# A PRIMER ON ALLEGING PROSECUTORIAL MISCONDUCT ON APPEAL

by Sandra Uribe, CCAP Staff Attorney

Introduction.

The Center For Public Integrity conducted a nation-wide study of alleged prosecutorial misconduct in criminal appeals from 1970 to 2003. The study revealed that there were 590 published California cases in which the defendant alleged prosecutorial misconduct. In 75 of those cases, the appellate court held a prosecutor's conduct was prejudicial to the defendant. And in 41 cases that were not overturned, there was a dissent opining the prosecutor's conduct warranted a reversal or a remand.

According to the study, of the 75 cases in which prosecutorial misconduct was deemed prejudicial, 48 cases involved improper trial arguments or examination, 11 concerned the withholding evidence from the defense, 8 related to discrimination in jury selection, 3 involved pre-trial tactics, 2 involved threatening a witness and 3 were about the destruction of evidence, the breach of an agreement and eavesdropping.

Given these numbers, prosecutorial misconduct is an area in which appellate counsel should become familiar. The purpose of this article is to provide a guide on alleging prosecutorial misconduct on appeal, as well as illustrative examples of behavior by prosecutors which has been classified as inappropriate.

What is Prosecutorial Misconduct?

Prosecutorial misconduct is defined as the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Espinosa* (1992) 3 Cal.4th 806, 820; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691.)

When alleging misconduct, a defendant need not make a showing that the prosecutor acted in bad faith. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) The test on appeal is not prosecutorial intent, but the effect on the defendant. (*People v. Vargas* (2001) 91 Cal.App.4th 506.) Thus, the California Supreme Court has noted that the term "prosecutorial misconduct" is somewhat of a misnomer in that "it suggests a prosecutor must act with a culpable state of mind. A more apt description ... is prosecutorial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.)

A prosecutor may not justify misconduct by saying that defense counsel "started it" or that he was merely responding to defense counsel's improper argument. (*People v. Perry* (1972) 7 Cal.3d 756, 790.) Prosecutors are held to an elevated standard of conduct to that imposed on other attorneys because of the unique function they perform in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As the United States Supreme Court has noted, 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 [55 S.Ct. 629, 633; 79 L.Ed. 1314, 1321].)

What is the Applicable Standard of Review?

The standards used to evaluate prosecutorial misconduct are well established. "A prosecutor's … intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) But even if the conduct does not render a trial fundamentally unfair, the actions may nevertheless be misconduct under state law, if they involve "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Price* (1991) 1 Cal.4th 324, 447.)

When is the Issue Arguable on Appeal?

A trial judge has no sua sponte duty to control prosecutorial misconduct in offering evidence, or otherwise, and is not obligated to intervene in the absence of an objection. (*People v. Carrera* (1989) 49 Cal.3d 291, 321.) Therefore, a defendant generally cannot complain on appeal of misconduct by a prosecutor at trial unless a timely objection was made, the objectionable comment was assigned as misconduct, *and* an admonition was requested. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Even if an objection is raised and sustained, if an admonition would have cured the harm, the issue is waived for appeal unless the defendant asks the court to admonish the jury to disregard the impropriety. (*People v. Prieto* (2003) 30 Cal.4th 226, 259.)

An objection and/or a request for an admonition will be excused if either would have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 [finding objection and request for admonition would have been futile].) Moreover, failure to request an admonition does not waive the issue for appeal if

such admonition would not have cured the harm caused (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333), or if the defendant had no opportunity to request an admonition because the court overruled defense counsel's objection. (*People v. Green* (1980) 27 Cal.3d 1, 35, fn. 19.) "The inherent impossibility of obtaining a curative admonition in [the latter] situation has led to the rule that the failure to request the admonition does not forfeit the error." (*People v. Hall* (2000) 82 Cal.App.4th 813, 817.)

Finally, absent an objection and a request for admonition, claims of misconduct may be considered on appeal if:

> "the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict...." (*People v. Lambert* (1975) 52 Cal.App.3d 905, 908.)

What to do when there are preservation problems? The more pervasive the misconduct was, the more likely it is that the appellate court will overlook the preservation problems and consider the merits, especially if defense counsel did attempt to object to the most serious instances of misconduct. (See e.g., *People v. Hill*, *supra*, 17 Cal.4th 800.)

