.App.5th 73, the court ultimately rejected (with some reservations) the defense allegation that the prosecution "sandbagged him by engaging one prosecutor, who played a more minor role at trial, to make a perfunctory opening argument, saving its genuine substantive attack [of over two hours] by the prosecutor who conducted the bulk of the examination." (***Id***. at p. 96.) The court also rejected the defense claim that, in light of this tactic, the defense should have been given an opportunity to offer surrebuttal argument. (***Ibid***.) Nor does the disdain for sandbagging mean a prosecutor cannot save her "most venomous" arguments until rebuttal. (**See *People* v. *Fernandez*** (2013) 216 Cal.App.4th 540, 563.) And in ***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, the court held that a prosecutor's mention of a victim's sexual orientation for the first time in rebuttal argument as evidence tending to show the victim would not have consented to the sex acts was not akin to the "sandbagging" that occurred in ***People* v. *Robinson*** (1995) 31 Cal.App.4th 494. (***Reyes*** at p. 73.)

Z. COMMENT UPON DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS

Generally, it is improper for prosecutors to make disparaging references to a defendant's exercise of his own constitutional rights. (**See *People* v. *Parker*** (2022) 13 Cal.5th 1, 82

1. Comment on Defendant's Exercise of His Sixth Amendment Right to Trial

Mere mention of the fact that a defendant has exercised his right to a jury trial is probably not error. However, if the prosecutor is suggesting that exercise of the right is evidence of consciousness of guilt, it will likely be error.

In ***People* v. *Perez*** (2017) 18 Cal.App.5th 598, the prosecutor told the jury: "It's time for him to take responsibility for what he did. Because the way our justice system works is this. When you're accused of a crime, no matter how guilty you know you are, you have the right in our country to have 12 citizens from the community leave their job, leave their retirement and have to sit through a boring trial and hear the evidence. No matter how guilty you know you are. Every person in this country has that right. And you've given him that right. You've done that." (***Id***. at p. 623.) The defendant contended this argument would be taken as meaning "the presumption of innocence is a farce, nothing more than a legal fiction." (***Ibid***.) The appellate court disagreed. It held all the argument did was assure "the jurors that defendant had been accorded his fundamental right to a fair trial. The prosecutor emphasized that a criminal defendant has that right to a fair trial even if he knows he is guilty. This argument does not suggest defendant is not presumed innocent, only that he

retains the right to a determination of his guilt or innocence by his peers even though he may be guilty. The argument is neither deceptive nor reprehensible." (***Ibid***.)

In ***People* v. *Jasso*** (2012) 211 Cal.App.4th 1354, the court did not *specifically* find a prosecutor's argument that the jury trial was only occurring because the defendant had exercised his right to trial to be improper. However, the court suggested it was misconduct by observing that this argument enhanced the risk that *another* argument made by the prosecutor (i.e., that appellate courts had upheld verdicts in similar cases –**see** this outline, section II-FF at p. 35) would improperly convey to the jury that a higher court "had already done the jury's work and made the jury's choice for it." (***Id***. at pp. 1367, 1368.)

In ***People* v. *Woodruff*** (2018) 5 Cal.5th 697, the court appeared to assume that it might be misconduct for a prosecutor to comment upon a defendant's exercise of his right to trial, but ultimately found that a prosecutor's comment *during voir dire* that everybody (even someone who committed the crime) has a right to go to trial was proper. Specifically, in ***Woodruff***, a prospective juror had explained that she had been a witness to a crime but that the case had never gone to trial because the defendant confessed. The prosecutor responded, "Do you understand, though, that even somebody who did it can ask for a trial?" He stated further, "That it's a constitutional right for everybody, even if they did it, to ask for a trial? Will you not hold it against the defendant?" (***Id***. at p. 755.) The California Supreme Court rejected defendant's argument that the prosecutor comments implied that the prosecution offered defendant a plea deal that he had rejected and that the jurors would "plausibly conclude that even though the defendant was guilty, he had asked for a trial." (***Id***. at p. 756.) The ***Woodruff*** court rejected the argument because the prosecutor was merely responding "to a juror's statement suggesting that cases do not go to trial if there has been a confession" and since in that case the defendant gave a confession, "the prosecutor did not commit misconduct in clearing up the juror's misconception." (***Ibid***.)

