

# **HELP US TO HELP YOU: PREVENT REVERSALS AND RETRIALS**

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## **INTRODUCTION**

### **WHO IS DECIDING THE APPEALS?**

Court of Appeal  
Federal Courts

### **PROSECUTORIAL ERROR IN CLOSING ARGUMENT : FINDING THE LINE**

### **BATSON/WHEELER: PAINTING AN ACCURATE PICTURE**

### **JUROR MISCONDUCT**

Withholding information during voir dire  
When the jury is hung  
Unsealing juror information to develop a motion for new trial

### **JURY INSTRUCTIONS**

Making a record  
Problem areas  
CALCRIM is not always right

### **EVIDENTIARY PITFALLS**

Picking your battles  
EC 1101/1108/1109  
Handling Exhibits

### **DEFENDANT'S RIGHTS: MAKING SURE THE RECORD REFLECTS THE RIGHTS ARE BEING HONORED**

When the defendant is absent  
When the defendant is shackled/restrained  
Valid admissions to priors

## **CONCLUSION**

## Examples of Aggressive, But Permissible, Closing Arguments

### From an unpublished Fifth District September 2009 case *People v. Rainwater*

“It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also 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.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness’ “ [citation], and he may “use appropriate epithets warranted by the evidence.” [Citations.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.)

It is 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. Bemore* (2000) 22 Cal.4th 809, 846.) “When a prosecutor denigrates defense counsel, it directs the jury’s attention away from the evidence and is therefore improper. [Citation.] In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor’s comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 978, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

“[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account. (See *People v. Frye* [, *supra*,] 18 Cal.4th [at pp.] 977-978 ... [no misconduct where prosecutor accused counsel of making an ‘irresponsible’ ‘third party culpability claim’]; *People v. Medina* (1995) 11 Cal.4th 694, 759 ... [no misconduct where prosecutor said counsel can ‘twist [and] poke [and] try to draw some speculation, try to get you to buy something’ ].) In so doing, the prosecutor may highlight the discrepancies between counsel’s opening statement and the evidence. [Citation.] Misconduct claims also have been rejected where the prosecutor anticipates the flaws likely to appear in counsel’s closing argument based on evidence that was introduced [citation], and where the prosecutor criticizes the defense theory of the case because it lacks evidentiary support [citation].” (*People v. Bemore*, *supra*, 22 Cal.4th at pp. 846-847, second, third, eighth, ninth & 10th bracketed insertions added.) “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. [Citation.]” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47 (*Cummings*).)

There are numerous cases which have rejected misconduct claims based upon closing arguments far more inflammatory than anything said in this case. For example, in *Cummings*, the court found the prosecutor did not commit misconduct when he argued that “ ‘a skillful lawyer, a lawyer that is persuasive as [defense counsel] is, could maybe get [a witness] to say almost anything.’ ” (*Cummings, supra*, 4 Cal.4th at p. 1303.) *Cummings* held such an argument was a comment on that witness's confusion and difficulty in understanding and responding to questions, rather than an assertion that defense counsel sought to elicit perjured testimony from the witness. (*Ibid.*)

*Cummings* also held the prosecutor did not commit misconduct when he pointed out the defendant's failure to present certain records as evidence and argued: “ ‘Does this tell us a little something about the ink and octopus and what is going on at the other end of the table. I think it should.’ ” (*Cummings, supra*, 4 Cal.4th at p. 1302, fn. 46.) The prosecutor added: “ ‘Does that make you wonder what they are doing down there? They are supposed to do that. That is their job. [¶] They are trying to get this man off.’ ” (*Ibid.*) The court found the prosecutor did not commit misconduct because the context of the statement was “such that the jury certainly would understand it to be nothing more than urging the jury not to be misled.” (*Id.* at p. 1302; see also *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor's reference to defense as “smokescreen” not misconduct]; *People v. Young* (2005) 34 Cal.4th 1149, 1193 [prosecutor's characterization of defense counsel's argument as “‘idiocy’” was fair comment on counsel's argument].)

