May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
335 Adams Street, Suite 2400
Brooklyn, New York 11201-3745
ad2-grv2@nycourts.gov

Re: Grievance Complaint Regarding Attorney John Kosinski, State Bar No. 2452084.

To the Grievance Committee:

We write to complain about the professional misconduct of attorney John Kosinski[1] in prosecuting *People v. Anderson.*[2]

In *Anderson,* the Appellate Division reversed a conviction because Kosinski disobeyed the trial judge's pretrial ruling; made remarks that "'were clearly intended'" to evoke propensity inferences by the jurors; denigrated the defense; and vouched for his two key witnesses.[3] In two other cases, Kosinski's summation arguments were challenged as misconduct on appeal.[4]

Despite being found to have committed misconduct by the Appellate Division,[5] Kosinski has seemingly held leadership positions in the Queens District Attorney's Office since at least 2009. Far from being publicly disciplined for his past misconduct, Kosinski has been promoted, and is currently a Deputy Bureau Chief. Kosinski has undoubtedly trained and supervised more junior prosecutors. His ascendance through the ranks sends a message to his supervisees and colleagues that higher ups ignore misconduct, and follow up on it with promotion, not discipline.

Kosinski'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'

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[1] John W. Kosinski Jr., State Bar No. 2452084, Queens County District Attorney's Office, 125-01 Queens Blvd., Kew Gardens, New York 11415. Phone: (718) 286-6000. The Unified Court System website does not list an email for Kosinski. We do not have personal knowledge of any of the facts or circumstances of Kosinski or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. Anderson*, 83 A.D.3d 854, 855-7 (2d Dep't 2011). Available at: https://www.nycourts.gov/reporter/3dseries/2011/2011_03078.htm.

[3] *Id.*

[4] Exhibit B, *People v. Bey*, 71 A.D.3d 1156, 1157 (2d Dep't 2010). Available at: https://www.nycourts.gov/reporter/3dseries/2010/2010_02806.htm. Exhibit C, *People v. Pinckney*, 27 A.D.3d 581, 582 (2d Dep't 2006). Available at: https://www.nycourts.gov/reporter/3dseries/2006/2006_01829.htm.

[5] Ex. A, *Anderson*, 83 A.D.3d at 856.

Miranda rights, according to the Appellate Division and the Court of Appeals.[6] 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.[7] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.[8] 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.[9] Kosinski's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Just as prosecutors hold individuals accountable for their actions, so must the Grievance Committee hold prosecutors accountable for their misconduct. Despite the findings of misconduct noted herein, as of the writing of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Kosinski.[10]

The Grievance Committee must suspend Kosinski.

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[6] *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.

[7] 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 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).

[8] *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.

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

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

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.[11] 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.[12]

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."[13] Hal Lieberman, former Chief Counsel for the Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[14]

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.[15] 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."[16] 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

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[11] *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.").

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

[13] *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).

[14] 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.

[15] *Id.*

[16] *Id.*

prosecutors were promoted and given raises soon after courts cited them for abuses.[17] 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."[18]

B. Summation Misconduct is Pernicious and Widespread.

In closing arguments ("summation"), the prosecutor's task is to explain how evidence introduced at trial applies to the legal elements of the charged offenses. Thus, prosecutors "must stay within the four corners of the evidence"[19] and are not permitted to make arguments that rely on facts that are not in evidence.[20] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[21] These missteps include making "irrelevant and inflammatory comments;"[22] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[23] also known as vouching; appealing to the jurors' sympathies or fears;[24] shifting the burden from the prosecution to the defense;[25] and denigrating the defense, defense counsel or the defendant.[26] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[27]

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."[28] In

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[17] *Id.*

[18] 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.

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

[20] *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).

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

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

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

[24] *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).

[25] *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).

[26] *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).

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

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

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.[29]

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."[30] 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."[31]

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?[32]

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."[33]

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

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

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

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

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

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

prosecutors "seek justice…not merely to convict."[34] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[35] 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."[36]

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.[37]

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.[38]

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[39]

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

[34] 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/.

[35] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

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

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

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

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

> 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.[40]

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.[41] 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.[42]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[43]—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 disciplined.[44]

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[40] 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).

[41] *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").

[42] *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).

[43] 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).

[44] 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 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).