In addition, an appellate court has the *discretion* to consider an inadequately preserved misconduct issue. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6, ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"].)

And finally, one should consider whether the waiver problem can be resolved by showing counsel was ineffective for failing to object to the misconduct. (See e.g., *People v. Anzalone* (2005) 130 Cal.App.4th 146, 159 [finding on direct appeal that trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law related to concept of concurrent intent]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125-26 ["we will reach the merits in response to defendant's assertion that the failure to assign misconduct constituted ineffective assistance of counsel."])

Examples of Misconduct.

This article will not discuss prosecutorial misconduct outside the courtroom because those matters are generally found outside the record on appeal and therefore need

to be raised via a writ. This discussion is limited to misconduct at the evidentiary stage of the trial and during closing argument.

1. General Trial Misconduct:

A. Eliciting improper evidence. A prosecutor may not knowingly or intentionally elicit testimony that is inadmissible in the present proceedings. (*People v. Bonin* (1988) 46 Cal.3d 659, 689, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1 ; *People v. Dagget* (1990) 225 Cal.App.3d 751, 758; *People v. Hudson* (1981) 126 Cal.App.3d 733.)

Asking clearly improper questions constitutes misconduct. (*People v. Smithey* (1999) 20 Cal.4th 936, 960-961.) One such example is *People v. Bell* (1987) 44 Cal.3d 137, in which the prosecutor stipulated the informant would not testify, and then he effectively read the informant's statement to the jury by incorporating it into a question. Asking an expert hypothetical questions not grounded in the evidence is another example of an improper question that has been held to be misconduct. (*People v. Boyette* (2002) 29 Cal.4th 381, 449-451.) Asking argumentative questions that go beyond an attempt to elicit facts within the witness' knowledge and are instead designed to engage an argument is also improper. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1235-1236.)

"Improper questions that violate a previous ruling by the trial court are particularly inexcusable." (*People v. Johnson* (1978) 77 Cal.App.3d 866, 873-874; see also *People v. Piper* (1980) 103 Cal.App.3d 102, 112 [failure to comply with the trial court's order to delete references to defendant's conduct on parole from an exhibit given to the jury was misconduct, even if inadvertent]; *People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170-1171 [prosecutor elicited evidence of defendant's prior arrest even though trial court had already ruled such evidence inadmissible]; *People v. Luparello* (1986) 187 Cal.App.3d 410, 422-426 [prosecutor's questioning violated court's directive regarding evidence of the codefendant's past acts]; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375 [prosecutor's "threat to defy the court's order was unprofessional and

improper, and his decision to act on this threat was outrageous."])

Additionally, prosecutors have a duty to reasonably anticipate and control witness misconduct. (*People v. Schiers* (1971) 19 Cal.App.3d 102, 112-113.) If a prosecutor believes a witness may give an inadmissible answer, he must warn the witness to refrain from making such statement. (*People v. Warren* (1988) 45 Cal.3d 471, 482.) But in *People v. Scott* (1997) 15 Cal.4th 1188, 1218, the Supreme Court held merely having a witness unintentionally stumble into such evidence is not misconduct.

B. Improper cross-examination of defendant. There is a split of authority on whether it is improper to ask the defendant if another witness is lying. (*People v. Foster* (2003) 111 Cal.App.4th 379.) The Ninth Circuit has held that asking these type of questions amounts to misconduct because credibility determinations are for the jury to make. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1219; *United States v. Geston* (9th Cir. 2002) 299 F.3d 1130, 1136; *United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 572-575.) In *People v. Zambrano*, *supra*, 124 Cal.App.4th 228, the court refused to hold that such questions were improper per se; finding at times they might be "necessary to clarify a witness's tesimomy." (*Id*. at p. 242.) However, in *Zambrano*, the prosecutor's questions rose to the level of misconduct because they were used "to berate [the] defendant ... and to force him to call the officers liars in an attempt to inflame the passions of the jury." (*Ibid*.)

