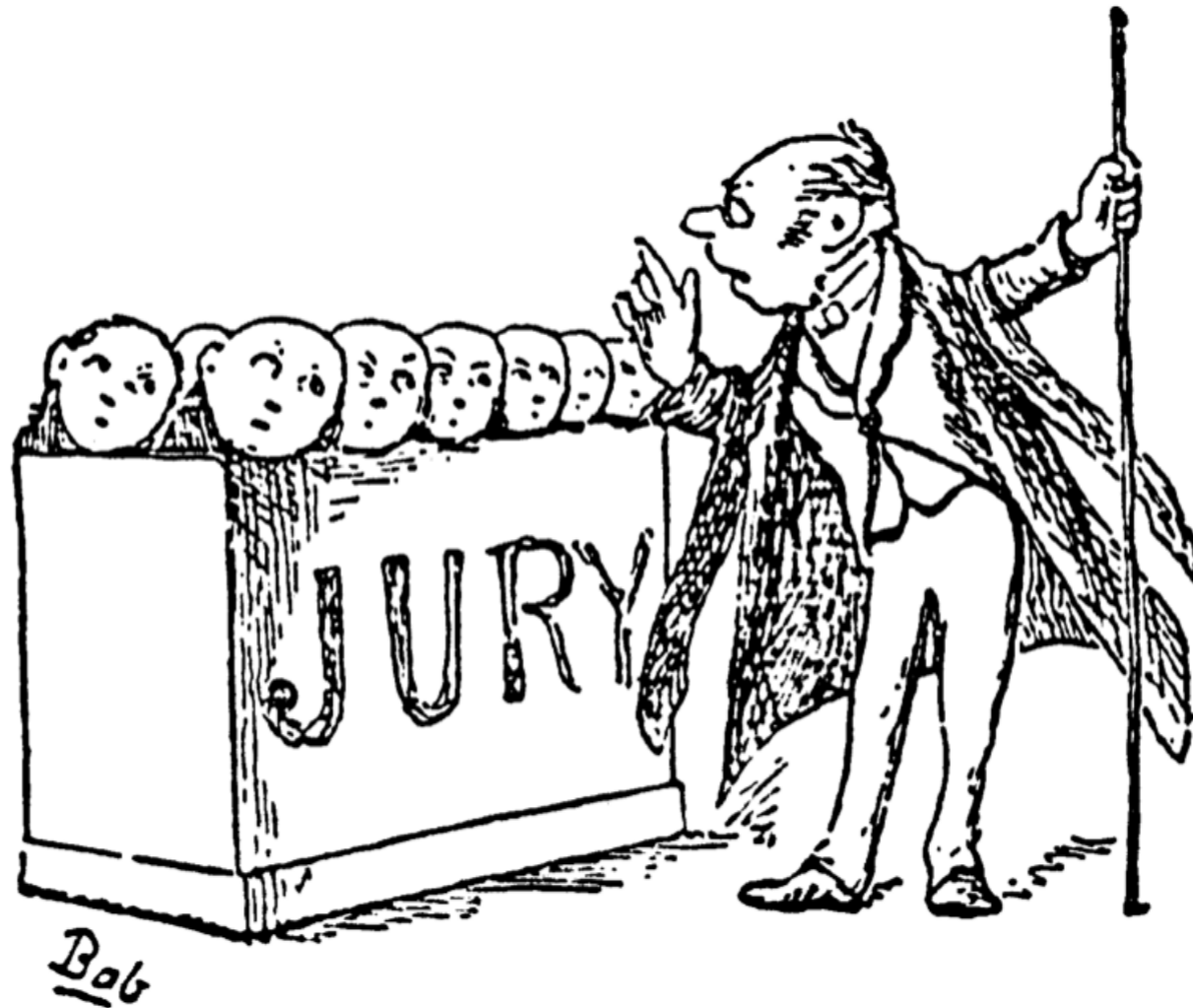


Garden State CLE Presents:

Ethical Issues in Prosecutors' Summations



Lesson Plan

Part I – Prosecutor’s Responsibilities

1. The traditional view of prosecutor’s ethical responsibilities:

The responsibilities of a prosecutor within his county are prescribed by [N.J.S. 2A:158–5](#):

‘Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws.’