In the unpublished decision ***People* v. *Kernes*** [unreported] 2002 WL 1486379, the court held it was misconduct for the prosecutor to state: "Sometimes in a criminal case defendants exercise their right … to come before this court, in this court before a jury like you, exercise their right to a trial by their peers. Not because they are innocent; because they take that chance and roll the dice and hope that one of you-because that's all it takes is one of you-is going to think that there is some doubt that the defendant is not guilty and exercise that right." (***Id***. at p. *8.) The court found it was improper, "[w]hether viewed as a commentary on the defendant's exercise of a constitutional right, in such a way as to cast the presumption of innocence into doubt, as a reference to the prosecutor's experience in other cases, or as the prosecutor's possession of some special knowledge to which the jury here was not privy, which indicated defendant's guilt." (***Ibid***.)

Out of state cases generally find it is prosecutorial misconduct to ask the jury to draw an adverse inference from the fact that defendant exercised his right to a jury trial -- albeit also generally finding such comment not to be prejudicial. (**See e.g**., ***State* v. *Killings*** (Kansas 2015) 340 P.3d 1186, 1199-1201, 1205 [discussing cases finding it is improper for a prosecutor during closing arguments to impugn a defendant for choosing to exercise his or her right to a jury trial but also finding error was harmless]; ***Barnes* v. *State*** (Oklahoma 2017) 408 P.3d 209, 214-215 [holding it was error to comment on a defendant's decision to exercise his right to trial and error was harmless in guilt phase but not in sentencing phase]; ***State* v. *Thompson*** (North Carolina, 1995) 454 S.E.2d 271, 276 [stating "prosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is . . . impermissible" but finding argument was harmless error].)

However, it is not improper to comment on the fact a defendant was in the courtroom and was able to listen to all the other witnesses before he testified –even though arguably being present in court is an aspect of the right to trial. (**See *Portuondo* v. *Agard*** (2000) 529 U.S. 61 [and dissenting opinion].)

2. Comment Upon Defendant's Exercise of His Sixth Amendment Right to Counsel

It is improper to comment upon the fact that a defendant has exercised his Sixth Amendment right to counsel. "Guilt cannot be inferred from the reliance on a constitutional right. Imposing a penalty for its exercise undermines that right 'by making its assertion costly.'" (***People* v. *Bryant*** (2014) 60 Cal.4th 335, 387 [citing to ***Griffin* v. *California*** (1965) 380 U.S. 609, 614]; **see also *Bruno* v. *Rushen*** (9th Cir. 1983) 721 F.2d 1193, 1194 [noting that the mere act of hiring an attorney is not probative in the least of the guilt or innocence of defendants].)

Editor's note: As to whether it is error to comment upon a defendant's request to speak with an attorney when there is neither a Fifth Amendment nor Sixth Amendment right to counsel, **see** IPG's ***Doyle*** and ***Griffin*** Error Outline (available upon request).

3. Comment Upon Defendant's Exercise of His Fourth Amendment Rights

The invocation of Fourth Amendment rights cannot be used to show guilt. (***People* v. *Wood*** (2002) 103 Cal.App.4th 803, 809; ***People* v. *Keener*** (1983) 148 Cal.App.3d 73, 78-79; ***Gasho* v. *United States*** (9th Cir. 1994) 39 F.3d 1420, 1431 [the "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing."]; ***United States* v. *Prescott*** (9th Cir.1978) 581 F.2d 1343, 1351 [same]; **see also *People* v. *Tate*** (2010) 49 Cal.4th 635, 688 [assuming without deciding that commenting on refusal of defendant to consent to search is improper].) In the unpublished case of ***People* v. *Kittrell*** [unreported] 2021 WL 5783179, the court held it was error to comment on defendant's refusal to consent to a search of his wallet in closing argument. (***Id***. at p. *6 [and noting that "there appear to be no published California opinions directly on point, but there are several cases from other jurisdictions that specifically hold a prosecutor commits misconduct by commenting on a defendant's refusal to consent to a warrantless search."].)

