

CRIMINAL LAW

In Search of Full Prosecutorial Accountability

By Ellen L. Koblitz and
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Two recent New Jersey Supreme Court opinions again raise the challenge of finding the appropriate remedy for continuing prosecutorial misconduct in summations. In *State v. Garcia*, 245 N.J. 412 (2021), the court reversed an aggravated assault conviction because in summation the prosecutor took advantage of a mistaken evidentiary ruling by “advance[ing] an argument he knew to be untrue.” *Id.* at 434. The judge had incorrectly precluded a video showing defendant’s family approaching the police at the scene to tell them what they had seen. “In summation, the prosecutor exploited the suppression of the video to present a false narrative,” arguing that the family did not approach the police at the scene, but rather concocted that story to help defendant at trial. *Id.* at 417.

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Justice Albin wrote: “That the prosecutor’s remarks may have been the product of the surprise production of the video that morning coupled with overzealous advocacy in which he was carried by the current of the moment cannot excuse the purposeful presentation of a fiction to the jury.” *Id.* at 435. Justice Albin reminded us: “In representing the State in a criminal action, the prosecutor is endowed with a solemn duty—to seek justice, not merely to convict. In fulfilling that duty, a prosecutor must refrain from making inaccurate factual assertions to the jury and from employing improper methods calculated to produce a wrongful conviction.” *Ibid.* (citations and quotation marks omitted). The court was “mindful of the charged atmosphere of a trial that summons the competitive instincts of the advocates,” but “a trial is not a gladiatorial contest” and prosecutors must “adhere to the high ethical standards of their office.” *Ibid.*

In *State v. Williams*, 244 N.J. 592 (2021), the court reversed a bank robbery conviction where the defendant passed a note stating “Please, all the money, ...” to the teller. The trial focused on



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whether defendant was guilty of second-degree robbery by using the threat of force or third-degree theft. In summation the prosecutor showed the jury a PowerPoint slide with the words, “Here’s Johnny” and a photograph of Jack Nicholson from “The Shining.” The State admitted on appeal that it was error to show the slide, and the court found the prosecutor’s improper “comparison between defendant and Jack Nicholson’s psychotic, ax-wielding character in “The Shining” required reversal, reminding prosecutors that “they have a unique role and responsibility in the administration of criminal justice.” *Id.* at 615, 617.

These two examples of criminal trials involving reversible prosecutorial misconduct in summation are but the most recent of such cases. In 1988, Appellate Division Judge Baime wrote that “instances of prosecutorial excesses in

the course of summation seem to come to this court with numbing frequency.” *State v. Watson*, 224 N.J. Super. 354, 362-63 (App. Div. 1988). Nearly all of these instances of prosecutorial misconduct result in no apparent personal consequences, professional sanctions or remedial actions.

In 2012, the American Civil Liberties Union of New Jersey published a report examining in great detail the history of such misconduct in New Jersey. See Alexander Shalom & George C. Thomas, Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey, ACLU-NJ (Sept. 19, 2012), <https://www.aclu-nj.org/theissues/criminaljustice/proscondreport>. The report found that “a small group of prosecutors commits multiple errors without seeming to learn from those missteps.” *Id.* at 4. The authors found the greatest misconduct by far occurred in summations, only a small percentage of which resulted in reversals, and recommended “better systems of training, supervision and discipline.” *Ibid.*

The report names three prosecutors with particularly egregious misconduct records. One was subsequently promoted to a leadership position within the county prosecutor’s office. Another received a county award for a conviction that was later overturned based on a “pattern” of prosecutorial misconduct. In *Watson*, where the Appellate Division did not reverse the conviction, Judge Baime wrote:



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Despite mandates and prohibitions, instances of discipline imposed on prosecutors for their actions as prosecutors are rare.

Often, as here, such derelictions go unpunished because it is clear that no prejudice to the defendant resulted. Although an automatic reversal rule might well have prophylactic value in deterring future misconduct, public security should not suffer because of the prosecutor’s blunder. We again remind prosecutors that a criminal trial is not a sporting event. Winning and doing justice are not always equivalent. We allude to the warning expressed by our Supreme Court [in *State v. Ramseur*, 106 N.J. 123 (1987)] that possible violations of the special ethical rules governing prosecutors may be referred to the appropriate district ethics committee for disciplinary action.