C. Use of a defendant's post-arrest silence for impeachment. "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." (*Doyle v. Ohio* (1976) 426 U.S. 610, 619, n. 10.) "*Doyle* [error] rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291 [106 S.Ct 634; 88 L.Ed.2d 623].)

Two examples of cases holding that *Doyl*e error occurred are: *People v. Evans* (1994) 25 Cal.App.4th 358 [the prosecutor asked the defendant whether he told police he did nothing wrong]; and *People v. Galloway* (1979) 100 Cal.App.3d 551 [the prosecutor asked the defendant on cross-examination whether it was the first time he told anyone about his whereabouts at the time of the crime].) (*Doyle* error can also occur during arguments to the jury, and these examples will be discussed below.)

D. Use of perjured testimony. "Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts." (*United States v. LaPage* (2000) 231 F.3d 488, 492.) A prosecutor's known use of perjured testimony deprives the defendant of due process. (*Id*. at p.491.)

However, when making such a claim in a habeas petition, the defendant must establish, by the preponderance standard, not only that perjured testimony was used at the trial, but also that the state's representative knew as much, and that the testimony may have affected the outcome of the trial. (*In re Roberts* (2003) 29 Cal.4th 726, 740; *In re Imbler* (1963) 60 Cal.2d 554, 560.)

E. Witness intimidation. Intimidation of potential defense witnesses is misconduct and violates the defendant's right to compulsory process. (*In re Martin* (1987) 44 Cal.3d 1 [prosecutor arrested one witness outside courtroom in front of others, and threatened prosecution if the other witnesses testified]; see also *People v. Nunez* (1984) 162 Cal.App.3d 280 [prosecutor's threat of perjury charges against defense witness].) However, for misconduct to be prejudicial, a showing of materiality is essential. (*People v. Woods* (2004) 120 Cal.App.4th 929, 936-938 [while it was clear the prosecutor's actions were a substantial cause in keeping defense witness off the stand, the testimony was not a material component of defendant's defense]; *People v. Robinson* (1983) 144 Cal.App.3d 962, 970-972.)

2. Misconduct During Argument.

While prosecutors are given wide latitude during closing arguments (*People v.*

*Thomas* (1992) 2 Cal.4th 489, 562), they are also held to a higher standard of conduct (*People v. Kelley*, *supra*, 75 Cal.App.3d at p. 690). A prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

A. Comment on a defendant's failure to testify. A prosecutor's comment on the defendant's failure to testify that invites or allows a jury to infer guilt therefrom is misconduct. (*Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229; 14 L.Ed.2d 106]; *People v. Vargas* (1973) 9 Cal.3d 470, 474; *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782 ["There is only one way to connect by direct evidence what Mr. Glass' intent was and that is if he would take the witness stand and tell us, say that my intent was to sell those."])

This prohibition does not extend to comment on the defendant's failure to call logical witnesses or introduce other evidence that could reasonably have been expected, except of course, the testimony of the defendant himself. (*People v. Hughes* (2002) 27 Cal.4th 287, 371-372; *People v. Sanders* (1995) 11 Cal.4th 475, 528-529.) However, a prosecutor cannot argue that the defendant should have produced evidence that was actually excluded on the prosecutor's own motion. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.)

Moreover, such a comment may constitute misconduct when it appears to improperly shift the burden of proof. For example, in *People v. Gaines* (1997) 54 Cal.App.4th 821, the prosecutor argued in closing argument that the defendant's potential alibi witness (Hicks), would have impeached defendant's testimony, that the defense "got Mr. Hicks out of here" and that the district attorney's office had tried unsuccessfully to locate the witness. (*Id*. at p. 824.) The court held "that a prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify and what the testimony of that witness would have been." (*Id*. at p. 822.)

B. Comment on the exercise of the right to counsel. Prosecutorial

comment on the defendant's exercise of the right to an attorney is strictly forbidden. (*People v. Fabert* (1982) 127 Cal.App.3d 604, 610-611; *People v. Schindler* (1980) 114 Cal.App.3d 178.)

Examples of this type of misconduct include: *People v. Turner* (1983) 145 Cal.App.4th 658, 672 ["Then [the witness is] attacked by a trained lawyer who's hired by the defendant."]; and *Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1194, [statement to the jury suggested that the fact the accused hired counsel was in some way probative of his guilt].)