4. Comment Upon Defendant's Exercise of His Fifth Amendment Right to Silence and Not to Testify at Trial (*Doyle* and *Griffin* Error)

Doyle* Error:** A person's silence in apparent reliance on ***Miranda advice cannot be used against him in a criminal trial. (***Doyle* v. *Ohio*** (1976) 426 U.S. 610)

Griffin* Error:** Prosecutor may not comment on failure of a defendant to testify. (Griffin* v. *California*** (1965) 380 U.S. 609)

Editor's note: Please see the updated memo on ***Doyle*** and ***Griffin*** Error for a comprehensive review of issues involving ***Doyle*** or ***Griffin*** error.

III. WHEN MISCONDUCT IN CLOSING ARGUMENT OR OPENING STATEMENT WILL CAUSE REVERSAL

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (***People* v. *Hill*** (1998) 17 Cal.4th 800, 819-820.)

Although the good faith or bad faith of a prosecutor may be relevant in assessing whether a prosecutor should be subject to discipline (**see *People* v. *Bolton*** (1979) 23 Cal.3d 208, 214, fn. 3), bad faith is not required in order to establish prosecutorial misconduct for purposes of determining whether a case should be reversed. The crucial issue "is not the good faith vel non of the prosecutor, but the potential injury to the defendant." (***People* v. *Clair*** (1992) 2 Cal.4th 629, 661; **see also *People* v. *Galloway*** (1979) 100 Cal.App.3d 551, 565, fn. 8.)

That said, the rules governing whether a prosecutor's closing argument will be held to be prosecutorial misconduct, and whether that misconduct will be deemed prejudicial, make it difficult for the defense to obtain reversal based on such a claim.

Error with respect to prosecutorial misconduct is evaluated under ***Chapman* v. *California*** (1967) 386 U.S. 18 to the extent federal constitutional rights are implicated, and ***People* v. *Watson*** (1956) 46 Cal.2d 818 if only state law issues were involved. (***People* v. *Fernandez*** (2013) 216 Cal.App.4th 540, 564; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 514.)

Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (***People* v. *Arias*** (1996) 13 Cal.4th 92, 161.)

"When a claim of misconduct is based on the prosecutor's comments 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."' [Citation.]" (***People* v. *Friend*** (2009) 47 Cal.4th 1, 29.) Reviewing courts must "consider the assertedly improper remarks in the context of the argument as a whole." (***People* v. *Covarrubias*** (2016) 21 Cal.5th 838, 894 citing to ***People* v. *Cole*** (2004) 33 Cal.4th 1158, 1203.) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.'" (***People* v. *Cortez*** (2016) 63 Cal.4th 101, 130 citing to ***People* v. *Benson*** (1990) 52 Cal.3d 754, 793.) Reversal is required only if "there is a 'reasonable likelihood the jury understood or applied [them] in an improper or erroneous manner.'" (***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, 77 citing to ***People* v. *Wilson*** (2005) 36 Cal.4th 309, 337.)

In conducting this inquiry, courts "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (***People* v. *Wilson*** (2005) 36 Cal.4th 309, 338; ***People* v. *Frye*** (1998) 18 Cal.4th 894, 970; **see also *Boyde* v. *California*** (1990) 494 U.S. 370, 385 ["[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"]).

"Juries are warned in advance that counsel's remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made. [Citations.]'" (***People* v. *Gonzalez*** (1990) 51 Cal.3d 1179, 1224, fn. 21.)

