May 3, 2021

Grievance Committee for the Second,
Eleventh and Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Rachel Buchter, State Bar No. 2929941.

To the Grievance Committee:

We write to complain about the professional misconduct of attorney Rachel Buchter.[1] The Appellate Division concluded that Buchter's summation remarks in *People v. Thompson* impermissibly shifted the burden of proof to the defense.[2] Specifically, Buchter improperly argued that Thompson had an obligation or an option to prove his innocence by submitting to DNA testing. This argument shifted the burden of proof to Thompson: he had to prove his own innocence, rather than the prosecution having had to prove his guilt.

Despite this misconduct, Buchter not only remains employed as a prosecutor in Queens County, but according to a 2021 press release, Buchter is the Bureau Chief of the Felony Trial Bureau III,[3] a senior position involving the supervising and training of other prosecutors. Moreover, as of the writing of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline for Buchter.[4]

Buchter's misconduct in Queens was far from unique; serious misconduct at the Queens District Attorney's Office (QDAO) has been regularly reported for years. For example, beginning in 2007, Queens prosecutors utilized interviewing practices that undermined suspects' *Miranda* rights, according to the Appellate Division and the Court of Appeals.[5] Another QDAO policy established a wall between different units in the office, leading to trial prosecutors failing to disclose exculpatory material in the hands of another unit.[6] The Appellate Division has repeatedly criticized Queens prosecutors' improper

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[1] Rachel Elyse Buchter, State Bar No. 2929941, Queens District Attorney's Office, 125-01 Queens Blvd., Kew Gardens, N.Y. 11415. Phone: (718) 286-6000. The Unified Court System website does not list an email for Buchter. We do not have personal knowledge of any of the facts or circumstances of Buchter or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. Thompson*, 99 A.D.3d 819, 819 (2d Dep't 2012). Available at: https://www.nycourts.gov/reporter/3dseries/2012/2012_06828.htm.

[3] https://queensda.org/wp-content/uploads/2021/03/drawhorne_kevin_indictment_03_04_2021-edited.pdf

[4] *See Attorney Detail Report*, Attorney Online Services -- Search, New York Unified Court System, available at https://iapps.courts.state.ny.us/attorneyservices.

[5] *People v. Dunbar*, 104 A.D.3d 198 (2d Dep't 2013), *aff'd*, 24 N.Y.3d 304 (2014). *See also People v. Perez*, 37 Misc. 3d 272 (Queens Sup. Ct. 2012) (deeming QDAO's *Miranda* interview practice an ethical violation of Rule 8.4(c)); Russ Buettner, *Script Read to Suspects Is Leading to New Trials*, New York Times (January 30, 2013) https://www.nytimes.com/2013/01/31/nyregion/appellate-panel-overturns-3-queens-convictions-based-on-rights-preamble.html.

[6] Sarah Maslin Nir, *Murder Conviction Tossed Out in Queens*, New York Times (March 18, 2013) https://www.nytimes.com/2013/03/19/nyregion/murder-conviction-reversed-over-withheld-information.html. *See also People v. Petros Bedi*, Ind. No. 4107/96, NYLJ 1202592836531 (Queens Sup. Ct. March 13, 2013) (Witness

summation conduct and urged that the Office provide better training for its trial prosecutors.[7] There are numerous court decisions finding that QDAO prosecutors acted improperly—a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.[8] Buchter's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Buchter's misconduct in *Thompson* constitutes professional misconduct in violation of Rule 8.4 of the New York Rules of Professional Conduct. For this misconduct, Buchter must be held accountable. The Committee must suspend Buchter.

1. **The Grievance Committee has a Unique Duty to Protect the Public by Holding Prosecutors Accountable for Misconduct.**

A. **Prosecutorial Misconduct is Pervasive and Unchecked.**

Our legal system holds prosecutors to the highest standards of all attorneys.[9] When any attorney missteps, it can cause harm, typically to an individual client. But a prosecutor's misconduct can destroy a person's life—and that of their family. Moreover, a prosecutor's misconduct negatively affects both law and society. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[10]

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one."[11] Hal Lieberman, former Chief Counsel for the Departmental

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Security Program documents, which were not made part of prosecutor's file "as matter of custom," were *Rosario* and *Brady* materials; failure to disclose required vacating murder conviction).