In *People v. Stanley* (2006) 39 Cal.4th 913, the court found the prosecutor did not commit misconduct when he argued that defense counsel “‘imagined things that go beyond the evidence’ and told them a ‘bald-faced lie.’ ” (*Id.* at p. 952.) *Stanley* found the remarks were merely responsive to defense counsel's argument, and further found “‘[t]he prosecutor's argument, although intemperate in tone, did little more than urge the jury not to be influenced by counsel's arguments, and to instead focus on the testimony and evidence in the case. [Citation.]’ ” (*Ibid.*)

In *People v. Zambrano* (2007) 41 Cal.4th 1082 (*Zambrano*) (overruled on another point in *People v. Doolin, supra*, 45 Cal.4th 390, 421, fn. 22), the defendant argued the prosecutor committed misconduct in closing argument by disparaging defense counsel's argument “as a ‘lawyer's game’ and an attempt to confuse the jury by taking the witness's statement out of context,” based on a prosecution witness who may have misspoke about a particular point. (*Zambrano*, at p. 1154.) *Zambrano* held the defendant forfeited the issue by failing to object, but also found the prosecutor did not commit misconduct or “engage in such forbidden tactics as accusing defense counsel of fabricating a defense or factually deceiving the jury. [Citations.] He simply used pungent language to describe defense counsel's tactical effort to exploit what the

prosecutor considered a slip of the tongue by a People's witness.” (*Ibid.*) *Zambrano* further held:

“It was clear the prosecutor's comment was aimed solely at the persuasive force of defense counsel's closing argument, and not at counsel personally. We have found no impropriety in similar prosecutorial remarks. (E.g., [*People v.*] *Stiteby* [2005] 35 Cal.4th 514, 559-560 ... [argument that jurors should avoid “fall[ing] for” defense counsel's “ridiculous” and “outrageous” attempt to allow defendant to “walk free” by claiming he was guilty only of second degree murder]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1216 ... [argument that defense counsel was talking out of both sides of his mouth and that this was “great lawyering”]; *People v. Breaux* (1991) 1 Cal.4th 281, 306-307 ... [argument that law students are taught to create confusion when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell* (1989) 49 Cal.3d 502, 538 ... [argument that defense counsel's job is to “confuse [ ]” and “throw sand in your eyes,” and that counsel “does a good job of it”].)” (*Zambrano, supra*, 41 Cal.4th at p. 1155, first & second bracketed insertions added.)

## **Perfecting the Record To Address Batson/Wheeler Claims**

by: DAG Sabrina Lane-Erwin

DAG Alana Cohen Butler

### **STEP ONE: DID THE DEFENSE MAKE A PRIMA FACIE SHOWING TO GIVE RISE TO A CREDIBLE INFERENCE OF DISCRIMINATORY PURPOSE**

- ☐ **Require Defense to Articulate Their Complaint**

Which panelists have been allegedly improperly excluded?

Basis for each panelist?

- ☐ **Identify the Key Players**

What is the race of the defendant?

What is the current composition of the jury? How many members of the challenged race remain? How many have previously been excused?

Refer to jury panelists in a uniform fashion, i.e., only by seat number, juror number, or name, not a combination.

What is the race of the prosecutor, defense attorney, judge, court staff if pertinent?

- ☐ **Put the Obvious On The Record**

Attitude or demeanor issues?

Inappropriate attire?

Bad hygiene?

Tardiness?

Poor interaction with court staff?

Inattentiveness?

- ☐ **Consider Offering Reasons for the Peremptory Challenge**

- ☐ **Place Final Composition of Jury on the Record**

### **STEP TWO: IF THE COURT FINDS THAT A PRIMA FACIE SHOWING HAS BEEN MADE, THE PROSECUTOR MUST ADEQUATELY EXPLAIN THE EXCLUSION BY OFFERING RACE-NEUTRAL REASONS**

- ☐ **Ask The Court To Make Findings on Demeanor When Offered**

The jury's demeanor and the prosecutor's demeanor.

- ☐ **Put Your Reputation To Good Use**

Court familiar with you? How many trials together? Reputation of prosecutor? Reputation of office?

- ☐ **Invite The Defense To Offer Comparisons**

Help us to help you

Prevent Reversals & Retrials

IMAG Sabrina Lane-Erwin  
& Alana Porter

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Who Is Looking At Your cases?