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."[45] "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."[46]

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.[47] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[48] But even a short suspension like that received by Rain and Kurtzrock[49]—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 Kosinski will continue unabated and undeterred.

2. Courts Found That Kosinski Committed Misconduct.

Courts have found Kosinski to have acted improperly on multiple occasions but these judicial determinations did not stop Kosinski rising to a powerful, influential position in the Queens District Attorney's Office. As such, Kosinski's case demonstrates the lack of redress within District Attorney offices in New York City, where promotions, rather than accountability, often follow findings of misconduct.

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[45] 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).

[46] *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.

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

[48] *Matter of Kurtzrock*, 192 A.D.3d 197 (2d Dep't 2020).

[49] 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)

A. In 2011, the Appellate Division Reversed the Conviction in the *Anderson* Case, Finding that Kosinski Disobeyed a Judicial Ruling and Made Improper Summation Arguments.

When the Appellate Division reviewed the appeal from the 2008 *Anderson* trial, it found that Kosinski violated a court ruling and committed summation misconduct so impactful that the conviction needed to be reversed.

The trial judge had issued a pretrial *Sandoval* ruling, setting narrow guidelines for Kosinski's questioning of Mr. Anderson about the underlying facts of a 2002 drug sale conviction, as well as about three other drug convictions.[50]

Kosinki violated the order twice. First, Kosinski violated the judge's *Sandoval* ruling as to the 2002 drug sale. Instead of "confining his inquiry" to the limited purpose of the *Sandoval* ruling, Kosinski cross-examined Anderson with a "series of irrelevant and prejudicial questions" about the June 2002 conviction.[51] These question focused on the source and packaging of the drugs, as well as Anderson's supplier and their financial arrangements.[52] Kosinski's questions "exceeded the proper scope of the *Sandoval* ruling" and "'were clearly intended'" to improperly demonstrate to the jurors Anderson's criminal propensity.[53] As such, Kosinski's conduct both violated the judge's ruling and was substantively improper.

Second, Kosinski violated the judge's *Sandoval* ruling in regard to Anderson's three other drug convictions. In the course of cross-examining Anderson, Kosinski "repeatedly demanded" that Anderson admit to choosing to do "'what's best for [the defendant]'" instead of choosing to abide by the law.[54] With these questions, Kosinski improperly "invit[ed] the jurors" to focus on Anderson's "propensity for criminal conduct."[55] Kosinski's conduct, again, both violated the judge's ruling and was substantively improper.

Finally, Kosinski made improper arguments in summation. A prosecutor may not vouch for his witnesses,[56] but the Appellate Division found that Kosinski did just that, "effectively

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[50] Ex. A, *Anderson*, 83 A.D.3d at 855-56. The decision does not identify Kosinski by name, but the transcript of the trial does. Trial Transcript Page, *People v. Anderson*, Ind. No. 958-05 (Queens Sup. Ct. August 5, 6, 7, 2008).

[51] Ex. A, *Anderson,* 83 A.D.3d at 855-56.

[52] *Id.* at 856.

[53] *Id.* The law generally disallows propensity evidence in criminal cases because it shifts the jurors' focus from the facts of the case (and whether a crime had occurred) to questions of character. *See*, *e.g., People* v. *Rojas*, 97 N.Y.2d 32 (2001) ("[A] criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crimes charged."); *People* v. *Wilkinson*, 43 A.D.2d 565, 565 (2d Dep't 1973) ("It is axiomatic that the prosecution may not attempt to prove a defendant's bad character unless the latter has introduced evidence of his good character.").

[54] Ex. A, *Anderson*, 83 A.D.3d at 856.

[55] *Id.*

[56] *See, e.g., Bailey,* 58 N.Y.2d at 277; *People v. Lovello*, 1 N.Y.2d 436, 439 (1956) (prosecutor may not support "his case by his own veracity and position"); *People v. Moye*, 12 N.Y.3d 743, 744 (2009)

vouching" for two of his witnesses.[57] Kosinski vouched for the first witness, a former colleague, by "emphasiz[ing]" the witness's councilman position and his attendance of the lineup in the case to make sure it was "fair."[58] Kosinski vouched for the second witness, a Deputy Executive Assistant District Attorney, by focusing on his high-level position and "stress[ing]" that the witness's credentials included "'lectures about ethical considerations of prosecutors.'"[59]