The quality of his performance of his duties is governed by Canon 5 of the Canons of Professional Ethics which states that:

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is [sic] done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

State v. D'Ippolito, 19 NJ 540, 549 (1955)



A public prosecutor has special responsibilities which have never been better described than by Mr. Justice Sutherland in [Berger v. United States, 295 U.S. 78, 88, \(1935\)](#):

The (prosecuting) Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor— indeed, he should do so. But, while he may strike hard blows, 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. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.



2. The current-day view of prosecutor's ethical responsibilities:

a.) RPC 3.8 (adopted 1984)



The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;**
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;**
- (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;**
- (d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;**

b.) New Jersey Supreme Court Comment



(Plea bargaining guidelines for municipal court 1990)

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is [sic] done and truth is [sic] revealed in each individual case. The goal should be to achieve individual justice in individual cases.

In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

3. Permissible scope of legal argument

Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. Indeed, prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries. *State v. Frost*, 158 NJ 76, 82 (1999)

Criminal trials are emotionally charged proceedings. A prosecutor is not expected to conduct himself in a manner appropriate to a lecture hall. He is entitled to be forceful and graphic in his summation to the jury, so long as he confines himself to fair comments on the evidence presented.

Justice Clifford's dissent in *State v. DiPaglia*, 64 N.J. 288 (1974),

“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.” *State v. Farrell*, 61 N.J. 99, 105 (1972).



Echoing those precepts, we too have explained that “[a] prosecutor may be zealous in enforcing the law but he must nevertheless refrain from any conduct lacking in the essentials of fair play, and where his conduct has crossed the line and resulted in foul play, the reversal of the judgment below will be ordered.” [State v. Siciliano, 21 N.J. 249, 262 \(1956\)](#).

Thus, we have defined the role of a prosecutor similarly:

It is but a truism that prosecutors, as lawyers, are engaged in an oratorical profession. As such, and in consonance with our adversarial method of ascertaining the truth, we properly afford counsel on both sides latitude for forceful and graphic advocacy. Our countenance of a certain measure of verbal flair is, however, tempered by the command that prosecutors are charged not simply with the task of securing victory for the State but, more fundamentally, with seeing that justice is served. Absolute adherence to this duty is stringently compelled in capital cases where the penalty is death. Accordingly, prosecutors should not make inaccurate legal or factual assertions during a trial and ... must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.

[State v. Reddish, 181 N.J. 553, 640–41 \(2004\)](#)

In sum, we acknowledge that “[p]rosecutors may fight hard, but they must also fight fair.” [State v. Pennington, 119 N.J. 547, 577 \(1990\)](#).

4. Grounds for reversal

[A] conviction will not be reversed solely because the prosecutor's remarks in summation were improper. Instead, we must evaluate the prosecutor's comments in the context of the overall tenor of the trial and degree of responsiveness of both counsel and the court to improprieties when they occurred in determining whether an improper comment denied defendant a fair trial and warrants reversal

Specifically, an appellate court must consider

- (1) whether defense counsel made timely and proper objections to the improper remarks;**
- (2) whether the remarks were withdrawn promptly; and**
- (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial.**

The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action.

State v. Murphy, 412 NJ Super. 553, 560 (App. Div. 2010).



For those reasons, we gauge the consequences of prosecutorial misconduct or error differently. We “evaluat[e] the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial” and conclude that “prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious as to deprive defendant of a fair trial. Thus, “[t]o justify reversal, the prosecutor's conduct must have been ‘clearly and unmistakably improper,’ and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.” Also, “the Court should consider “whether defense counsel made a timely and proper objection, whether the remark was withdrawn promptly, and whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.” Next, “[the] court must also decide whether the prosecutor's misconduct constitutes grounds for a new trial ... because, in order to justify reversal, the misconduct must have been so egregious that it deprived the defendant of a fair trial.” In sum, “to warrant a new trial the prosecutor's conduct must have been clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.” It is in that context that we consider defendant's prosecutorial misconduct or error claims.

