ATTACKING PROSECUTORIAL MISCONDUCT

By Michael Kresser

I. GENERAL LEGAL BASES FOR CLAIMS OF PROSECUTORIAL MISCONDUCT DURING TRIAL

A. Federal law basis: Due Process Clause of Fourteenth Amendment

1. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 held that if a prosecutor's conduct did not violate a specific constitutional provision, misconduct must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Id*. at p. 643.) Prosecutor stated in argument that although the defense said they hoped for a not guilty verdict, prosecutor believed they were hoping for something a little less than first degree murder. Defense counsel objected, trial judge sustained objection and later instructed jury to disregard. Court holds that implication that defendant had offered to plead to lesser was speculation, and noted trial court's instruction to the jury to disregard comment because it was unsupported by any evidence.

2. *Darden v. Wainwright* (1986) 477 U.S. 168. Prosecutor in guilt phase of death penalty murder case made numerous inflammatory comments, including his wish that the victim had blasted the defendant's face off with a shotgun, that the defendant had committed suicide, and that he had been killed in an auto accident following the murder, as well as references to the defendant as an animal who should only be let out of his cell on a leash held by a prison guard. Though USSC joined all lower courts in condemning the argument, it held that no due process violation had occurred. Its analysis: there was no manipulation or misstatement of evidence, no attack on the right to counsel or to remain silent, much of objectionable content was invited by or responsive to

defense argument, the trial court instructed the jury to decide based on evidence alone, the evidence against the defendant was overwhelming, and the defense got the final argument and effectively responded to the prosecutor's comments.

Justice Blackmun's dissent notes that the court's cases have "condemned the behavior but affirmed the conviction." (*Darden*, supra, 477 U.S. at p. 205 (dis. opn. of Blackmun, J.).) Quotes excellent dissent of Circuit Judge Jerome Frank in *U.S. v. Antonelli Fireworks Co.* (2d Cir. 1946) 155 F.2d 631, 661 that such judicial conduct "means actual condonation of counsel's alleged offense, coupled with verbal disapprobation . . . [means that] our rules on the subject are pretend-rules . . . we will not deprive [prosecutors] of their victories; we will merely go through the form of expressing displeasure . . . The practice of this court . . . breeds a deplorably cynical attitude toward the judiciary . . .' [Citation.]" (*Id.* at p. 206.)

3. Practice Note: Since the *Donnelly* due process test includes a defense showing of substantial prejudice, there is no need for a further harmless error analysis.

B. State Law Basis: Decisional Law Prevents "the Use of Deceptive or Reprehensible Methods to Attempt to Persuade either the Trial Court or the Jury."

1. So held in *People v. Morales* (2001) 25 Cal.4th 34, 44.

2. Showing of subjective bad faith by prosecutor not necessary, rather, test is how jury would likely understand remark and whether injury to defendant resulted. (*People v. Benson* (1990) 52 Cal.3d 754, 793, citing *People v. Bolton* (1979) 23 Cal.3d 208, 213-214; see also *People v. Hill* (1998) 17 Cal.4th 800, 822-823.)

3. Because this is only a rule of state law, the *Watson* standard of prejudice applies. (*People v. Harrison*

(2005) 35 Cal.4th 208, 244.)

C. Defendant Must Show "Reasonable Likelihood that the Jury Construed or Applied the Complained-of Remarks in an Objectionable Fashion."

1. So held in *People v. Harrison*, *supra*, 35 Cal.4th at p. 244, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.

2. USSC in *Donnelly v. DeChristoforo, supra*, 416 U.S. 637 also cautioned that "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 a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Id.* at p. 647.)

3. Practice Note: take some time to show why in context of trial and points of conflict between prosecution and defense, there was reasonable likelihood that jury construed the remark in objectionable fashion. Do not overlook tendency of AG to create an innocent explanation or perceive ambiguity when there is none.

II. ISSUES CONCERNING REVIEWABILITY OF CLAIM OF PROSECUTORIAL MISCONDUCT

A. General Rule: There Must be Timely Objection on the Same Ground Raised on Appeal and a Request for Jury Admonition.

1. *People v. Lopez* (2008) 42 Cal.4th 960, 966 so holds, citing *People v. Thornton* (2007) 41 Cal.4th 391, 454.

2. Trial court has no sua sponte duty to control

prosecutorial misconduct. (*People v. Carrera* (1989) 49 Cal.3d 291, 321.) There is no "close case" exception to contemporaneous objection rule. (*People v. Green* (1980) 27 Cal.3d 1, 28-34, overruling *People v. Berryman* (1936) 6 Cal.2d 331, 337.)

3. Can be raised on appeal in absence of objection as ineffective assistance of counsel, but "the appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus . . ." (*People v. Lopez, supra*, 42 Cal.4th at p. 966.)

4. Practice Note: May be able to do successful on the record IAC claim if trial counsel objects but objection is defective or untimely or counsel fails to request admonition, as counsel thus tactically wanted to object, but failed to do so effectively. (Cf. *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366: "The fact that counsel objected . . . at all, however, refutes any inference that he was pursuing some tactical advantage by withholding [the meritorious] argument."

   Also, where prosecutor argued legally erroneous theory of guilt as to attempted murder, failure to object held to be IAC on record even though defense was an alibi. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 395.)

   Sometimes, coupling prosecutorial misconduct with on the record IAC will lead court to exercise its discretion to decide prosecutorial misconduct claim on the merits rather than find procedural default. Usually done to reject claim, but means no procedural default problem on federal habeas.