And courts are also less likely to find prosecutorial misconduct when the statements in question are brief, isolated remarks and/or are offered in response to defense counsel's misleading comments on the subject. (**See *People* v. *Cortez*** (2016) 63 Cal.4th 101, 133.)

If the prosecutor's comments run counter to the court's instructions, courts "will ordinarily conclude that the jury followed the latter and disregarded the former," for it is presumed "that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (***People* v. *Reyes*** (2016) 246 Cal.App.4th 62, 78 citing to ***People* v. *Centeno*** (2014) 60 Cal.4th 659, 676; **accord *People* v. *Cortez*** (2016) 63 Cal.4th 101, 131; **see also *Boyde* v. *California*** (1990) 494 U.S. 370, 384 ["arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence . . . and are likely viewed as the statements of advocates"]; ***People* v. *Lepere*** (2023) 91 Cal.App.5th 727 [308 Cal.Rptr.3d 558, 568] ["we must presume the jury understood and followed the court's instructions"].)

Misstatements of Law

Although courts generally review claims of prosecutorial error for an abuse of discretion, when the claim is that there was a misstatement of law, the reviewing court independently examines what the law is and tries to "objective[ly]" examine how a "reasonable juror" would likely interpret the prosecutor's remarks." (***People* v. *Collins*** (2021) 65 Cal.App.5th 333, 340.) A misstatement of the law is only error if there is "a reasonable likelihood that the jury understood or applied the [prosecutor's remarks] in an improper or erroneous manner." (***People* v. *Centeno*** (2014) 60 Cal.4th 659, 667.)

If the prosecutor and/or the defense attorney refers the jury to the court's instructions, this can help place the allegedly erroneous misstatement in context or mitigate any damage done by the misstatement of law. (**See *People* v. *Cortez*** (2016) 63 Cal.4th 101, 131.) Other factors considered by the court in evaluating the degree of prejudice arising from a prosecutor's misstatements of the law under either standard, include: (1) "whether the misstatements were fleeting or more pervasive"; (2) "whether the evidence of the defendant's guilt on the issue affected by the misstatement was close or overwhelming"; (3) "whether other jury instructions obviated the effect of the error"; and (4) "whether the jury made other findings that necessarily indicate that the error had no effect." (***People* v. *Collins*** (2021) 65 Cal.App.5th 333, 342.)

A. PROSECUTORIAL MISCONDUCT RISING TO THE LEVEL OF FEDERAL CONSTITUTIONAL ERROR

"Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action "'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" [Citation.]" (***People* v. *Riggs*** (2008) 44 Cal.4th 248, 298.) However, if federal constitutional error ***is*** involved, then the burden shifts to the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (***People* v. *Bolton*** (1979) 23 Cal.3d 208, 214.) This is the "***Chapman***" standard. (***People* v. *Gionis*** (1995) 9 Cal.4th 1196, 1214–1216; ***People* v. *Harris*** (1989) 47 Cal.3d 1047, 1084.)

B. PROSECUTORIAL MISCONDUCT *NOT* RISING TO THE LEVEL OF FEDERAL CONSTITUTIONAL ERROR

Even when misconduct in closing argument does not rise to the level of federal constitutional error, it may be error under California state law, but "***only*** if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (***People* v. *Mendoza*** (2016) 62 Cal.4th 856, 905, emphasis added.) Moreover, it must be "reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted." (***People* v. *Riggs*** (2008) 44 Cal.4th 248, 298.) This is the ***Watson*** standard. (***People* v. *Gionis*** (1995) 9 Cal.4th 1196, 1215.)