State v. Wakefield, 190 NJ 397, 438-439 (2007)



Part II - Examples of misconduct during summation

1. Vouching for the police credibility

Our courts have consistently held that such statements by a prosecutor about a police officer's credibility are wholly inappropriate. *State v. Goode*, [278 N.J. Super. 85, 90 \(App.Div.1994\)](#) (recognizing that it was improper for prosecutor to tell jury that police had no motive to lie);

[State v. Staples, 263 N.J. Super. 602, 623 \(App.Div.1993\)](#) (recognizing impropriety of prosecutor asking officer “is your career and the penalties that you would sustain for perjuring yourself worth the conviction for a \$20.00 bag of cocaine?” during direct examination);

See *State v. Engel*, [249 N.J. Super. 336, 381 \(App.Div. 1991\)](#) (recognizing that it was improper for prosecutor to tell jury that investigators were “good men who leave their family [and] work day and night” and would not “jeopardize their careers” over defendants);



State v. West, 145 N.J.Super. 226, 233–34 (App.Div.1976) (finding improper prosecutor's statements that police officer would not lie because “[t]here is a lot of harm that could come to him” and because “the police officer's career would be finished in a minute”);

State v. Jones, 104 N.J.Super. 57, 65, 248 A.2d 554 (App.Div.1968) (stating that it is “obviously improper” to imply that police testimony should be accepted, “not because of its believability but because the witnesses were policemen”).

State v. Murphy, 412 NJ Super. 553, 561 (App. Div. 2010).

“Here, defense counsel did object, but the judge overruled the objection by saying in open court, in full hearing of the jury, that the prosecutor's remark was a “fair comment” on the evidence. Thus, not only did the judge err by failing to strike the offending remark, he compounded the harmful effect of the remark by essentially signaling to the jury his agreement with the prosecutor's argument. The judge's comment had the effect of encouraging the jury to utilize the prosecutor's remark in its overall evaluation of whether it was defendant or [the police officer] who was telling the truth.”



2. Name-calling

[B]y no stretch of the imagination can it be said that describing defendant as a “coward,” “liar,” or “jackal” is not derogatory... It is not fair to employ degrading epithets such as “[a] cancer,” and “parasite upon society,” “animal,” “butcher boy,” “young punk,” “hood,” “punk,” and “bum [.]”

Epithets are especially egregious when, as here, the prosecutor pursues a persistent pattern of misconduct throughout the trial. [State v. Pennington, 119 N.J. 547, 576–77 \(1990\)](#),

We have also condemned references to a defendant as the “guest of honor,” an “equal opportunity shooter,” and, in respect of an African–American capital defendant, a “brother.” [State v. Long, 119 N.J. 439, 484 \(1990\)](#).

We have, therefore, “caution[ed] prosecuting attorneys that derogatory name-calling will not be condoned[,]” and we have “admonish[ed] prosecutors to be circumspect in their zealous efforts to win convictions.” [State v. Williams, 113 N.J. 393, 456 \(1988\)](#).