5. To do IAC habeas due to failure to object, must inquire of trial counsel why no objection was made. Though counsel may claim the tactical justification of not wanting to emphasize it to jury, some will candidly admit they missed the comment, or did not realize it was

objectionable, or cannot remember.

B. Exceptions to Contemporaneous Objection Rule.

1. "[I]f an admonition would not have cured the harm caused by the misconduct." (*People v. Tafoya* (2007) 42 Cal.4th 147, 176, quoting *People v. Earp* (1999) 20 Cal.4th 826, 858.) Exception applied in *People v. Johnson* (1981) 121 Cal.App.3d 94, 102-103, in which defense witness testified that complaining witness offered to drop charges in exchange for defendant's car and bank account, and prosecutor stated in argument that he didn't bother recalling complaining witness just so she could deny and that he had concluded the defense witness' testimony was an outright lie.

2. If either objection or request for admonition would be futile, failure to object or request is excused. (*People v. Hill*, supra, 17 Cal.4th 800, 820.) In *Hill*, counsel objected to some, but not all, instances of misconduct, and when he objected, he sometimes failed to adequately state grounds or request admonition. However, counsel was subjected to a "barrage" of misconduct and the trial judge overruled his objections with suggestions that counsel was an obstructionist, convincing the Supreme Court further objection would have been futile.

3. Practice Note: If objection made and immediately overruled, lack of request for admonition is excused because it would have been futile. (*People v. Green, supra*, 27 Cal.3d at p. 35, fn. 19.) On the other hand, if defendant does not request admonition, issue deemed forfeited. (*People v. Silva* (2001) 25 Cal.4th 345, 373.)

C. If Policies Behind Contemporaneous Objection Rule Are Satisfied, Substantial Compliance Will be Found.

1. *People v. Bonin* (1988) 46 Cal.3d 659, 689: "The reason for this rule, of course, is that 'the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.'" [Citation.]" Supreme Court finds substantial compliance where defense counsel moved for a mistrial and moved to strike evidence elicited by prosecutor that had been ruled inadmissible. Defense counsel "gave the court more than ample opportunity to 'correct the abuse.'" (*Ibid.*)

III. SOME DIFFERENT FORMS OF TRIAL MISCONDUCT.

A. References to Facts Not in Evidence.

1. Claim should always be stated as both violation of Sixth Amendment right to confrontation and misconduct under state law. *People v. Johnson*, *supra*, 121 Cal.App.3d at p. 104: "a prosecutor, through argument, may serve as his own unsworn witness, thus violating the defendant's Sixth Amendment right to confrontation of witnesses." Cited with approval in *People v. Harris* (1989) 47 Cal.3d 1047, 1083. Applied to reverse in *People v. Gaines* (1997) 54 Cal.App.4th 821, 825.

2. Reference to evidence outside record is prosecutorial misconduct under state law. (*People v. Frye* (1998) 18 Cal.4th 894, 976, citing *People v. Bain* (1971) 5 Cal.3d 839, 848 and *People v. Perez* (1962) 58 Cal.2d 229, 245-246.)

3. Frequent means of commission: stating that a person not called would have testified favorably for prosecution. (*People v. Johnson, supra,* 121 Cal.App.3d at p. 102; *People v. Hall* (2000) 82 Cal.App.4th 813, 816; *People v. Hill, supra,* 17 Cal.4th at p. 829; *People v. Gaines, supra*, 54 Cal.App.4th at p. 824.)

4. Other means:
(a) arguing from supposed personal expertise (*People v. Mendoza* (1974) 37 Cal.App.3d 717, 726 [prosecutor says child molesters are typically "meek" and that defendant looked meek], *People v. Criscione* (1981) 125 Cal.App.3d 275, 287-290 [Italian-American prosecutor prosecuting Italian-American defendant of murder of girlfriend attacks insanity defense by claiming defendant's attitude normal for Italians;
(b) misstatement of evidence whether deliberate or just mistaken (*People v. Hill, supra,* 17 Cal.4th at pp. 823-827, citing *People v. Purvis* (1963) 323, 343.)

5. "A statement of supposed fact not in evidence is a highly prejudicial form of misconduct. As such it is a frequent basis for reversal." (*People v. Hall, supra,* 82 Cal.App.4th at p. 818; see also 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 576, pp. 824-826.)

B. Eliciting Inadmissible Evidence

1. "It is of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.'" (*People v. Bonin, supra,* 46 Cal.3d 659, 689, quoting *People v. Sims* (1976) 65 Cal.App.3d 544, 554.

2. Misconduct for prosecution cross-examining defense mental state expert to ask if he had an opinion regarding defendant's capacity to form intent to commit charged crimes, then offering to "open door" when defense objected to the admissibility of such capacity evidence. (*People v. Smithey* (1999) 20 Cal.4th 936, 959-961.)

3. Misconduct for prosecutor to ask eyewitness ID expert if he had considered a police report which contained information that had been stipulated to be inadmissible that defendant had been seen cleaning a weapon similar to one used in a murder the day before. (*People v. Bell* (1989) 49 Cal.3d 502, 531-533.)

C. Obtaining Exclusion of Evidence And Then Claiming That No Such Evidence Had Been Presented By The Defense

1. Reversible error found where the prosecutor moved for exclusion of the evidence that the alleged victim was a prostitute and then argued to the jury that there was no evidence that she was a prostitute. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.)