When Not to Turn The Other Cheek:
Confronting Prosecutorial Misconduct At Trial With Style
By: Martin Sabelli

INTRODUCTION

In the world of boxing, both Joe Louis – a consummate gentleman in the ring – and Mike Tyson – considered by many disinterested observers to be less than a gentleman in the ring – have been honored as heavyweight champions of the world. This range does not necessarily offend the sensibilities of boxing fans because prizefighters are matched by weight-class and, to some extent, step into the ring by choice.

The criminal justice system lacks these elements – matched adversaries and choice to compete – but suffers from the same range of sportsmanship from the heavyweight in the ring – the prosecutor. While there are more than a few Joe Louis's robed in governmental gear, there are quite a few who are willing to hit below the belt and bite a few ears in an effort to win at any cost. This memorandum is designed to identify several of the more common types of ear biting and sucker punching that you might encounter in trial and help develop an approach to counter prosecutorial misconduct in the moment.

No Ear Biting Allowed: The Prosecutor's Duty Is to Seek Justice , Not Win At Any Cost

The prosecutor's duty is to "seek justice, not merely convict." ABA Standards for Criminal Justice § 3-1.2(c) (3rd ed. 1993). Her "job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323. Biting off an ear of the accused party – metaphorically speaking – does not reflect the proper role of the prosecutor within the adversarial system (as tempting as this might be to some of our adversaries).

Th prosecutor's proper role in our adversarial system is to be "the representative *not* of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case but that *justice shall be done*. . . . He may prosecute with earnestness and vigor — indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States* (1935) 295 U.S. 78, 88; 55 S.Ct. 629, 632; 79 L.Ed.1214 (emphasis added).

Prosecutors should be held to this standard in light of the effect of their conduct on the Fifth and Sixth Amendment trial rights and on the Rule of Law generally. According to Justice Brandeis, "[c]rime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it breeds anarchy." *Olmstead v. United States* (1928) 277 U.S. 438, 485; (Brandeis dissenting).

In Reality, Some People Get Their Ears Bit Off

In reality, and as we well know, prosecutorial misconduct is pervasive and is most often excused in

practice as the natural and understandable consequence of zealous advocacy:

> There is not doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. If every remark made by counsel . . .were grounds for reversal, comparatively few verdicts would stand since in the ardor of advocacy, and in the excitement of trial even the most experienced counsel are occasionally carried away by this temptation.

Dunlop v. United States (1897) 165 U.S. 486, 498 ; 17 S. Ct. 375, 379; 41 L.Ed. 799.

Object To Misconduct In A Way Which Maintains Your Integrity In The Eyes Of The Jury And Preserves Issues For Appeal

In order to prevent prosecutorial misconduct from doing irreparable harm to our clients, we must make ***persuasive, clear, and timely*** legal objections, while maintaining our credibility and personal integrity in the eyes of the jury:

By persuasive, we mean objections that are most likely to win the legal point before the Court *as well as win the hearts and minds of the jurors*.

By clear, we mean objections that can be fully understood by the trial judge and on appeal. Objections must be understood in terms of the legal basis (*including the federal constitutional basis including the specific clause so that federal claims are not waived*).

By timely, we mean objections that are made contemporaneously as often as possible. Untimely objections risk the very difficult plain error standard of review on appeal.[1]

Take for example, a prosecutor's attempt to introduce hearsay during direct examination through the following question:

Prosecutor: "Officer, what did Signorina Discrupula say to you regarding the mosh pit?"

How can one object?

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[1]"Defendant argues the prosecutor committed repeated misconduct in his closing arguments to the jury. His failure to object ? or to seek a jury admonition bars him from raising the issue on appeal. *People v. Seaton* (2001) 26 Cal.4th 598, 660 (death penalty affirmed). *United States v. Cabrera* (9th Cir. 2000) 201 F.3d 1243, 1246 , citing *United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1218.

Option One: "Objection. F.R.E. 801."

Legally unclear, and not persuasive to jurors in the least.

Option Two: "Objection. Hearsay."

Legally more clear, but not persuasive jurors.

Option Three: "Objection. Calls for hearsay."

Legally clear, but still not persuasive to jurors.

Option Four: "Objection. Calls for very unreliable hearsay."

Legally clear to the trial judge and persuasive to the jury.

Option Five: "Objection. Calls for very unreliable hearsay. Confrontation Clause. Sixth Amendment."

Legally clear to the trial judge and the appellate court and persuasive to the jury.

Option Six: "Objection. Misconduct. Calls for very unreliable hearsay. Confrontation Clause. Sixth Amendment."

Legally clear to the trial judge and the appellate court and persuasive to the jury as to testimony, as well as the prosecutor's conduct.