Court of Appeal, Fourth Appellate District, Division 3

Federal Courts  
District Courts  
Ninth Circuit

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Prosecutorial Error In Closing Argument

- Prosecutor's argument must be a fair comment on the evidence **or** in fair response to defense counsel's argument.
- The propriety of the argument is **ALWAYS** case dependent.
  - Evidence
  - Defenses
  - Defense attorney arguments

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### Beyond A Reasonable Doubt

- **DO** STICK TO THE LANGUAGE OF THE INSTRUCTION
- **Do Not** Get Creative
  - Use "feelings" for abiding conviction.
  - Place burden on the defense.
  - Do puzzles, percentages, traffic signals, or quantify.
  - No comparison to everyday life decisions.
- **MAYBE**
  - Standard Used Every Day In Criminal Courts In the County
  - Pointillism, not puzzles
- **SUGGESTIONS:**
  - **Bugliosi:** Prosecution must prove D guilty to the exclusion of a reasonable doubt.
  - **Quesnel:** Is guilt the only reasonable interpretation of the evidence and therefore innocence is unreasonable.

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### Pitfalls In Closing Argument

- **Matters Outside the Record**
  - Failure to Call Witnesses
  - Establishing Credibility of Officers
- **Attacking Defense Counsel**
  - No accusations towards counsel; but OK to respond to evidence and defense argument.
  - No references to counsel by name.
- **Vouching**
  - Do Not use prestige of office.

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### BATSON/WHEELER Step One

- Box in the defense
- Identify and describe the players in the beginning
- Make a record of what you see and how you heard it
- Consider offering reasons
- Place the final composition of the jury on the record

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**Prosecutor:** Mrs. Simpson, when the judge asked you about bad experiences with police officers, you said you had a bad experience once. Do you feel negatively about police officers in general?

**Mrs. Simpson:** No.

**Q:** Do you think you can set aside those feelings from that experience when you listen to the police officers in this case?

**A:** Yes.

**Q:** Are you still affected by that bad experience?

**A:** No.

**Q:** Are you going to hold that bad experience in any way against the People in this case?

**A:** No.

**Q:** Are you comfortable sitting on a case such as this when you will need to evaluate police officer testimony?

**A:** Yes.

**Q:** Can you be fair and impartial in this case?

**A:** Yes.

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*BATSON/WHEELER*

STEP TWO

- PUT YOUR REPUTATION TO GOOD USE
- INVITE THE DEFENSE TO OFFER COMPARISONS
- ASK THE COURT TO MAKE A RECORD OF ITS OBSERVATIONS REGARDING THE JUROR'S DEMEANOR
- MAINTAIN A RECORD POST-TRIAL OF JURY SELECTION

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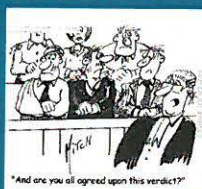
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*JUROR MISCONDUCT*

- Juror Comes Forward With Information Withheld During Voir Dire
  - Intentional/Unintentional
- Hung Jury
  - No longer Abuse of Discretion Standard; must Be a demonstrable reality On the record




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### Protecting Juror's Identities

- Code of Civil Procedure 237
- Defense Must Meet Burden
  - Declaration showing good cause
  - Denial of motion outright if now showing
  - Compelling reason to deny motion? Threats or danger?
- If a hearing is set, jurors will be notified
- If denied, court must make express findings

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### Jury Instructions: The Bane DAG existence

- Making The Record
- Problem Areas
  - Unanimity
  - Amplifying Reasonable Doubt
  - Missing Instructions & Elements
  - Conforming Instructions To Evidence
  - LIOs
  - 250/251/252
- Trusting Use Notes: Don't.

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### Evidentiary Pitfalls

- Look before you leap; make a deliberate decision
  - Theory of admissibility
  - Importance of evidence
  - Likelihood of finding of error
  - Difficulty of retrial

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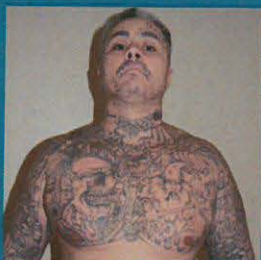
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## MOTIVE

- No Job
- No Money
- No Home



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## Evidentiary Pitfalls II

1101/1108/1109

Exhibits

Handling during trial

Where they go after trial

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## Defendant's Rights

- Absent
- Shackles/Restraints
  - Decision To Use Restraints
  - If the Jury Sees Them
- Admissions on Priors
  - Right to a trial by jury
  - Right to silence (privilege against self-incrimination)
  - Right to confront witnesses

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