C. IMPACT OF DEFENSE FAILURE TO OBJECT TO ALLEGED MISCONDUCT IN TIMELY MANNER

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (***People* v. *Covarrubias*** (2016) 21 Cal.5th 838, 894; ***People* v. *Valencia*** (2008) 43 Cal.4th 268, 281; **accord *People* v. *Fuiava*** (2012) 53 Cal.4th 622, 691; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1263 [albeit also noting that if the objection is not immediately made, it may still be considered "timely" if "it came in time for the trial court to cure any harm made by the remarks"]; ***People* v. *Steskal*** (2021) 11 Cal.5th 332, 360 [timely where mistrial requested day after remarks but before defense finished closing argument].) The reason for this rule is that the trial court should be given an opportunity to correct the error and, if possible, prevent any prejudice by an appropriate curative instruction. (**See *People* v. *Peoples*** (2016) 62 Cal.4th 718, 801.)

If no objection was made to the argument by counsel, "the initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected ...; if it would not, the court must then and only then reach the issue whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution." (***People* v. *Bell*** (1989) 49 Cal.3d 502, 535.)

An objection to a claim of prosecutorial misconduct during closing argument is timely (i.e., is preserved for purposes of appeal) "if presented in a motion for mistrial made while proceedings are still ongoing and there is a meaningful opportunity for the trial court to cure the error(s) by admonishing the jury." (***People* v. *Wilson*** (2023) 89 Cal.App.5th 1006, 1013 [finding objection preserved where raised by defense counsel 10 minutes after closing argument but before the jury returned a verdict].)

Moreover, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (***People* v. *Peoples*** (2016) 62 Cal.4th 718, 797; **see *People* v. *Friend*** (2009) 47 Cal.4th 1, 29–30 [concluding that exceptions to forfeiture rule were inapplicable when defense counsel frequently objected to asserted misconduct and the trial court sustained several objections;]; ***People* v. *Hill*** (1998) 17 Cal.4th 800, 821 [noting that the "absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request'" and finding forfeiture rule inapplicable where the record established the "unusual circumstances" of "continual misconduct, coupled with the trial court's failure to rein in [the prosecutor's] excesses, [which] created a trial atmosphere so poisonous that [counsel] was thrust upon the horns of a dilemma" concerning whether to object, thereby "provoking the trial court's wrath," or declining to object, thereby forcing the defendant to suffer the prejudice of the prosecutor's "constant misconduct"]; **see also *People* v. *Seumanu*** (2015) 61 Cal.4th 1293, 1341 [recognizing that an objection may be viewed as futile when the failure to object is "due to the incremental nature of the improper argument, [so that] by the time the basis of an objection was apparent it would have been ineffective to counteract the prejudice flowing from the misconduct" but finding such an "unusual application of the futility exception" to be rare].) The overruling of some *other* defense objection does not establish futility. (**See *People* v. *Ramirez*** (2019) 40 Cal.App.5th 305, 310.)

When the issue on appeal involves a pure question of law which affects the substantial rights of the defendant, "a reviewing court may, in its discretion, decide to review a claim that has been or may be forfeited for failure to raise the issue below." (***People* v. *Sanchez*** (2014) 228 Cal.App.4th 1517, 1525 citing to ***In re Sheena K.*** (2007) 40 Cal.4th 875, 887, fn. 7 and Pen. Code, § 1259; **accord *People* v. *Denard*** (2015) 242 Cal.App.4th 1012, 1019-1020; **see also *People* v. *Potts*** (2019) 6 Cal.5th 1012, 1035 [forfeiture concerns may be irrelevant when the issue presented is a pure question of law based on undisputed facts].)

A defendant "is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (***People* v. *Vera*** (1997) 15 Cal.4th 269, 276.) However, misstatement of the law in closing argument will ordinarily not qualify as such a deprivation. For example, courts will apply the "ordinary forfeiture rule to claims that a prosecutor misstated the reasonable doubt standard. (***People* v. *Potts*** (2019) 6 Cal.5th 1012, 1035 [citing cases].)

Failure to object may still provide a basis for an ineffective assistance of counsel claim. (**See *People* v. *Castaneda*** (2011) 51 Cal.4th 1292, 1333-1334.)