Tell The Referee What You Want (Remedy) And Why (Prejudice)

To make your point and preserve the record, you must not only object, you must also move to strike and request corrective action. The ideal objection, therefore, has three components:

(1) Objection,

(2) Motion to strike if the testimony was heard, and

(3) Request corrective action by the court.

In other words, we must not only object clearly, timely and persuasively; we must also include (1) a

remedy designed to (2) redress a harm which (3) must result in a ruling.

Sly judges know this and can sidestep rulings like the young Fred Astaire. "Move on" or "I'll take that under submission" or "Hmmm. Interesting" or "Good point" are examples of non-rulings that undermine the legal and persuasive effect of the objection.

Remember – and this is fundamental – to demand that the trial court rule on your objection and your proposed remedy. If the judge squirrels his/her way out of making a ruling -- by taking your proposed remedy under submission, for example -- this usually results in waiver of the issue for appeal.

Remember also – and this is equally fundamental – that persistent misconduct calls for graduated response; that is, if a prosecutor commits repeated, varied, or escalating misconduct, you must establish this pattern for the record and call for a remedy commensurate with the pattern.

Remember also – yes, this fundamental too – that you must establish the harm (prejudice) done by the misconduct.

If You Know You're Up Against Tyson, Wear An Ear Guard

We suggest that defense counsel prepare a short list of objections to common forms of misconduct to be placed in the trial notebook. Preparation of this type will – to mix the metaphor to an absurd point – grease the skids so that objections roll off the tongue in pleasing and dulcet tones, thereby maximizing the chances of winning the objection, persuading the jury of the absolute righteousness of your view, and preserving the appeal (if necessary).

This approach results in concise, clear and (occasionally) entertaining objections thereby not only reducing friction with the trial judge but also keeping the jury on your side . . . and it feels good to have objections roll trippingly off the tongue (and jolts of good feeling are definitely a plus during trial).

Prevent misconduct and the corresponding harm before it occurs. Use pretrial limine motions or mid-trial limine motions to keep the misconduct from occurring or, at the very least, to draw the court's attention to the importance of the issue. This type of education may help "set up" a mistrial motion or some other remedy.

Remember to request that the prosecutor admonish her/his witnesses of court rulings and, of course, you may ask the court to do so -- or do so yourself -- if you have doubts about the prosecutor.

In this connection, it may be helpful -- especially for public defenders -- to keep a book on the foibles of local prosecutors because sin often follows sin.

COMMON TYPES OF MISCONDUCT

The following memorandum focuses on common types of prosecutorial misconduct which counsel should be able to identify and object to easily. The bottom line is that misconduct occurs when a prosecutor's action (e.g., commenting on silence) directly or indirectly denigrates a procedural or substantive right (e.g., the right against self incrimination).

1. Presenting False or Misleading Evidence To The Jury

A. Direct and Intentional Presentation of False or Misleading Evidence

The most obvious misconduct is presenting **false testimony or misleading evidence** to the jury which, of course, violates due process guarantees of the Fifth Amendment. Be prepared to object and protect your federal claims -- and make sense to the jury: e.g., "Objection. Misconduct. Fifth Amendment, Due Process. The Prosecutor knows this is not true."[2]

In *Young*, the Ninth Circuit noted that "even if the government *unwittingly* presents false evidence, a defendant is entitled to a new trial if there is a *reasonable probability* that [without the evidence] the result? ? would have been different."[3]

For the same reasons, the use of evidence that creates a false impression of material fact or a

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[2]*Schledwitz v. U.S.* (6th Cir. 1999) 169 F.3d 1003 (presenting an expert as neutral who was long involved in investigation of defendant egregious and due process violation); *U.S. v. Lapage* (9th Cir. 2000) 231 F.3d 488.

[3]*United States* v. *Young* (9th Cir. 1993) 17 F.3d 1201, 1204; See also *Killian* v. *Poole,* (9th Cir. 2002) 282 F.3d 1204, cert. den. at 537 U.S. 1179 (applied to a lying informer) (emphasis added).

proffer of inadmissible evidence violates due process.[4]

B. Failure To Correct Inadvertent Presentation of False or Misleading Evidence

Similarly, the prosecutor's failure to correct false or misleading evidence also constitutes a due process violation. *Napue v. Illinois*. *Napue* error occurs when the prosecutor elicits false or misleading evidence and allows it to stand.

Permission to cross does not cure the misconduct. Do not let the trial judge suggest that an opportunity to cross (or "leeway" cross) suffices.

2. Referring To Inadmissible Evidence Or Unprovable Facts To Taint The Accused

The prosecutor must have a good-faith basis for posing questions. S/he cannot pose questions which the prosecutor (1) does not, in good faith, know to be true or (2) is not prepared to prove using admissible evidence.