In contrast, in *People v. Crandall* (1988) 46 Cal.3d 833, 878, the reference to the defendant's invocation of the right to counsel was not misconduct because the remarks did not invite the jury to draw any adverse inference from either the *fact* or the *timing* of defendant's exercise of his constitutional right.

C. Comment of the exercise of Fourth Amendment rights. "Although an individual's refusal to consent to a warrantless entry of his residence may be open to various interpretations and is not encouraged, the assertion of the right itself cannot be a crime nor can it be evidence of a crime (*People v. Keener* (1983) 148 Cal.App.3d 73, 78-79.) See also *Unites States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1352 ["The right to refuse [entry] protects both the innocent and the guilty, and to use its exercise against the defendant would be, as the court said in *Griffin*, a penalty imposed by courts for exercising a constitutional right."])

But *People v. Redmond* (1981) 29 Cal.3d 904, held "moderate" references were not misconduct, in part because the defendant's Fourth Amendment rights were vicarious.

D. Comment on post-arrest silence. As noted above, *Doyle* error can also occur during the argument phase. A few examples include: *Wainwright v. Greenfield*, *supra*, 474 U.S. 284; and *People v. Fondron* (1984) 157 Cal.App.3d 390 [prosecutor's reference to post-arrest silence in his closing argument was prejudicial].)

E. Comment on the preliminary hearing. The prosecutor should not make references about the defendant's failure to produce witnesses at the preliminary hearing. (*People v. Conover* (1966) 243 Cal.App.2d 38, 48-49.) Additionally, arguing that the defendant had been held to answer constitutes misconduct. (*People v. Whitehead* (1957) 148 Cal.App.2d 701, 706; *People v. Brown* (1927) 81 Cal.App.226, 240.)

F. Stating personal opinions. "It is misconduct for a prosecutor to express a personal belief in the defendant's guilt if there is a substantial danger that the jurors will construe the statement as meaning that the belief is based on information or evidence outside the trial record." (*People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.) Thus, in *People v. Bain* (1971) 5 Cal.3d 839, 846, the Supreme Court found misconduct was committed when the prosecutor argued that if he really thought that the defendant was innocent he would not prosecute him. Other examples include: *People v. Johnson* (1981) 121 Cal.App.3d 94, 102 [prosecutor stated he personally investigated the matter]; *People v. Kirkes* (1952) 39 Cal.2d 719, 723 [prosecutor's statement that he would not be associated with the case if he didn't believe the defendant was guilty]; *People v. Modesto* (1967) 66 Cal.2d 695, 715 [prosecutor said he would not prosecute any man that he did not believe to be guilty]; *People v. Edgar* (1917) 34 Cal.App. 459, 467 [same]; *People v. Hidalgo* (1947) 78 Cal.App.2d 926, 936 ["Any time I am not absolutely convinced of the guilt of the defendant ... I will tell the jury about it"].)

On the other hand, expressions of belief in the defendant's guilt are not improper if the prosecutor makes clear that the belief is based on the evidence before the jury. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 782.) A prosecutor is entitled to assert his or her interpretation of what the evidence showed. (*People v. Navarette* (2003) 30 Cal.4th 458, 513.) That the argument was phrased in the first person is not necessarily dispositive of the propriety of the comment. (*See People v. Frye* (1998) 18 Cal.4th 894, 1019; *People v. Rosoto* (1962) 58 Cal.2d 304, 361.)

G. Witness vouching. The prosecutor may comment upon the credibility of witnesses in light of the evidence in the case. (*People v. Thomas*, *supra*, 2 Cal.4th at p. 529; *People v. Babbitt* (1988) 45 Cal.3d 660, 702.) However, it is improper for the prosecutor to vouch or express a personal belief as to the credibility of a witness. (*People v. Anderson* (1990) 52 Cal.3d 453, 479; *People v. Turner* (2004) 34 Cal.4th 406, 432-433 [prosecutor vouched for the credibility of the court-appointed experts based on his prior working relationships with them].) It is even more reprehensible for the prosecutor to suggest that the integrity of the district attorney's office should be considered in assessing the credibility of prosecution witnesses. (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 536-537.) But the prosecutor need not imply that he has private knowledge in support of the credibility of the witnesses; simply telling the jury that the witness had no reason to lie constituted improper vouching. (*United States v. Weatherspoon* (9th 2005) 410 F.3d 1132 [prosecutor who improperly vouched for law enforcement witness committed prejudicial misconduct].)