[7] *See, e.g.*, *People v. Velez*, 2014-09698, Oral Argument, Appellate Division, 48:30-50:15 (March 16, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1521208616.External_(PubliP).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1521208616.External_(Public).mp4; *People v. Cherry,* 2014-10909*,* Oral Argument, Appellate Division, 26:34-29:31 (March 13, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1520949280.External_(Public).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1520949280.External_(Public).mp4

[8] Amended Complaint, *Julio Negron v. The City of New York et al.*, No.18-cv-6645 (DG) (RLM) (filed March 10, 2021).

[9] *Matter of Rain*, 162 A.D.3d 1458, 1462 (3d Dep't 2018) ("prosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice"); *see also* 2017 ABA Prosecution Function Standards, Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

[10] *Rain*, 162 A.D.3d at 1462.

[11] *Berger v. United States,* 295 U.S. 78, 88 (1935) (emphasis added); *People v. Jones*, 44 N.Y.2d 76, 80 (1978) (quoting *Berger*, 295 U.S. at 88). *See also People v. Calabria*, 94 N.Y.2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility--determining facts relevant to guilt or innocence.") (citation omitted); *People v. Levan*, 295 N.Y. 26, 36 (1945).

Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[12]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 analysis of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[13] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees "almost never took serious action against prosecutors."[14] In the 30 cases where judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[15] As the *New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[16]

B. **Summation Misconduct is Pernicious and Widespread.**

In closing ("summation") arguments, the prosecutor's task is to explain how trial evidence applies to the legal elements of the charged offenses. Thus, prosecutors "must stay within the four corners of the evidence"[17] and are not permitted to make arguments that rely on facts that are not in evidence.[18] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[19] These missteps include making "irrelevant and inflammatory comments;"[20] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[21] also known as vouching; appealing to the jurors' sympathies or fears;[22] shifting the burden from the prosecution to the defense;[23] and denigrating the defense, defense counsel or the defendant.[24]

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[12] Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (April 3, 2013), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] New York Times Editorial Board, *Prosecutors Need a Watchdog*, N.Y. Times, (August 14, 2018), https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html.

[17] *People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (internal quotation marks and citation omitted).

[18] *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976). *See also People v. Wright*, 25 N.Y.3d 769, 779-780 (2015); *People v. Singh*, 128 A.D.3d 860, 863 (2d Dep't 2015).

[19] See Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent*, 103-118 (2012).

[20] *Mehmood*, 112 A.D.3d at 853.

[21] *People v. Bailey,* 58 N.Y.2d 272, 277 (1983) (citation omitted).

[22] *See, e.g., Ashwal,* 39 N.Y.2d at 110; *People v. Lindo*, 85 A.D.2d 643, 644 (2d Dep't 1981); *People v. Fernandez*, 82 A.D.2d 922, 923 (2d Dep't 1981); *People v. Fogarty*, 86 A.D.2d 617, 617 (2d Dep't 1982); *People v. Brown,* 26 A.D.3d 392, 393 (2d Dep't 2006).

Engaging in these prejudicial forms of arguments is improper and can violate the constitutional right to a fair trial.[25]

As far back as 1899, the New York Court of Appeals cautioned prosecutors against appealing to "prejudice" or seeking conviction "through the aid of passion, sympathy or resentment."[26] In 1906, the Court of Appeals reversed a criminal conviction because of the prosecutor's improper comments to the jury and expressed its frustration with the frequency of such misconduct:

> We have repeatedly laid down the rule governing prosecuting officers in addressing the jury… We have repeatedly admonished [prosecutors] at times with severity… not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer… *Why should court and counsel violate the law in order to enforce it?* What a pernicious example is presented when such officers, intrusted [sic] with the most important duties, in attempting to punish the guilty, are themselves guilty of departing from the law.[27]

But those early rebukes from the courts seem to have had little impact on prosecutors' practices. Over the last few decades, New York courts have had to remind prosecutors over and over that "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command."[28] Countering the gamesmanship and instinct to win that overcomes many prosecutors at trial, courts have reminded them that "our adversarial system of justice is not a game, it has rules, and it is unfortunate when a prosecutor … plays fast and loose with them."[29]

Summation misconduct continues—apparently unabated—to this day. During oral argument in 2018, Justice LaSalle of the Appellate Division sharply criticized the regularity of summation misconduct:

> At what point does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?… why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[30]

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[23] *People v. DeJesus*, 137 A.D.2d 761, 762 (2d Dep't 1988); *People v. Lothin*, 48 A.D.2d 932, 932 (2d Dep't 1975).