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[4]*U.S. v. Handly* (5th Cir. 1979) 591 F.2d 125, 1128-1130 (reference to co-defendants' conviction at separate trials misconduct but harmless); *U.S. v. Martino* (5th Cir. 1981) 648 F.2d 367 (reference to witness' willingness to take a lie detector test misconduct, but harmless).

The prosecutor has a duty to see to it that his or her **witnesses do not volunteer any statements** that would be inadmissible.[5]

The prosecutor may not suggest the existence of facts harmful to the accused through questioning, when lacking a good-faith belief that the questions would be admitted; or a belief that the facts could be proved and an intent to prove them if denied by the witness.[6] Note that this is a tough standard to prove for the defense; courts often give the benefit of the doubt as to the prosecutor's good-faith belief.[7]

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[5]*People v. Warren* (1988) 45 Cal.3d 471, 481-482.

[6]*People* v. *Perez* (1962) 58 Cal.2d 229, 241 [overruled on other grounds in *People* v. *Green* (1980) 27 Cal.3d 1, 27-34].

[7]*People* v. *Hughes* (2002) 27 Cal.4th 287, 388-389.

Use of inadmissible evidence during cross-examination is improper[8] and can only be used when it is related to a subject raised during the direct testimony of the defendant.[9] "[A] prosecutor may not use impeach[ment] as a guise for submitting to the jury substantive evidence that is otherwise unavailable."[10]

A prosecutor cannot impeach a defense *witness* with defendant's un-Mirandized statement (but can

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[8]*U.S. v. Sanchez* (9th Cir. 1999) 176 F.3d 1214 (use of defendant's wife's hearsay statement to impeach defendant is misconduct); *Thomas* v. *Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1175 (the district attorney committed intentional misconduct by eliciting excluded testimony about defendant use of a gun in a prior robbery during cross of defendant).

[9]*Agnello v. U.S.* (1925) 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145; *U.S. Hickey* (1st Cir. 1979) 596 F.2d 1082.

[10]*U.S. v. Silverstein* (8th Cir. 1984) 737 F.2d 864, 868.

impeach defendant unless the statement was suppressed because it was involuntarily coerced.).[11]

The prosecutor must have **some factual basis** for an inquiry either into prior convictions[12] or bad acts not amounting to a conviction.[13] "It is unprofessional conduct to ask a question implying the existence of a factual predicate which the examiner cannot support by evidence." ABA Standards for Criminal Justice § 3-5.7 (d) (2.ed 1982). **The prosecutor cannot ask questions without any factual basis which are designed to suggest that such a factual basis exists.[14]**

A prosecutor may not force a witness to give his opinion as to whether law enforcement lied because it invades the jury's province of deciding credibility.[15]

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[11] *James v. Illinois* (1990) 493 U.S. 307.

[12] Fed. R. Evid. 609(a); see *United States v. Beckman* (9th Cir. 2002) 298 F.3d 788 (court improperly required defendant to answer question regarding prior arrest under the guise of impeachment; facts of arrest not inconsistent with testimony, but harmless.)

[13] Fed. R. Evid 404(b).

[14] *U.S. v. Thomas* (D.C. Cir. 1997) 114 F.3d 228.

[15] *U.S. v. Fernandez* (1st Cir. 1998) 145 F.3d 59; *U.S. v. Richter* (2nd Cir. 1987) 826 F.3d 743; *Freeman v. US* (D.C. 1985) 495 A.2d 1183; *State v. Singh* (2002) 259 Conn. 693, 793 A.2d 226; *State v. Pilot* (Minn. 1999) 595 N.W.2d 511; *People v. Cornes* (5th Dist. 1980) 80 Ill.App.3d 166, 399 N.E.2d 1346; *People v. Calderon* (2nd Dist. 1982) 88 A.D.2d 604; see also *McLeod v. U.S.* (D.C. App. 1990) 568 A2d 1094, 1097; *People v.*

Dowd (Ill. 1981) 428 N.E.2d 894, 904; *Comm'n v. Johnson* (Mass 1992) 588 N.E.2d 684, 690; *People v.Buckey* (MI 1984) 348 N.W.2d 53, 55.

Prejudice is heightened when the defendant is forced to call a police officer a liar.[16]

It is misconduct for a prosecutor to elicit testimony about an officer's perceptions as to credibility of a witness or defendant.[17]

A prosecutor may not threaten a witness to force him or her to invoke their Fifth Amendment privilege against self-incrimination.[18]

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[16]*US v. Sanchez* (9th Cir. 1999)176 F.3d 1214 (error for prosecutor to force defendant to call U.S. Marshal "liar"); *US. v. Fernandez*, supra 145 US F.3d 59 at 64 "Given the faith a jury may place in the word of a law enforcement officer, it is unfair to force a defendant to choose between recanting and calling a law officer a liar." *U.S. v. Boyd* (D.C. Cir 1995) 54 F3d 868; *U.S. v. Scanio* (2nd Cir. 1990) 900 F.2d 485; *People v. Berrios* (2nd Dept 2002) 298 A.D. 597, 750 N.Y.S.2d 302; *State v. Suarez-Bravo* (Div. 3 1994) 72 Wash.App.359, 864 P.2d 426.