H. Disparaging defense counsel. It is improper for the prosecutor to imply that defense counsel has fabricated evidence or to otherwise malign defense counsel's character. (*People v. Cash* (2002) 28 Cal.4th 703, 732; *People v. Bemore* (2000) 22 Cal.4th 809, 806.)

Some cases in which the prosecutor's remarks were found to be misconduct include: *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 [reversible error for prosecutor to say that defense counsel's clients are all "rapists, murderers, robbers, child molesters" whom defense counsel "tells what to say" and argues for innocence even though he knows they are guilty]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 59-61 [reading from a dissenting opinion that stated defense counsel does not care about the truth and will argue for innocence even when he knows that the defendant is guilty]; *People v. Perry* (1972) 7 Cal.3d 756, 789-790 [argument suggesting defense counsel was free to obscure the truth and confuse the jury]; *People v. Bain*, *supra*, 5 Cal.3d at p. 847 [unsupported implication that defense counsel fabricated a defense].)

I. References to facts not in evidence. It is misconduct for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury. (*People v. Kirkes*, *supra*, 39 Cal.2d at p. 724.) "Such testimony, although worthless as a matter of law, can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Frye*, *supra*, 18 Cal.4th at p. 976-977.) As such, it is "a highly prejudicial form of misconduct" and "a frequent basis of reversal." (*People v. Hall, supra,* 82 Cal.App.4th at p. 818.)

Thus, it is misconduct to suggest during closing that there was evidence which could have been presented, but was not, to save the jurors' time. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 452.) Likewise, a prosecutor cannot tell the jury that a witness was not called because the testimony would have been cumulative. (*People* v. *Harris* (1989) 47 Cal.3d 1047, 1084; *People v. Hall*, *supra*, 82 Cal.App.4th at p. 817.)

It is also misconduct to argue that the jury should treat unanswered questions as substantive evidence. (*People v. Rios* (1985) 163 Cal.App.3d 852, 868-869.) Nor is it "permissible for a prosecutor to say what the answer to a question would have been." (*People v. Johnson*, *supra*, 121 Cal.App.3d at p. 101.)

The exception to the rule about not arguing matters which are not in evidence, is that "[c]ounsel may argue to the jury matters which are not in evidence, but which are common knowledge or illustrations drawn from common experience, history or literature." (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 704; accord *People v. Williams* (1997) 16 Cal.4th 153, 221.)

Related to the concept of arguing facts not in evidence, is the mis-characterization of the evidence, which is also improper. (See *People v. Hill*, *supra*, 17 Cal.4th 800, 823.) More specifically, "[u]rging the 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; *People v. Daniels* (1959) 169 Cal.App.2d 10; *People v. Craig* (1957) 49 Cal.2d 313.)

J. Misstatement of the law. Misstating the law may constitute misconduct, but unlike most types of misconduct, it may require bad faith on the part of the prosecutor. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 830-831; *People v. Bonin*, *supra*, 46 Cal.3d at p. 702.)

K. Appeals to passion and prejudices of the jury. "It is improper for the prosecutor to appeal to the passion and prejudice of the jury in closing argument." (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1378, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) Thus, an improper reference to the defendant's social or religious background is impermissible. (See e.g., *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 ["maybe the next time it won't be a little black girl from the other side of the tracks"]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974-975 [argument involving the beliefs of the Sikh religion]; *People v. Simon* (1927) 80 Cal.App. 675, 677 [promoting stereotypes about Jews].)

Likewise, a prosecutor's argument that only jurors have the power to enforce the law was an improper emotional appeal. (*People v. Turner*, *supra*, 145 Cal.App.3d 658, 674.) Another improper argument based on emotion would be one appealing to the jurors' pecuniary interests (*People v. Smith* (1984) 155 Cal.App.3d 1103, 1182 [misconduct occurred in a tax fraud case when the prosecutor improperly told jury that every time someone lies or cheats on their taxes it increases the burden on all others]), or to other societal pressure (*People v. Purvis* (1963) 60 Cal.2d 323, 324 [reference to unfavorable reaction of jurors' neighbors if they were to acquit].)