Kosinski made other improper and inflammatory arguments as well. He repeatedly denigrated the defense and Anderson,[60] likening Anderson's testimony to a "script" composed of "[r]ehearsed line[s]," calling part of Anderson's testimonial a "[b]old-face[d] lie," and making other comments suggesting that Anderson was lying.[61] Kosinski also "mischaracterized" Anderson's testimony in order to "support an unnecessarily inflammatory argument" that Anderson was remorseless.[62]

The Appellate Division reversed Anderson's conviction, finding that the "cumulative effect" of Kosinski's misconduct deprived Anderson of a fair trial.[63]

B. The Appellate Division Implied That Some of Kosinski's Summation Arguments Were Improper in 2003 and 2008 trials.

In 2003, Kosinski prosecuted Comfort Pinckney at trial[64] and summation misconduct was raised on appeal. In a 2006 opinion, the Appellate Division found that while some of Kosinski's summation remarks were proper, it impliedly found that others were not: "[t]he remaining remarks were not so egregious as to violate the defendant's fundamental right to a fair trial."[65] The implication is that Kosinski made improper remarks, but the Appellate Division did not believe the remarks had enough of an influence to necessitate a reversal.

The Appellate Division came to a similar conclusion in *People v. Bey*. Kosinski prosecuted Yusef Bey and a jury convicted after trial.[66] In a 2010 opinion, the Appellate Division again

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(prosecutor may not support case by his or anyone else's "[v]eracity and position," citing *Lovello*).

[57] Ex. A, *Anderson*, 83 A.D.3d at 856.

[58] *Id.*

[59] *Id.*

[60] A prosecutor may not denigrate the defense, defense counsel or the defendant. *See, e.g., Damon,* 24 N.Y.2d at 260; *Lombardi,* 20 N.Y.2d at 272; *Gordon,* 50 A.D.3d at 822*; Brown,* 26 A.D.3d at 393*; LaPorte,* 306 A.D.2d at 95.

[61] Ex. A, *Anderson*, 83 A.D.3d at 856-57 (quotes in original).

[62] *Id.* at 856.

[63] *Id.* at 855.

[64] Ex. C, *Pinckney*, 27 A.D.3d at 581. The decision does not identify Kosinski by name, but the transcript of the trial does. Trial Transcript Page, *People v. Pinckney*, Ind. No. 1497/00 (Queens Sup. Ct. February 4, 2003).

[65] Ex. C, *Pinckney,* 27 A.D.3d at 581.

[66] Ex. B, *Bey*, 71 A.D.3d at 1156. The decision does not identify Kosinski by name, but a news article and the prosecution's appellate brief identify him as the trial prosecutor. Exhibit B1, Appellate Brief at *12,

impliedly found that some of Kosinski's summation remarks were improper: "most of the challenged remarks in the prosecutor's summation [were proper.] To the extent that some of the remarks were improper, they did not warrant reversal."[67] By implication, most—not all—of Kosinski's remarks were proper, so some, by inference, were not.

3. The Grievance Committee Must Discipline Kosinski 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."[68] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[69] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[70]

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 cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[71]

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."[72]

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."[73] 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.[74] The New

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People v. Bey, 2009 WL 8730196 (2d Dep't December 9, 2009); Nicole Bode, *Revenge killer gets 45-to-life*, NY Daily News (January 03, 2008), http://www.nydailynews.com/news/crime/revenge-killer-45-to-life-article-1.339318.

[67] Ex. B, *Bey,* 71 A.D.3d at 1157 (citation omitted).

[68] *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.

[69] 22 N.Y.C.R.R. Part 1240.

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

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

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

[73] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[74] 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/.

York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[75] 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. Kosinski Violated Professional Rules.[76]

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.[77] 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.*'"[78]

Kosinski violated the Rules by prejudicing the administration of justice and acting in a manner not befitting an attorney. In one subsection, Rule DR 1-102 (now replaced by 8.4(d) & (h)) prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, while in another subsection, the Rule prohibited attorneys from engaging in any other conduct that adversely reflected on their fitness to practice law.[79] The Court of Appeals has stated that a prosecutor's improper summation remarks amount to prosecutorial misconduct.[80] A prosecutor's summation misconduct violated Rule DR 1-102 by prejudicing the administration of justice and reflecting adversely on the prosecutor's fitness as a lawyer.[81]

Kosinski violated each of the two subsections of Rule DR 1-102. In *Pinckney* and *Bey*, Kosinski made improper summation remarks. And in *Anderson*, Kosinski violated the judge's Sandoval ruling; made "'clearly intended'" propensity arguments;[82] improperly vouched for two of his witnesses; and repeatedly denigrated the defense. Each action prejudiced the administration of justice and was not fitting of an attorney.