[17]*U.S. v. Sanchez supra* (9th Cir. 1999) 176 F.3d 1214, 1221; *People v. Sergill* (1982) 138 Cal.App.3d 34 (the trial court erred in admitting testimony by two police officers to the effect that the eight-year-old victim was telling the truth when she reported that the defendant, her uncle, had sexually molested her); See also, *People v. Smith* (1989) 214 Cal.App.3d 904, 915, (deputy sheriff should not have been allowed to testify that he believed victim's dying declaration).

[18]*U.S. v. MacCloskey* (4th Cir. 1982) 682 F.2d 468;U.S. v. Morrison (3d Cir. 1976) 535

A prosecutor may not use his own unsworn testimony to impeach the defendant by either misstating the defendant's prior record to the jury or by telling the jury about portions of the defendant's prior record which have been excluded by the court.[19]

For instance, in trying to impeach an adverse witness with a statement made to the prosecutor he may not say — when dissatisfied with the answer he believed a lie but to which he is the only witness — "I submit to you, ma'am, you're telling a bald face lie right now."[20]

3. Commenting on Post-Arrest Silence (*Doyle* Error Under Fifth Amendment, Self-Incrimination Clause)

F.2d 223, 227-228 (defense witness repeatedly called to the AUSA's office and threatened with perjury charge. standard on appeal varies among the federal circuits form per se to harmless error.)

[19]*U.S. v. Labarbera* (5th Cir. 1978) 581 F.2d 107, 109.

[20]*People v. Bailey* (1983) 58 N.Y.2d272, 460 NYS 2d 912, 447 N.E.2d 1273.

In *Doyle v. Ohio*,[21] the United States Supreme Court established the principle that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[22] For this reason, the decision to exercise the constitutional right to silence and counsel *after* a *Miranda* warning cannot be used against the defendant at trial to impeach his/her trial testimony[23] or as evidence of guilt.[24]

If, however, no *Miranda* warning has been given, a prosecutor may generally comment on defendant's post-arrest silence.[25] Similarly, pre-arrest and pre-*Miranda* silence are generally open for comment.

Mentioning the right to silence is **reversible per se**, and it is constitutional error which must be deemed "harmless beyond a reasonable doubt " to stand appellate review.[26]

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[21]*Doyle v. Ohio* (1976) 426 U.S. 610.

[22]*Id*. at 618, fn. omitted; see also *People v. Farris* (1977) 66 Cal.App.3d 376, 387-390; *Alo v. Olim* (9th Cir. 1980) 639 F.2d 466.

[23]See also *Greer v. Miller (*1987) 483 U.S. 756, 763.

[24]*U.S. v. Velarde-Gomez* (9th Cir. 2001) (en banc)224 F.3d 1062, 1071 (defendant's demeanor and non-response after arrest to search results inadmissible); *People v. Gaines* (1980) 103 Cal.App.3d 89, 94-96.

[25]*Fletcher v. Weir* (1982) 455 U.S. 603, 604.

[26]*Chapman v. California* (1967) 386 U.S. 18, 24; *U.S. v. Branson* (9th Cir. 1985) 756 F.2d 752, 757.

The most common form of this misconduct goes something like this:

"Why didn't you tell the police the story you told this jury (alibi,[27] self-defense,[28] set-up,[29] lack of knowledge,[30] insanity[31]) when you were arrested?"

This type of question is improper. The defense attorney should file a motion in limine to prevent this question because, even though it is constitutional error, it is often held to be harmless error when it is allowed into evidence.[32]

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[27]*U.S. v. Hale* (1975) 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99.

[28]*U.S. ex. Rel. Allen v. Franzen* (7th Cir. 1981) 659 F.2d 745.

[29] *Doyle v. Ohio supra.*

[30]*U.S. v. Rivera* (5th Cir. 2002) 295 F.3d 461.

[31]*Wainwright v. Greenfield* (1986) 474 U.S. 284, 106 S.Ct 634, 88 L.Ed. 2d 623.

[32]*Greer v. Miller* (1987) 483, U.S. 756, 107 S.Ct. 3102, 97 L.Ed. 2d 618.