3. Character of the victim

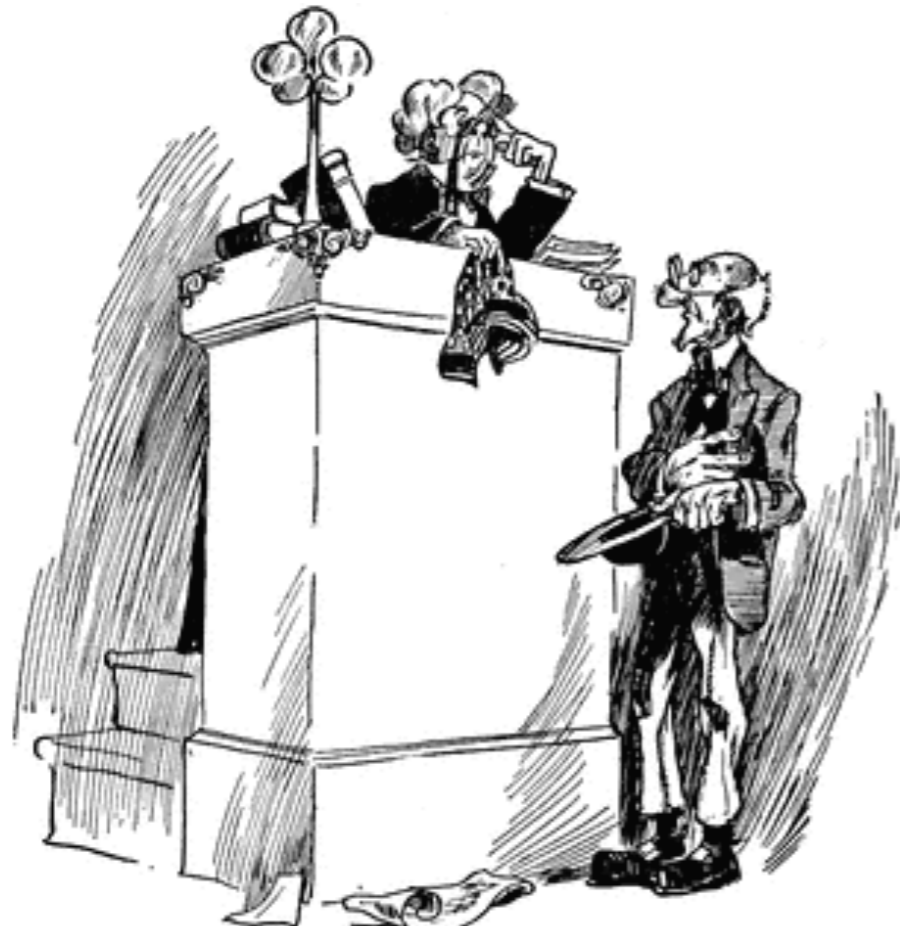
“Beverly Mitchell had so much to live for. Bright, beautiful, educated, religious, a member of her church choir. Beverly taught school in the Trenton school system. She taught special education. She was working part-time as a receptionist at the Bellevue Care Center to earn some extra money. You see, Beverly was due to be married in 1983. That very day, December 30, 1982, Beverly and her mother spent the day before Beverly went to work at the Bellevue Care Center, they spent the day looking for an apartment, an apartment that Beverly and her husband-to-be would share when Beverly started her new life. Beverly looked forward to 1983 with such joy, such hope, such promise. But it was not to be. The defendant, James Edward Williams, changed all of that. He changed it brutally, savagely, permanently. In a few moments of unspeakable horror, the defendant destroyed all of Beverly's dreams. In a few moments of unimaginable terror, the defendant destroyed all of Beverly's plans. In those few moments of a living nightmare, the defendant destroyed all of that joy, all that hope, all that promise. In those few moments, he destroyed Beverly Mitchell. She would never live to see her wedding day.”

State v. Williams, 113 N.J. 393, 448 (1988).



The passage quoted at length above contains nothing that would aid the jury in determining the defendant's guilt or innocence. Rather, the inflammatory statements could likely result not only in unduly prejudicing the jury against defendant but also in confusing it over whether its deliberations should be influenced by the sterling character of the victim. There is no place in a capital case for such confusion and prejudice. The prosecutor's remarks were clearly improper and should have been stricken from the record and the jury properly instructed to disregard them.

State v. Williams, 113 N.J. 393, 452 (1988).



4. Disparaging counsel or the defense

The prosecutor may not “characterize the defense attorney and the defense [in inflammatory terms such] as outrageous, remarkable, absolutely preposterous and absolutely outrageous.” [State v. Acker, 265 N.J.Super. 351, 356 \(App.Div. 1993\)](#),

A prosecutor is not permitted to cast unjustified aspersions' on defense counsel or the defense [State v. Lockett, 249 N.J.Super. 428, 434 \(App.Div. 1991\)](#).

Likewise, we find the prosecutor's comments suggesting that defense counsel's closing arguments were “lawyer talk,” and that defense counsel hoped that one or more jurors had “a bad taste in [their] mouth towards officers” to be improper. “A prosecutor is not permitted to cast unjustified aspersions” on defense counsel or the defense. Defense counsel should not be subjected to disparaging remarks for simply doing his or her job. [State v. Frost, 158 N.J. 76, 86 \(1999\)](#).



5. Other misconduct

a.) The “invited response” doctrine



At the United States Supreme Court's urging to examine alleging improper statements in the context of the trial as a whole, courts have employed the “invited response” rule, which maintains that they must look not only at the impact of the prosecutor's remark but also at defense counsel's remarks. The Court has stated that “the import of the evaluation has been that if the prosecutor's remarks were invited, and did no more than respond substantially in order to right the scales” as tipped by the defense counsel's statements, such remarks would not unfairly prejudice the defendant. U.S. v. Young, 470 US 1, 13-14 (1985).