IV. MISCONDUCT OF *DEFENSE COUNSEL* IN CLOSING ARGUMENT OR OPENING STATEMENT

A prosecutor is held to "a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (***People* v. *Hill*** (1998) 17 Cal.4th 800, 820.) And certain arguments may be viewed as more damaging if made by the prosecutor than the defense attorney due to the perceived prestige placed on the office of the prosecutor. (**See *People* v. *Alvarado*** (2006) 141 Cal.App.4th 1577, 1584). Moreover, misconduct by a prosecutor in closing argument can result in a mistrial or reversal of a case; while misconduct by the defense counsel in closing argument, no matter how egregious, will result in neither

unless it somehow reflects ineffective assistance of counsel or adversely impacts a co-defendant. (**See *People* v. *Hardy*** (1992) 2 Cal.4th 86, 157 ["the identity of the speaker can make a difference when determining whether an improper remark was harmless beyond a reasonable doubt. Thus, a comment alluding to the silence of a defendant that would require reversal if made by a prosecutor may be deemed harmless—or even not error—if made by a codefendant's attorney."].)

However, *this does not mean* that defense counsel is unrestrained by the rules governing permissible argument. In ***United States* v. *Young*** (1985) 470 U.S. 1, the High Court made it clear that, generally, if the type of argument would constitute misconduct on behalf of the prosecutor, it will also constitute misconduct on the part of defense counsel: "It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, "[t]he interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." [Citation omitted]. Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case." (***Id***. at p. 8 [citing to ABA Model Code of Professional Responsibility DR 7–106(C)(3) and (4) (1980), quoted in n. 3 and ABA Model Rules of Professional Conduct, Rule 3.4(e)(1984)].)

"Defense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate. The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded; a trial judge should deal promptly with any breach by either counsel. These considerations plainly guided the ABA Standing Committee on Standards for Criminal Justice in laying down rules of trial conduct for counsel that *quite properly hold all advocates to essentially the same standards*. Indeed, the accompanying commentary points out that "[i]t should be accepted that both prosecutor and defense counsel are subject to the same general limitations in the scope of their argument," . . ." (***Young*** at p. 9 [citing to ABA Standards for Criminal Justice 4–7.8, p. 4•97]; **see also *People* v. *Armstrong*** (2019) 6 Cal.5th 735, 797 ["An *advocate* . . . may not mislead the jury as to what the record actually contains."], emphasis added].)*

Editor's note**: The ABA Model Rules of Professional Conduct "do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own." (State Compensation Ins. Fund* v. *WPS, Inc.*** (1999) 70 Cal.App.4th 644, 655-656 citing to ***General Dynamics Corp.* v. *Superior Court*** (1994) 7 Cal.4th 1164, 1190, fn. 6 and ***Cho* v. *Superior Court*** (1995) 39 Cal.App.4th 113, 121, fn. 2.) However, Rule 1–100(A) [now Rule 1.0(b)], paragraph 3 of the California Rules of Professional Conduct provides: "The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered." (***State Compensation Ins. Fund* v. *WPS, Inc.*** at p. 656.) "Thus, the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California." (***Ibid***.)

NEXT EDITION: TWO NEW CALIFORNIA SUPREME COURT CASES – ONE INVOLVING THE QUESTION OF WHETHER THE BILL REDUCING PROBATION FOR FELONIES TO TWO YEARS APPLIES RETROACTIVELY TO CASES NOT YET FINAL ON APPEAL AND THE PROPER REMEDY IF THAT IMPACTS AN EXISTING PLEA AGREEMENT PROVIDING FOR A LONGER TERM (*PEOPLE V. PRUDHOLME*) AND ONE INVOLVING THE QUESTION OF WHETHER THE FORCE OR FEAR ELEMENT OF KIDNAPPING IS 'RELAXED" WHEN THE VICTIM IS INTOXICATED IN THE SAME WAY IT IS RELAXED WHEN THE VICTIM IS AN INFANT OR SMALL CHILD (*PEOPLE V. LEWIS*).

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.