It is misconduct for a prosecutor to question a defendant about invocation of his Fifth Amendment right to counsel.[33] The prosecutor cannot elicit that the defendant ended the questioning by making the statement, "I have nothing more to say and I want to see my lawyer."[34]

However, a defendant's *pre-arrest and pre-Miranda* silence can be used as impeachment evidence.[35] Also, post-arrest statements can be used to impeach if the defendant testifies that s/he told the police her/his defense and (1) did not[36] or (2) that s/he cooperated and did not.[37]

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[33]*U. S. v. McDonald* (5th Cir. 1980) 620 F.2d 559.

[34]*U.S. v. Williams* (D.C. Cir. 1977) 556 F.2d 65; *Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1994 (misconduct to infer that hiring of counsel is evidence of guilt).

[35]*Jenkins v. Anderson* (1980) 447 U.S. 231, 100 S. Ct. 2124, 65 L.Ed. 2d 86.

[36]*Doyle v. Ohio, supra* 426 U.S. at 619, n.11.

[37]*U.S. v. Reveles* (5th Cir. 1999) 190 F.3d 678.

In *U.S. v. Bushyhead*,[38] the Ninth Circuit illustrated an example of *Doyle* error. After arrest, but before the police officer administered *Miranda* warnings, the defendant said: "I have nothing to say, I'm going to get the death penalty anyway."[39] This statement was revealed by the prosecutor in both his opening and closing statement and in the testimony of an FBI agent.[40] Despite a limiting instruction on each occasion that it was to be considered only as proof of defendant's consciousness of having committed a homicide,[41] use of the statement violated the defendant's right to remain silent.[42] "[A] person's statement invoking his right to silence is part of the 'silence' that must be protected. The privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence - not merely the silence itself, but the circumstances of that silence as well. The entirety of Bushyhead's statement was an invocation of his right to silence and is therefore protected by the Fifth Amendment privilege..."[43]

4. Character Assassination (Or Attacks On the Defendant or Defense Counsel In Violation of the Sixth Amendment)

Defendant is to be tried for what s/he is alleged to have done and not for who s/he is.[44]

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[38] *U.S. v. Bushyhead* (9th Cir. 2001) 270 F.3d 905.

[39] *Id.* at 907.

[40] *Id.* at 911.

[41] *Id.* at 911-912.

[42] *Id.* at 913.

[43] *Ibid.*

[44] *U.S. v. Vizcarra-Martinez* (9th Cir. 1995) 66 F.3d 1006.

For this reason, the State may not engage in racial bias,[45] call defendant names,[46] compare actions to hated historical figures,[47] or other techniques that offend the dignity of the court,[48] unless there is some evidence to support that comparison.[49]

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[45]*Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 ("maybe next time [the victim] 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 (race/ethnic bias is plain error).

[46]*People v. Saunders* (1995) 11 Cal.4th 475, 527-528 ("the monster that is sitting before us" improper but harmless)

[47]*People v. Bedolla* (1979) 94 Cal.App.4th 1, 8 (compared to Hitler's Brown Shirts, Mussolini's people, Tojo's people, the KKK and American Communists).

[48]*Viereck v. U.S.* (1943) 318 U.S. 236, 63 S. Ct. 561. 87 L. Ed. 734.

[49]*People v. Franco* (1994) 24 Cal.App. 4th 1528 ("hard-core experienced gang member"

The use of prior convictions to impeach the defendant's credibility is abused unless the prosecutor has a certified record of conviction or the trial court rules that the prosecutor has shown reliable proof of that conviction.[50]

Pairing the prior crime and a similar current crime can lead to impermissible propensity and is therefore discouraged.[51]

The prosecutor may usually only inquire into the number of charges, the date, and the nature of the crimes.[52] Excessive details of the offense are prohibited. [53]

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found to be supported by evidence).

[50]*Reed v. U.S.* (D.C. 1984) 485 A.2d 613.

[51]*U.S. v. Carter* (D.C.Cir. 1973) 482 F.2d 738.

[52]*U.S. v. Tumblin* (5th Cir. 1977) 551 F.2d 1001; *U.S. v. Mitchell* (3d Cir. 1970) 427 F2d 644; but see *People v. Wheeler* (1992) 4 Cal.4th 284 (Cal. Supreme holds facts of misdemeanors admissible for credibility).

[53]*Michelson v. U. S.* 335 U.S. at 475-476; *Williams. Henderson* (E.D. NY 1978) 451 F.Supp.328.

When the defendant's character is not in issue the state may not smuggle in references to it. Convictions have been reversed where there are references to a witness picking the defendant's picture out of a "mug book" which indicates a criminal record; [54] a jail or arrest identification number is used and explained;[55] or where the investigating officer is assigned to the "major offenders unit."[56]

One technique to be particularly on guard against is the use of wealth or lack of it to provide motive.[57] "A defendant's poverty generally may not be admitted to prove a motive to commit a

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[54]*U.S. v Rixner* (5th Cir. 1977) 548 F.2d 1224.