In [State v. Purnell, 126 NJ 518 (1992)], the New Jersey Supreme Court reasonably applied the “invited response” rule in concluding that the prosecutor's comments about the jury having to find all of the state's witnesses to be liars did not constitute misconduct in light of the defense attorney's repeated assault on the truthfulness of the state's witnesses. Thus, this Court cannot and will not disturb its holding. Purnell v. Hendricks, 2000 WL 1523144 (D. NJ)

b.) Comments on issues not reflected in the evidence.

In reviewing the prosecutor's remarks in the context of his summation as a whole, we are convinced that these remarks did have the capacity to unfairly influence the jury and deprive defendant of a fair trial. The prosecutor repeatedly referred to defendant as “drunk” or “blotto” when the evidence did not support the inference that defendant met the legal standard for intoxication. Nor was there any evidence in the record from which the jurors could answer the prosecutor's question “[w]hat does cold do to smell?” That question called for speculation on the part of the jurors. Moreover, we are particularly offended by the prosecutor's comment: “he's closing in on the kill.” There was no evidence whatsoever that defendant acted intentionally or that he was in any way focused on hitting the victims, as this remark suggests. Indeed, the prosecutor's remarks would, by themselves, have led to reversible error in this case. *State v. Atwater*, 400 N.J. Super. 319, 337 (App. Div. 2008).



Part III – Sample summation – State v. Harris, 156 N.J. 122 (1998)



Summation by State of New Jersey in guilt phase of trial.

Part IV – Sanctions for professional misconduct

This Court has repeatedly expressed concern for prosecutorial propriety. We have said time and again that ‘because the prosecutor represents the government and people of the State, it is reasonable to say that jurors have confidence that he will fairly fulfill his duty to see that justice is done whether by conviction of the guilty or acquittal of the innocent.’ His comments during opening and closing carry the full authority of the State. Hence, we cannot sit idly by and condone prosecutorial excesses. State v. Spano, 64 NJ 566, 568 (1974)

There is now a plethora of cases where prosecutors have been admonished. See E.g., [State v. Siciliano, 21 N.J. 249, 262-263, 121 A.2d 490 \(1956\)](#); [State v. D'Ippolito, 9 N.J. 540, 549, 117 A.2d 592 \(1955\)](#); [State v. Bogen, 13 N.J. 137, 139, 98 A.2d 295 \(1953\)](#). Improper comments are fast becoming too prevalent, thereby vitiating defendant's right to a fair trial.

Henceforth, an expression of displeasure may not suffice. Further and more severe action may be necessary. State v. Spano, 64 NJ 566, 568 (1974)

Again, we caution prosecuting attorneys that derogatory name-calling will not be condoned. Mindful of the rhetorical excesses that invariably attend litigation, we nonetheless strongly admonish prosecutors to be circumspect in their zealous efforts to win convictions. Although our courts on numerous occasions have noted with displeasure prosecutorial excesses, it is evident that these expressions of dissatisfaction have failed to eliminate improper conduct that results in constitutional deprivation or violates established notions of fair play. As this Court cautioned in *State v. Spano*, we are prepared to take more severe action as required to ensure that capital trials are conducted without resort to improper remarks and questionable tactics by the State's prosecuting attorneys. [State v. Williams, 113 N.J. 393, 456 \(1988\)](#).

Today we do not adopt a *per se* rule that requires reversal of every conviction whenever there is evidence of egregious prosecutorial misconduct during trial. We stress, nonetheless, “that prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expressions of personal or official opinion as to the guilt of the defendant, or [otherwise engage] in collateral improprieties of any type, lest they imperil otherwise sound convictions.” They also risk having the matter referred to the appropriate district ethics committee.