Additionally, "an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds *sub nom*. *Stansbury v. California* (1994) 511 U.S. 318, [114 S.Ct. 1526; 128 L.Ed.2d 293].) Thus, an argument inviting the jury to reflect on all that the victim had lost through her death is improper. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.; see also *People v. Stankewitz*

(1990) 51 Cal.3d 72, 112 ["imagine the loss you would feel if someone close to you were taken from you or murdered at a young age for no reason at all. Then multiply that, because there were many persons, family and friends, who would miss [the victim]"]; *People v. Burton* (1989) 48 Cal.3d 843, 868 ["put yourselves . . . in [the relatives'] position and imagine the loss"]; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250, [prosecutor asked the jury to imagine that the victim was one of their children]*; People v. Ghent* (1987) 43 Cal.3d 739, 772 ["think about how you would feel if it were your baby"].)

L. Appeals to the Bible. Prosecutors may not appeal to religious authority in a closing argument to the jury. (*People v. Harrison* (2005) 35 Cal.4th 208, 247.) Appeals to religious authority at the guilt phase are impermissible because the jury's role is to decide questions of fact based on the evidence and to apply those facts to the law as stated by the trial court. Religious input has no legitimate role to play in this process. (*Ibid*.) Appeals to religion at the guilt phase are improper for a different reason: "to invoke God may diminish the jurors' sense of personal responsibility for the decision whether to impose the death penalty or may encourage jurors to base their penalty decision on a different or higher law than that found in the California Penal Code." (*Ibid*.)

But not every reference to the Bible is an appeal to religious authority, and prosecutors may refer to the Bible in closing argument to illustrate a point. (*Id*. at p. 248.) In *Harrison*, the prosecutor referred to the defendant as "evil" and referred to the Bible in calling appellant a "disciple of Satan" and discussing the apocalypse. This was not misconduct because he jury would reasonably have understood the references merely as an illustration of the gravity of the offense and not an appeal to religious authority. (*Id*. at pp. 246-248.) Likewise, in *People v. Williams* (1988) 45 Cal.3d 1268, the prosecutor did not commit misconduct in referring to capital punishment as discussed in the Bible because the statement was part of a fairly neutral history of capital punishment.

M. Comment on the prosecutor's role. In *People v. Perry*, *supra*, 7

> Cal.3d 756, the prosecutor read from a United States Supreme Court opinion which stated that the role of the prosecutor, unlike defense counsel, was to ascertain the truth. He then suggested that defense counsel was acting in bad faith by challenging the sufficiency of a police report. (*Id*. at p. 789.) The appellate court found that the remarks amounted to misconduct. (*Id.* at p. 790.) In *People v. Hawthorne*, *supra*, 4 Cal.4th 43, the prosecutor also argued to the jury that while it was his duty to expose the truth, defense did not have a similar duty. In finding that the argument was improper, the court held that such an extraneous generalization diverts "the jury's attention from the specifics upon which they must focus." (*Id*. at p. 60.)

Federalizing the Issue.

Some forms of prosecutorial misconduct may infringe on specific constitutional rights. The issue should be framed as a constitutional violation as well as a state law one whenever possible. Following are some of the forms of misconduct that can be alleged as federal constitutional error.

*Griffin* error (the improper comment on the defendant's failure to testify) is an infringement of the self-incrimination clause of the Fifth Amendment. (*Griffin v. California*, *supra*, 380 U.S. 609.) Likewise, a comment on a *non-testifying* defendant's demeanor during trial violates the Fifth Amendment right not to testify. (*United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 981.)

A comment on the defendant's exercise of the right to counsel implicates a defendant's Sixth Amendment right, as well as due process. (*People v. Crandall* (1988) 46 Cal.3d 833, 878; *People v. Schindler* (1980) 114 Cal.App.3d 178, 187; *United States v. Kallin* (9th Cir. 1995) 50 F.3d 689, 692-694; *Bruno v. Rushen*, *supra*, 721 F.2d 1193 [defendant was denied due process when prosecutor insinuated during argument that defendant's hiring of counsel was probative of guilt; and prejudice was not cured by court's general admonition to consider only the evidence].)