[55]*People v. Dowdell* (1st Dept. 1982) 88 A.D. 2d 239, 453 NYS 2d 174.

[56]*State v. Gamez* (1985) 144 Ariz. 178, 696 P.2d 1327.

[57]*Sizemore v. Fletcher* (6th Cir. 1990) 921 F.2d 667 (prosecutor's statements during closing argument appealing to wealth and class biases, questioning defendant's motives for consulting counsel, and inviting jury to view with suspicion defendant's ability to hire several attorneys and to produce expensive exhibits violated due process)*; People v. Andrews* (1979) 88 Mich.App.115, 276 N.W.2d 867; *State v. Matthews* (Div. 1 1994) 75 Wash. App.278, 877 P.2d 867; *People v. Herring* (1993) 20 Cal. App.4th 1066 (cumulative misconduct: called an African-American

robbery or theft . . .'[58]

These prohibitions apply to attacks on defense counsel personally and the defense function generally because such attacks would offend the Sixth Amendment right to the effective assistance of counsel. In this connection, the prosecutor may not personally attack counsel, [59] her integrity, or the role of defense counsel.[60] Suggesting counsel is unethical or deceptive can be misconduct.[61]

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defendant in a biracial trial "primal man," a "parasite," a "bad man" because of his poor work history, laziness, and driving other people's cars.)

[58]*People v. Koontz* (2002) 27 Cal.4th 1041, 1076; see also *State v. Mathias* (N.J. 1966) 221 A.2d 529, 538.; *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104,, 1108-1109.

[59]*Bruno v. Rushen* (9th Cir. 1983) 721 F.2d 1193, 1195.

[60]*U.S. v. Bennett* (1st Cir. 1996) 75 F.3d 40, 46.

[61]*U.S. v. Berger* (1935) 295 U.S. 78; *Cline v. U.S.* (8th Cir. 1968) 395 F.2d 138.

Though courts have allowed prosecutors to characterize a particular defense as contrived, nonsense,[62] smoke screen,[63] and absurd and a big fake,[64] the state goes too far when saying the defense is a "colossal fabrication . .[and] ... fairy tale"[65] or it is filled with "deceit, devoid of decency, devoid of truth, foul and vile."[66]

5. Vouching

Improper vouching occurs when: (1) the prosecutor places the prestige of the government behind a witness by expressing his or her personal belief in the veracity of the witness, or (2) the prosecutor indicates that information not presented to the jury supports the witness' s testimony.[67]

The prosecutor cannot give his personal opinion about the reliability of the evidence or defendant's

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[62]*State v. Arndt* (Minn. 1978) 264 N.W.2d 637.

[63]*Com. v. Collins* (1975) 462 Pa. 495, 341 A.2d 492.

[64]*U.S. v. Caldwell* (D.C. Cir. 1974) 543 F.2d 1333.

[65]*People v. World* (1st Dept 1990) 157 A.D.2d 567, 559 N.Y.S. 2d 310.

[66]*People v. Lombardi* (1967) 20 N.Y.2d 266, 282 N.Y.S. 2d 519, 229 N.E.2d 206 .

[67]*U. S. v. Edwards* (9th Cir. 1998) 154 F.3d 915, 921.

guilt.[68] Nor may he say someone is completely truthful[69] or elicit information that the information always gives good information from a detective.[70]

Offering immunity in front of the jury (so it can be rejected) is an example of vouching.[71]

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[68]*U. S. v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1211.

[69]*U.S. v. Garza* (5th Cir. 1979) 6008 F.2d 659, 662.

[70]*U.S. v. Martinez* (6th Cir. 2001) 253 F.3d 251.

[71]*U.S. v. Simtob* (9th Cir. 1990) 901 F.2d 790, 799.

During closing argument, prosecutors portrayed themselves as members of team conducting investigation by using the terms "we" and "us." This constituted impermissible vouching.[72]

It is reversible error for the prosecutor to make statements during closing argument that are not supported by evidence presented at trial[73] if these statements suggest a personal belief in (or basis outside the record for) these statements.

A prosecutor may not implicitly vouch for a witness' s credibility,[74] or vouch for his or her own credibility.[75]

A prosecutor may not argue facts of which he has personal knowledge.[76]

Repeated reliance on testimony from which the jury can infer that the government independently

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[72]*U.S. v. Hermanek* (9th Cir. 2002) 289 F.3d 1076.

[73]*U.S. v. Mastrangelo* (3d Cir. 1999) 172 F.3d 288, 296-298.

[74]*U. S. v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1211.