[24] *See, e.g., People v. Damon*, 24 N.Y.2d 256, 260 (1969); *People v. Lombardi*, 20 N.Y.2d 266, 272 (1967); *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); *Brown,* 26 A.D.3d at 393; *People v. LaPorte,* 306 A.D.2d 93, 95 (1st Dep't 2003).

[25] *DeJesus*, 137 A.D.2d at 762.

[26] *People v. Fielding*, 158 N.Y. 542, 547 (1899).

[27] *People v. Wolf*, 183 N.Y. 464, 471-76 (1906) (emphasis added).

[28] *Ashwal*, 39 N.Y.2d at 109.

[29] *People v. Payne,* 187 A.D.2d 245, 247 (4th Dep't 1993).

[30] *Velez*, 2014-09698, Oral Argument at 0:46:55-0:48:05.

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such remarks are *effective* at winning cases—they go beyond the evidence, to manipulate biases, prejudice, and passions. Discussing prosecutorial misconduct in opening statements —where attorneys are even more limited than in summation—Justice Alan D. Scheinkman of the Appellate Division remarked in oral argument, "It's obvious that the prosecutor who tried this case was saying things for the purpose of winning it."[31]

For that reason, summation misconduct is not trivial or a "mere technicality." Summation misconduct increases the likelihood of a guilty verdict—and of the prosecutor winning their case. However, the prosecutor's role in a criminal trial is not just to win the case: the law requires that prosecutors "seek justice…not merely to convict."[32] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[33] Winning a case through summation misconduct violates this fundamental obligation. The American Bar Association's own ethical standards insist that "prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."[34]

Improper summations have been a particular problem at the Queens District Attorney's Office in recent years, distorting numerous trials, and sometimes resulting in reversal. As Justice Miller of the Appellate Division stated in oral argument:

> I could read this summation and without knowing what office it is from would say it is from Queens. That's the reputation that your office is building with this court. Because this [summation misconduct] happens repeatedly.[35]

Similarly, commenting on the Queens District Attorney's Office's opening and closing statement misconduct, Justice Austin of the Appellate Division stated in oral argument:

> I feel like a broken record because I address this every time. Almost every time the Queens DA is before us . . . When do we say to your office, enough is enough? . . . I've got to tell you, it distresses me to no end, the line that you consistently cross. Consistently! . . . You always agree [that these remarks are improper] when you're here [in the Appellate Division]. But you keep doing it and you keep doing it and you keep doing it … I've heard somebody from your office standing there every time I've been here saying the same exact thing [agreeing remarks were improper]. And I'm here 9 years this week. It's 9 years of the same thing.[36]

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[31] *Cherry,* 2014-10909*,* Oral Argument at 0:27:45-0:28:13.

[32] American Bar Association, Standard 3-1.2 Functions and Duties of the Prosecutor (2017) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[33] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[34] Commentary, Criminal Justice Standards Comm., Am. Bar Ass'n, Standards for Criminal Justice: Prosecution and Defense Function Standards 3-5.8 (3d ed. 1993).

[35] *Velez*, 2014-09698, Oral Argument at 0:48:30-0:49:00.

[36] *Cherry,* 2014-10909*,* Oral Argument at 0:26:34-0:29:31.

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[37]

Professor and former prosecutor Bennett Gershman highlights the broad shadow that summation misconduct continues to cast over the entire criminal justice system:

> The problem is not new … [M]isconduct by prosecutors in oral argument has indeed become staple in American trials. Even worse, such misconduct shows no sign of abating or being checked by institutional or other sanctions … Virtually every federal and state appellate court at one time or another has bemoaned the 'disturbing frequency' and 'unheeded condemnations' of flagrant and unethical prosecutorial behavior.[38]

Despite the courts' clear prohibition of summation misconduct, prosecutors often ignore the law in an attempt to win their cases.

C. The Grievance Committee, as the Only Body Entrusted with Checking Prosecutorial Misconduct, has an Important Duty to Hold Prosecutors Accountable.

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[39] In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[40]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[41]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly sanctioned.[42]

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[37] *Velez*, 2014-09698, Oral Argument at 0:49:30-0:50:15.

[38] Bennett L. Gershman, *Prosecutorial Misconduct*. § 11:1. Introduction (2d ed.) (August 2018 update) (internal citations omitted.) Gershman is a former New York prosecutor. See also Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 Hastings Const. L. Q.915 (2011).

[39] *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v. Auburn Police Dep't*, 138 A.D.3d 1468, 1469 (4th Dep't 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.") (internal quotation marks omitted); *see also Ryan v. State*, 56 N.Y.2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[40] *Imbler,* 424 U.S. at 429; *see also Matter of Malone*, 105 A.D.2d 455, 459 (3d Dep't 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[41] Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 242–43 (2012).