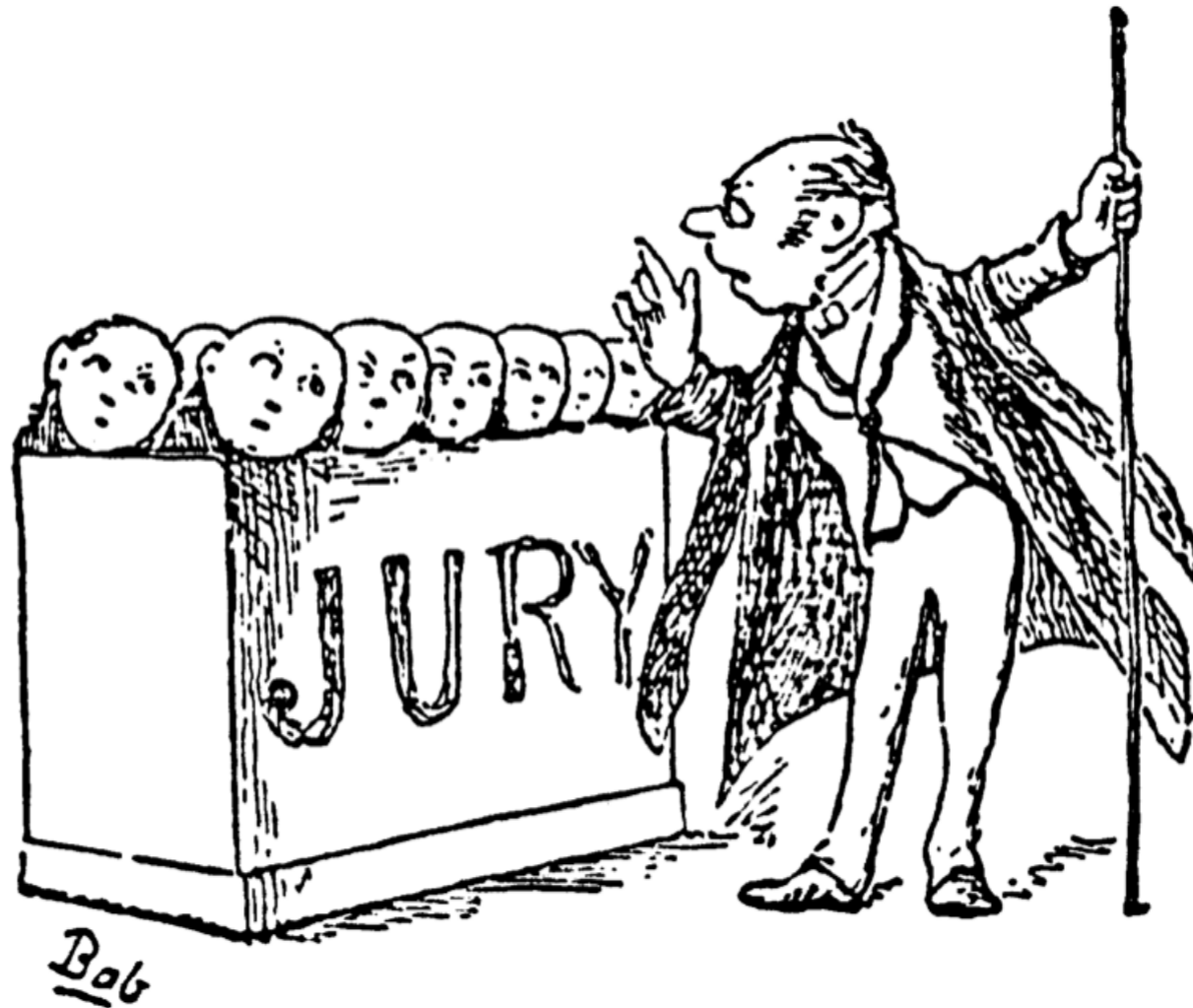
Although we do not establish a *per se* rule, a reversal is required in this case. The critical issue was credibility, and the prosecutor improperly impugned the credibility of defendants' version of the facts, thereby interfering with the jury's right to make the credibility determination. Consequently, we are satisfied that the prosecutor's misconduct had the clear capacity to have led to an unjust verdict

In view of the egregious prosecutorial misconduct that occurred in this case, we are compelled to consider what if any action should be taken against the trial prosecutor *personally* to discourage such blatant misconduct in the future. The Appellate Division referred this matter to the Attorney General who, as the chief law enforcement officer of the State, has supervisory powers over prosecutors. The Attorney General wrote the assistant prosecutor a letter of reprimand. Because this was the young assistant prosecutor's first jury trial, and because he had left the Essex County Prosecutor's Office, that letter was a sufficient personal sanction in this case. Again, we remind prosecutors that they have “a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system.” [State v. Frost](#), 158 N.J. 76, 88-89 (1999).

See also [State v. Ramseur](#), 106 N.J. 123, 323-34 (1987) and [State v. Watson](#), 224 N.J.Super. 354, 363 (App. Div. 1988) (stating possible violations of special ethical rules governing prosecutors may be referred to appropriate district ethics committee for disciplinary action)

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