[75]*United States v. Smith* (9th Cir. 1992) 962 F.2d 923, 933-34; U.S. v. Edward (9th Cir. 1998) 154 F.3d 915 (prosecutor cannot testify to crucial evidence he found in case).

[76]*U.S. Flores-Chapa* (5th Cir. 1995) 48 F.3d 156, 159-160; *Simtob*, 901 F.2d 799 (extrinsic information not presented in court supported the witness's testimony).

verified the truthfulness of the witness is plain error.[77]

Examples:

- "As many as ten other officers could have supported the testimony of the testifying agent."[78]
- A child witness sitting on the prosecutor's lap while testifying is misconduct.[79]

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[77] *U.S. v. Rudberg* (9th Cir. 1997) 122 F.3d 1199.

[78] *U.S. v. Molina* (9th Cir. 1991) 934 F.3dt 1440, 1446.

[79] *Sexton v. Howard* (11th Cir. 1995) 55 F.3d 1557(harmless).

- "I think these Drug Enforcement Administration People are professionals. I think their motives are pure as the driven snow."[80]

- "Do you think that agents for the federal government are going to risk their career to get on the stand and commit perjury?"[81]

- "After hearing the People's witnesses,. . . my conviction of the defendant's guilt no longer remains a belief but has become an absolute certainty."[82]

- The prosecutor may not insinuate defendant is a liar when this charge is based on prosecutor's personal belief.[83]

6. Commenting On Defendant's Failure To Testify (*Griffin* Error)

Prosecution cannot actively encourage the jury to draw an inference of guilt from the defendant's silence or decision to rely on counsel.[84]

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[80]*U.S. v. Garza* (5th Cir. 1979) 608 F.2d 659.

[81]*U.S. v. Gallardo-Trapero* (5th Cir. 1999) 185 F.3d 307.

[82]*People v. Nicoll* (4th Dept 1956) 3 A.D. 2d 6664, 158 N.Y.S. 2d 279.

[83]*U.S. v. Garcia-Guizar* (9th Cir 1998) 160 F.3d 511 (impression that defendant was lying based on opinion that State had compelling witnesses).

[84]*U.S. v.. Kallin* (9th Cir. 1995) 50 F.3d 689, 695.

The State cannot comment directly or indirectly on defendant's election not to testify.[85] " [T]he defendant) would know that . . . He did not see fit to take the stand and explain . . ."

In practice, prosecutors have found many ways to commit *Griffin* error including the following (which were found to be error):

- He "has been very quiet during trial."[86]

[85] *Griffin v. California* (1965) 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed 2d 106.

[86] *U.S. v. Rodriquez* (7th Cir. 1980) 627 F.2d 110.

- "He [the defendant] is sitting here in this courtroom and just sitting."[87]

- "Where is the outcry of innocence?"[88]

- A prosecutor argued that defendant was the only one who knew the motive and "no one has chosen to tell us what the motive was."[89]

- "Only victim and defendant were present and we have brought the victim to you."[90]

- A prosecutor pointing to the defendant, asking: "What other witnesses could the defendant's case have put forward who were totally available to you?"[91]

But the prosecution may refer to facts or witnesses as undisputed,[92] uncontested,[93] or

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[87]*People v. Modesto* (1967) 66 Cal.2d 695, 711.

[88]*People v. Bates* (2d Dept. 1977) 58 A.D. 2d 838, 396 N.Y.S.2d 469.

[89]*People v. Williams* (1971) 22 Cal.App.3d 34, 43.

[90]*U.S. V. Wikerson* (5th Cir. 1976) 534 F.2d 43.

[91]*Eberhardt v. Bordenkircher* (6th Cir. 1979) 716 F.2d 1096.

[92]*U.S. v. Fearns* (7th Cir. 1974) 501 F.2d 486.

[93]*U.S. v. Goldman (*1st Cir. 1977) 563 F.2d 501.

unimpeached.[94]

7. Burden shifting

Unless the defendant raises an affirmative defense, the presumption of innocence precludes prosecutors from suggesting that a defendant has a duty to prove his or her innocence. For this reason, the prosecutor cannot shift the burden of proof onto the defense by implying a defense failure to disprove an element of the offense.

[94] *U.S. v. Hooker* (1st Cir. 1976) 541 F.3d 300.

For example, the prosecutor may comment on the defense's failure to call an obvious witness, but cannot suggest that it was the defendant's obligation to do so (and, therefore, that the jury should infer guilt from the defendant's "failure" to call the witness).[95]

The prosecutor cannot comment in any way regarding an uncalled witness if s/he knew that the uncalled witness would have invoked her/his Fifth Amendment right.[96] Indeed, the comment is generally impermissible when the witness is available to both sides[97] or the prosecutor, through threats of prosecution, has driven the witness from the stand.[98]

"A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and 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."[99] If the prosecution has sidled over this line, a defense attorney should ask for a re-instruction on reasonable doubt.