[42] Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013) www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf; *see also Proj. On Gov't*

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously." Indeed, "neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly … [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes."[43] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica. "Prosecutors engage in misconduct because they know they can get away with it."[44]

In 2018, the Appellate Division suspended New York prosecutor Mary Rain's law license for two years for a variety of misconduct, including summation misconduct.[45] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[46] But even a short suspension like that received by Rain and Kurtzrock[47]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not held accountable themselves. Absent strong, public discipline by the Grievance Committee, misconduct like that of Buchter will continue unabated and undeterred.

2. The Appellate Division Found That Buchter Committed Misconduct in *People v. Thompson* When She Impermissibly Shifted the Burden of Proof to the Defense.

The Appellate Division ruled that Buchter, in her summation, shifted the burden of proof to a defendant.[48] While the Appellate Division did not overturn the conviction—the judges decided that

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Oversight, Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards (Mar. 12, 2014), http://pogoarchives.org/m/ga/opr-report-20140312.pdf; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[43] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 65 (2017) (internal citations omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697 (1987).

[44] *ProPublica Investigates Prosecutorial Misconduct in New York,* Innocence Project (April 3, 2013) https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[45] *Rain*, 162 A.D.3d at 1462.

[46] *In the Matter of Glenn Kurtzrock*, 192 A.D.3d 197 (2d Dep't, Dec. 30, 2020).

[47] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State, HuffPost (September 20, 2017)*, https://www.huffpost.com/entry/the-most-dangerous-prosec_b_12085240; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (October 1, 2016), https://www.huffpost.com/entry/a-most-dangerous-prosecutor-a-sequel_b_57effb8fe4b095bd896a0fba; Nina Morrison, "What Happens When Prosecutors Break the Law?" *New York Times*, June 18, 2018 https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html (see also Morrison's twitter thread following the *Kurtzrock* decision, https://twitter.com/Nina_R_Morr/status/1344413003903602688)

[48] Ex. A, *People v. Thompson*, 99 A.D.3d at 819.

there was overwhelming evidence of guilt—the decision nevertheless recognized that Buchter's remarks were impermissible.[49]

The Constitution requires that a prosecutor shoulder an unalterable burden of proving beyond a reasonable doubt every element of a charged crime.[50] Accordingly, any remark by a prosecutor that attempts to shift the burden of proof to the defense is improper and impermissible.[51] In particular, it is error for a prosecutor to argue that the defense bears the burden of producing trial evidence to prove innocence.[52]

Indeed, by the time of Thompson's trial in 2010, it was particularly clear in the Appellate Division that prosecutors may not suggest to the jury that it was the defendant's "burden to prove his innocence by submitting to a [forensic] test."[53]

Buchter's summation remarks blatantly, repeatedly and explicitly undermined this foundational principle. She stated to the jury:

> [Y]ou heard that this defendant didn't want us to have his DNA. Do you think that's the way an innocent person would behave? . . . I submit to you[,] isn't it reasonable that a person who is innocent of a crime that they had been accused of would say[,] please, take my DNA, I want to clear my name? He didn't want to give it to us.
>
> You heard how long this thing dragged on because we got an order from the Judge. He wouldn't give his DNA. They had to then go back and get a force order. He still didn't want to give his DNA. Finally he had to be forcibly restrained to get his DNA and he still bit the tip of the swab so that what was submitted was a bloody stick.
>
> Is that consistent with someone who is innocent or someone who is guilty of a burglary and knows that his DNA taken from his mouth is gonna match that blood at that crime scene? Someone who knows he's guilty of a burglary and that's why he doesn't want to give his DNA sample?…

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[49] *Id.*

[50] *In re Winship*, 397 U.S. 358 (1970); *People v. Antommarchi*, 80 N.Y.2d 247, 252 (1992).

[51] *See, e.g., People v. Levandowski*, 8 A.D.3d 898, 900-01 (3d Dep't 2004) (improper to suggest that defense was required to prove witnesses' motive to lie); *People v. Jamal*, 307 A.D.2d 267, 268 (2d Dep't 2003) (impermissible to argue that the defense had not disputed or controverted the prosecution's evidence); *People v. LaPorte*, 306 A.D.2d 93, 96 (1st Dep't 2003) (improper to comment on defendant's failure to call witnesses and suggest this was because they would be unfavorable); *People v. DeJesus*, 137 A.D.2d 761, 762 (2d Dep't 1988) (burden-shifting to suggest defendant had obligation to prove why complainant would make false allegations).