Watson, 224 N.J. Super. at 363. Twelve years later our Supreme Court reiterated that prosecutors who argue improperly in summation “also risk having the matter referred to the appropriate district ethics committee.” *State v. Frost*, 158 N.J. 76, 88 (1999). Prosecutors, like all lawyers, face the usual professional ethics requirements. The prosecutors in *Garcia* and *Williams* evidently violated RPC 3.4—the duty of fairness to opposing parties and counsel. In addition, prosecutors must comply with RPC 3.8 “Special Responsibilities of a Prosecutor.” The rule imposes duties unique to prosecutors including not prosecuting charges unsupported by probable cause; acting to ensure that the defendant has been informed of his rights and had a reasonable opportunity to obtain counsel; not seeking a

waiver of rights from an unrepresented person; disclosing exculpatory and mitigating evidence to the defense; avoiding subpoenaing a lawyer for evidence concerning that lawyer's past or current client; and making no extrajudicial comments that could prejudice the defendant beyond statements necessary to inform the public and to assist law enforcement. Trial publicity by any participating lawyers is further addressed in the Rules at RPC 3.6.

Reversible error, whether intentional or not, frequently falls outside the prosecutor-specific RPCs and must be investigated as possible violations of RPC 3.4 or 8.4: conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct prejudicial to the administration of justice. Repeated acts or a single gross act of negligence on the part of a prosecutor arguably also violate the duty of competent representation mandated by RPC 1.1. Unlike other advocates, prosecutors also have a responsibility to seek justice due to the power of their position. *State v. McNeil-Thomas*, 238 N.J. 256, 274-75 (2019).

Despite these specific and general mandates and prohibitions, instances of discipline imposed on prosecutors for their actions as prosecutors are rare. No reported New Jersey case involves inflammatory or false statements in a summation. *See, e.g., In re Weishoff*, 75 N.J.

326 (1978) (one year suspension for improper disposition of a traffic ticket by municipal prosecutor); *In re Whitmore*, 117 N.J. 472 (1990) (reprimand for municipal prosecutor's violation of RPC 3.3 in dismissing DUI); *In re Norton & Kress*, 128 N.J. 520 (1992) (three month suspensions of prosecutor and defense attorney for improperly arranging DWI dismissal); *In re Shafir*, 92 N.J. 138 (1983) (reprimand of assistant county prosecutor for putting supervisor's name on forms and inaccurately communicating criminal history); *In re Segal*, 130 N.J. 468, 483 (1983) (reprimand of municipal prosecutor for grossly negligent lack of preparation for trial).

Many Opinions of the Supreme Court Advisory Committee on Professional Ethics focus on conflicts of interest, and Opinion 661 (1992) prohibits conditioning plea agreements on release of lack of probable cause claims, but none address trial conduct. The absence of advisory opinions or disciplinary sanctions despite judicial determinations of reversible error suggests that the attorney regulatory process is underutilized with respect to prosecutorial misconduct.

The personal and professional impact of a disciplinary investigation rarely results from prosecutorial misconduct even when misconduct is undisputedly established. The paucity of reported instances suggests a different standard for

prosecutors than for other litigators. Indeed, New Jersey courts have referred assistant prosecutors who behave improperly to the Attorney General rather than the ethics system for discipline, notwithstanding the principle that prosecutors have broader ethical obligations than other attorneys and should be held to higher standards than private counsel. *State v. Ruffin*, 371 N.J. Super. 371, 389-90 (App. Div. 2004).

The purpose of discipline is twofold: to preserve public confidence in the profession and to protect the public from an untrustworthy or unfit lawyer. Those goals are not sufficiently served by the criminal justice system alone or referral to the Attorney General for private handling; the disciplinary process provides a measure to promote justice and hold prosecutors accountable. In other states, upon occasion, prosecutors have been disciplined for misconduct in summations. *See, e.g., In re Martinez*, 248 Ariz. 458, 462 P.3d 36 (2020) (prosecutor reprimanded for violating 8.4(d) for comments to jury in three cases); *In re Weber*, IL Disp. Op. 07 CH 61 (Ill. Atty. Reg. Disp. Comm'n May 3, 2012) (censure for arguments to jury). Disciplinary action in New Jersey is public, Rule 1:20-9(d)(3), and the process would determine after careful scrutiny the appropriate discipline, if any, and would serve as a disincentive to such behavior in the future. ■