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[75] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

[76] Kosinski's extensive misconduct occurred before 2009, when the Rules of Professional Responsibility regulated attorney professional conduct, as opposed to the current Rules of Professional Conduct.

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

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

[79] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). These rules were in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.

[80] *Wright*, 25 N.Y.3d at 780.

[81] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009. *See also Rain*, 162 A.D.3d at 1459 (summation misconduct violated Rules 8.4(d), (h)).

[82] Ex. A, *Anderson*, 83 A.D.3d at 856.

B. For His Misconduct, Kosinski 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."[83] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[84]

In considering the appropriate measure of discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[85] Simply being a prosecutor supports aggravated discipline because the law tasks them "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."[86] Similarly, extensive prosecutorial experience weights towards an aggravated sanction.[87] Kosinski was not an uninformed novice when he committed the misconduct above. To the contrary, Kosinski appears to have begun his prosecutorial career in 1991.[88]

The nature of Kosinski's misconduct calls out for serious discipline. A prosecutor who blatantly disobeys a judge's ruling and was found to have "'clearly intended" to improperly evoke the defendant's criminal propensity,[89] should have his license suspended at a minimum.

Kosinski's supervisory roles further support serious discipline. By 2009, at the latest, Kosinski headed the Vehicular Homicide Unit in the Queens District Attorney's Office.[90] By 2016, Kosinski held a Deputy Bureau Chief position, which he continues to hold today, under the leadership of DA Melinda Katz.[91] In these roles—and as a senior trial attorney, prior to his

[83] 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/.

[84] *Id.*

[85] *Kurtzrock*, 192 A.D.3d 197. *See also Rain*, 162 A.D.3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

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

[87] *Id*. *See also Rain*, 162 A.D.3d at 1461 (prosecutor's experience an aggravating factor).

[88] *See* Queens Gazette, *ADA Scott Mendelsohn Receives Weinstein Memorial Award* (November 18, 2009), https://www.qgazette.com/articles/ada-scott-mendelsohn-receives-weinstein-memorial-award/ (noting Kosinski was part of the DA's Class of 1991).

[89] Ex. A, *Anderson*, 83 A.D.3d at 856.

[90] Queens District Attorney's Office, Press Release (August 17, 2009), https://webcache.googleusercontent.com/search?q=cache:7dYKRCIiydYJ:www.queensda.org/newpressreleases/2009/august/badalov_lakhcchakov_08_17_2009_upgraded_cmp.pdf+&cd=9&hl=en&ct=clnk&gl=us.

[91] Queens District Attorney's Office, Press Release (February 13, 2020), http://www.queensda.org/da_Katz_pressRelease/2020/FEB_2020/rivas_william_02_07_2020_sen.pdf.

promotions—Kosinski likely tutored, supervised, and oversaw the conduct of junior prosecutors, and served as a role model to them. The Grievance Committee must discipline Kosinski, not only because his misconduct must result in consequences, but also to send a clear message to his supervisees and colleagues that they must *not* follow his example.

Conclusion

Kosinski committed misconduct in summation in multiple cases. In doing so, he violated the legal professional rules. To our knowledge, Kosinski remains unsanctioned publicly or privately for his serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[92] 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."[93] 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 Kosinski. 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."[94] 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 Kosinski'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.[95]

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

[93] *Id.*

[94] Rule 8.3, Comment [1].

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

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 Kosinski and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

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(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

(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.

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.

Cynthia Godsoe
Professor of Law
Brooklyn Law School

Nicole Smith Futrell
Associate Professor of Law
CUNY School of Law

Steven Zeidman
Professor of Law
CUNY School of Law

Daniel S. Medwed
University Distinguished Professor of
Law and Criminal Justice
Northeastern University

Abbe Smith
Scott K. Ginsburg Professor of Law
Director, Criminal Defense & Prisoner Advocacy Clinic
Co-Director, E. Barrett Prettyman Fellowship Program
Georgetown University Law Center