[52] *See People v. Collins*, 12 A.D.3d 33, 38 (1st Dep't 2004) (improperly burden shifting to argue that defendant should have produced evidence); *People v. Pizarro*, 184 A.D.2d 448, 449 (1st Dep't 1992) (improper to suggest that defense had burden to produce evidence); *People v. Perry*, 172 A.D.2d 858, 858-59 (2d Dep't 1991) (same); *see also People v. Hall*, 181 A.D.2d 1008, 1009 (4th Dep't 1992) (error to suggest that defense bore burden of producing expert to test blood sample).

[53] *People v. Handwerker*, 12 Misc.3d 19, 21 (App. Term, 2d Dep't 2006); *accord People v. Uriah*, 261 A.D.2d 848, 848-49 (4th Dep't 1999) (finding it improper to argue during summation that the defendant did not take a polygraph test "because he had something to hide").

> He could have just given his swab that day with his attorney right there. He chose not to. On two separate dates he chose not to and he had his attorney standing next to him so that has nothing to do with it. It's the fact that he did not want to give his DNA because he knew he was guilty.[54]

Buchter improperly argued that Thompson had an obligation or an option to prove his innocence by submitting to DNA testing. This argument shifted the burden of proof to Thompson: he had to prove his own innocence, rather than the prosecution having had to prove his guilt. As every law student knows —and certainly a prosecutor of Buchter's 12 years of prosecutorial experience when she tried *Thompson*—shifting the burden to a defendant is unequivocally impermissible.

3. Two Other Courts Found Buchter's Summation Comments Improper.

Appellate attorneys raised prosecutorial misconduct in summation at least two other trials handled by Buchter. In *People v. Adams*, the Appellate Division found that "some of the challenged remarks were improper and should not be repeated."[55] In *People v. Ellis*, the Appellate Division found that some of the summation comments were "inappropriate."[56]

Though the Appellate Division did not reverse the conviction in either case, it is a troubling pattern for any prosecutor, particularly one with great influence over newer prosecutors who she supervises as the Bureau Chief of the Queens District Attorney Office's Trial Bureau III.

4. **The Grievance Committee Must Discipline Buchter for the Serious Professional Misconduct That Occurred Here.**

As noted by one Grievance Committee, "[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct."[57] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[58] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[59]

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can

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[54] Trial Transcript at 408:5 – 409:15, *People v. Thompson*, Ind. No. 347-07 (Queens Sup. Ct. April 28, 29, May 5, 2010).

[55] Exhibit B, *People v. Adams*, 93 A.D.3d 734, 735 (2d Dep't 2012). Buchter is not named as the prosecutor in the Appellate Division decision, but the trial transcript reflects that she gave the summation argument on February 2, 2010.

[56] Exhibit C, *People v. Ellis*, 138 A.D.3d 1136, 1137 (2d Dep't 2016). Buchter is not named as the prosecutor in the court decision, but her name appears in the partial trial transcripts included in the Petition for Writ of Habeas Corpus, *Ellis v. Lee*, 1:17-cv-06834-CBA, U.S. District Court, Eastern District of New York, filed November 21, 2017.

[57] *How to File a Complaint*, Attorney Grievance Committee — First Department (July 30, 2020), https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/How%20to%20File%20a%20Complaint%2007.30.2020.pdf.

[58] 22 N.Y.C.R.R. Part 1240.

[59] *How to File a Complaint*, Attorney Grievance Committee — First Department.

cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[60]

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, "Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[61]

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence."[62] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving the maximum number of convictions.[63] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[64] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

A. Buchter's Misconduct in Summation Violated New York Rule of Professional Conduct 8.4.

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.[65] The Court of Appeals explained, "[T]he privilege to practice law is *not a personal or liberty interest, but 'is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.*'"[66]

The Appellate Division found Buchter's remarks impermissible.[67] In New York, professional misconduct for an attorney includes any violation of the New York Rules of Professional Conduct. Buchter's remarks constituted professional misconduct.

Under Rules 8.4(d) and 8.4(h), a lawyer shall not engage in conduct that is prejudicial to the administration of justice or engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.[68]

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[60] *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quotation marks omitted).

[61] *Kurtzrock*, 192 A.D.3d 197.

[62] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[63] 2017 ABA Functions and Duties of the Prosecutor, Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[64] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

[65] *See, e.g., Matter of Capoccia*, 59 N.Y.2d 549 (1983).

