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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 24

The People &c.,
Appellant,

v.

Ronald Moye,
Respondent.

Mark Dwyer, for appellant.
Anthony L. Ricco, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

An attorney may not "mak[e] himself an unsworn witness"
by "supporting his case by his own" or anyone else's "veracity
and position" (People v Lovello, 1 NY2d 436, 439 [1956]). While

we do not fault the prosecutor for remarks made at sidebar, in his summation he concededly became an unsworn witness by "vouch[ing] for the witness with the most favorable testimony for the prosecution by reference to his own pretrial conduct . . . and credibility by virtue of his position in the District Attorney's office" (People v Moye, 52 AD3d 1, 8 [1st Dept 2008]). We agree with the majority below that the prosecutor's vouching remarks in summation may not be excused as fair response to defense provocation. Further, they were prejudicial to defendant, and, in this case, the trial court's limiting instruction failed to eliminate the prejudicial effect.

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Order affirmed, in a memorandum. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

Decided February 19, 2009