8. Appealing To Passion And Prejudice

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[95] *U.S. v. Miller* (7th Cir. 2002) 276 F.3d 370

[96] *Miller, supra* 460 F.32d 582; *People v. Murray* (2d Dept. 1978) 64 A.D. 916, 407 N.Y.S. 2d 890; *People v. Manson* (2d Dept 1978) 63 A.D. 2d 686, 404 N.Y.S. 2d 659.

[97] *U.S. v. Airedale* (5th Cir. 1971) 444 F.2d 1260.

[98] *U.S. v. Gelding* (4th Cir. 1999) 168 F.3d 700; *U.S. v. Lavages* (9th Cir. 1998) 151 F.3d 1185.

[99] *People v. Bradford* (1997) 15 Cal.4th 1229, 1340-1341.

The prosecutor may not argue to a jury by appealing to their passion or prejudice. ABA Standards for Criminal Justice §3-5.8(c) (2d ed 1982).

A prosecutor's appeal to community conscience in context of war on drugs and suggestion that local drug problem would continue if defendant was not convicted deprived defendant of his right to a fair trial.[100]

[100] *United States v. Sullivan* (6th Cir. 1991) 937 F.2d 1146 .

Calling a particular case a "war on crime" and arguing that the jury is the protector of public safety with only martial law as the last resort, is reversible misconduct.[101]

If the jury fails to convict a drug defendant, he will continue to be a drug problem in the community.[102]

A prosecutor cannot argue that the defendant is a personal threat to jurors, families, or a witness if acquitted.[103] For instance, it is misconduct to say if you acquit then: "Okay, Tulsa citizens, it is open season on spouses. Take your shot."[104]

The prosecution may not invoke the "Golden Rule" which seeks to place the jury in the role of the victim.[105]

If persistent, appeals to class and wealth are misconduct.[106]

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[101]*Dance V. Want* (11th Cir. 1983) 696 F.2d 940.

[102]*U.S. v. Johnson* (8th Cir. 1992) 968 F.2d 768, 770-772.

[103]*U.S. V. McRae* (5th Cir. 1979) 593 F.2d 700, 706.

[104]*Meggett v. State* (Okla. Crim. App. 1979) 1979 OK CR 89, 599 P.2d 1110.

[105]*State v. Mills* (2000) 57 Conn. App.202, 748 A.2d 318.

[106]*U. S. v. Stahl* (2d Cir. 1980) 616 F.2d 30, 32. (Bribery, businessman's wealth exploited exaggerated, and misrepresented: reversed).

REMEDIES

Remember that the predicate for achieving strong corrective action lies not in the stars but in ourselves – specifically, the way we set up the misconduct objection. The better we are at predicting misconduct and sensitizing the court to misconduct and the resulting harm, the more likely we are to win an appropriate rememdy.

In this connection, judges often do not understand our theory of the case and must be guided step by step to understand the connection between the misconduct and the error. This is also necessary to protect the record on appeal.

Remember to request that the prosecutor admonish her/his witnesses of court rulings and, of course, you may ask the court to do so -- or do so yourself -- if you have doubts about the prosecutor.

Possible remedies include (1) jury instructions, (2) exclusion of evidence, (3) mistrial, or any remedy that fits the misconduct in that particular case.

Mistrial motions may be granted if the error was not or could not be cured. When prosecutorial misconduct is too prejudicial to be cured by an admonition, the conviction will be reversed. [107]

It is generally proper to make a mistrial motion out of the jury's presence. Remember to refer to the in limine ruling you won before trial (or testimony). When an in limine objection has been made, and the prosecution is properly warned, the chances for mistrial are much higher when the misconduct occurs despite the judge's order. Not only has the prosecutor been unethical, s/he has broken the judge's personal order (which is of more import to the judge usually).

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[107] *People v. Woodberry* (1970) Cal. App.3d 645, 708; *People v. Hathcock* (1973) 8 Cal.3d 599, 607.

Counsel may also request a strongly-worded jury instruction regarding, for example, the evidence or the prosecutor's misconduct. The key here is to persuade the court that the punishment (instruction) fits the crime (harm caused by, and nature of, the misconduct). On request, the trial judge "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks."[108] For example:

> "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."[109]

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[108] *People v. Bolton* (1979) 23 Cal.3d 208, 216 n. 5.

[109] *People v. Bolton* (1979) 23 Cal.3d 208, 216 (as to it continuing validity: "*Bolton* has been the law since 1979."); *People v. Hill* (1998) 17 Cal.4th 800, 823.