[66] *Matter of Scudieri*, 174 A.D.3d 168, 173 (2019) (emphasis added) (quoting *Matter of Seiffert,* 65 N.Y.2d 278, 280 (1985)).

[67] Ex. A, *People v. Thompson*, 99 A.D.3d at 819.

[68] 22 N.Y.C.R.R. Part 1200, Rule 8.4.

Summation misconduct violates these rules. The Court of Appeals has stated that a prosecutor's improper statements in summations amount to prosecutorial misconduct.[69] Such summation misconduct violates Rule 8.4. The Third Department found in *People v. Wright* that prosecutor Mary Rain improperly appealed to the jury's sympathy and made other improper comments in her trial summation.[70] In a disciplinary action against Rain, stemming in part from her statements in *Wright*, the Third Department affirmed that Rain violated Rule 8.4 with her summation remarks, which were "prejudicial to the administration of justice" and constituted "conduct adversely reflecting on her fitness as a lawyer."[71]

More broadly, Buchter's remarks demonstrate a disregard to the most basic principle of our criminal legal system — the burden of proof. Such disregard, when it takes the form of improper behavior as it did in *Thompson,* undermines the administration of justice. Buchter thus violated Rule 8.4(d). At the same time, Buchter's choice to make those remarks, especially given that she had been a seasoned prosecutor when she made them, reflected negatively on her fitness as a lawyer. Such a failure of judgment violated Rule 8.4(h), as demonstrated by *Rain*.

B. For Her Misconduct, Buchter Must be Suspended.

Though the misconduct discussed here occurred years ago, New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[72] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[73]

Buchter was not an uninformed novice when she violated the Professional Rules in this case. To the contrary, Buchter began her career as a prosecutor in 1998. At the time of her misconduct in *Thompson,* Buchter was already an experienced prosecutor with over 10 years of practice in the criminal legal system. She was undoubtedly aware of her professional duties.

Professional discipline, through the Grievance Committee, is the mechanism entrusted by the Supreme Court of the United States to regulate prosecutorial behavior. Without appropriate sanctions, this Committee will derelict its duty and send a message—to prosecutors, defense attorneys, the courts, defendants and the public at large—that it does not take prosecutorial misconduct seriously. If the Committee did not properly discipline Buchter, it would send a message condoning prosecutorial misconduct to her, her colleagues, and prosecutors. Only a strong message from the Grievance Committee can hold Buchter accountable and minimize repeated occurrences of this misconduct by other prosecutors.

Therefore, the Grievance Committee must suspend Buchter.

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[69] *People v. Wright*, 25 N.Y.3d 769, 780 (2015).

[70] *People v. Wright*, 133 A.D.3d 1097, 1098 (3d Dep't 2015).

[71] *Rain*, 162 A.D.3d at 1459.

[72] 2020 Model Rules for Lawyer Disciplinary Enforcement, Rule 32 and Commentary, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/.

[73] *Id.*

Conclusion

Prosecutorial misconduct in summation, as committed by Buchter, has a devastating impact on due process and the right to a fair trial. It is a long-standing, largely unaddressed problem in the court system. To our knowledge, though the Appellate Division found Buchter to have acted improperly, she remains unsanctioned for this misconduct. Instead, Buchter has seemingly faced no professional or employment consequences for serious violations of the Professional Rules of our profession.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[74] To that end, "the grievance process exists to protect the public... By bringing a complaint to a committee's attention, the public helps the legal profession achieve its goal."[75] The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Buchter. As the comment to Rule 8.3 of the New York Rules of Professional Conduct reminds us, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."[76] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should obtain a list of all cases that this prosecutor worked on and contact the attorneys, witnesses, and accused persons (while protecting the accused's rights to privacy and counsel) in those cases. The Committee should also identify all of Buchter's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

2. The Committee should promptly investigate whether any supervising attorney at the Queens District Attorney's Office (QDAO) is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[77]

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[74] NYSBA Committee on Professional Discipline, Guide to Attorney Discipline, available at: https://nysba.org/public-resources/guide-to-attorney-discipline/.

[75] *Id.*

[76] Rule 8.3, Comment [1].

[77] Rule 5.1 (d). A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

3. The Grievance Committee should investigate whether the Queens District Attorney's Office (QDAO) and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.

4. The Committee should identify any prosecutors trained and/or supervised by Buchter and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to investigate all cases handled by this prosecutor and vacate convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the Queens District Attorney's Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.

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(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.