Comment on defendant's post-arrest silence (*Doyle* error), and an instruction that the jury could construe it as an adoptive admission violates the Fifth Amendment privilege against self-incrimination. (*Franklin v. Duncan* (9th Cir. 1995) 70 F.3d 75, 76.)

Prosecutorial violations of the confrontation clause are one of the most common and most prejudicial forms of misconduct. There are several scenarios by which this can occur. One is when the prosecutor makes references to matters outside the record and effectively becomes his own "unsworn witness." (See e.g., *People v. Bolton*, *supra*, 23 Cal.3d 214-215, fn. 4; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825; *People v. Johnson*, *supra*, 121 Cal.App.3d at p. 104.) The prosecutor can also violate the confrontation clause by using improper questions to place extrajudicial information before the jury. (*People v. Bell* (1989) 49 Cal.3d 502, 532-534; *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1222; *Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 878-879.)

Prosecutorial appeals to racial, religious, or ethnic prejudices and stereotypes give rise to Fourteenth Amendment equal protection and due process violations, as well as the Sixth Amendment right to a fair trial. (*United States v. Santiago* (9th Cir. 1995) 46 F.3d 885, 890-891; *People v. Cudjo* (1993) 6 Cal.4th 585, 625; *Bains v. Cambra, supra,* 204 F.3d 694, 974; see also, *McCleskey v. Kemp* (1987) 481 U.S. 279, 309, fn. 30 [107 S.Ct. 1756, 1776; 95 L.Ed.2d 262] ["The Constitution prohibits racially biased prosecutorial arguments."].)

The prosecutor's knowing use of perjured testimony violates due process. (See *Mooney v. Holohan* (1935) 294 U.S. 103 [55 S.Ct. 340; 79 L.Ed. 791]; *Pyle v. Kansas* (1942) 317 U.S. 213 [63 S.Ct. 177; 87 L.Ed. 214]; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1015.)

The prosecutor's use of evidence in breach of an agreement made with and relied on by the defendant also violates due process. (*People v. Quartermain* (1997) 16 Cal.4th 600.)

And pervasive improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Earp* (1999) 20 Cal.4th 826, 858; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464; 91 L.Ed.2d 144].)

What is the Standard of Prejudice?

As noted above, there are some forms of misconduct that implicate federal constitutional rights, and these are subject to the *Chapman v. California* (1967) 386 U.S. 18, 23-23 [87 S.Ct. 824; 17 L.Ed.2d 705], standard of prejudice, which inquires whether

the error is "harmless beyond a reasonable doubt."

For misconduct that is violation of state law, a defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that the jury would have reached a result more favorable to the defendant had the misconduct not occurred. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

However, misconduct committed during closing argument seems to have its own unique standard. "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

In establishing prejudice for alleged prosecutorial misconduct, one should also consider how many instances of misconduct occurred. Even when it is determined that a single instance of misconduct does not require the reversal of a conviction, the cumulative effect of a pattern of such conduct may. (*People v. Hill*, *supra*, 17 Cal.4th 800, 844-847; *People v. Herring, supra*, 20 Cal.App.4th at pp. 1074-1075; *People v. Pitts*, *supra*, 223 Cal.App.3d 606; see also *Berger v. United States*, *supra*, 295 U.S. 78, 89 ["Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."])

And finally, it may be worthwhile to consider whether the prosecutor trying the case has previously been found by an appellate court to have committed misconduct. In *People v. Hill*, *supra*, 17 Cal.4th at pp. 847-848, the Supreme Court took judicial notice that the offending prosecutor was found to have committed misconduct in two other published, and one unpublished, appellate court opinion. The Supreme Court stated that under Evidence Code section 452, subdivision (b) the unpublished opinion was a "[r]ecord[] of ... any court of this state"; and that it could take judicial notice of such records." Since the Court was not citing or relying on that opinion, judicial notice did not run afoul of rule 977 of the California Rules of Court which prohibits the citation of unpublished opinions.