

May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Franchesca Basso, State Bar No. 4492708.

To the Grievance Committee,

We ask the Grievance Committee to investigate and discipline Franchesca Basso¹ for her prosecutorial misconduct in *People v. Baez*. In *Baez*, the Appellate Division found that Basso made improper bolstering remarks in opening and summation, and elicited bolstering testimony.² The trial transcript also reveals that Basso violated the trial judge's explicit ruling prohibiting her from commenting on, or eliciting, bolstering testimony.³

Basso'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.⁴ 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.⁵ The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.⁶ There are numerous court decisions

¹ Franchesca Basso, State Bar No. 4492708, Queens District Attorney's Office, 12501 Queens Blvd., Kew Gardens, NY, 11415. Phone: (718) 286-6274. Email: fbasso@queensda.org. We do not have personal knowledge of any of the facts or circumstances of Basso or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

² Exhibit A, *People v. Baez*, 172 A.D.3d 893, 894 (2d Dep't 2019). Available at: https://www.nycourts.gov/reporter/3dseries/2019/2019_03611.htm.

³ Trial Transcript, *People v. Baez*, Ind. No. 2176/2012 (Queens Sup. Ct. October 2013).

⁴ *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>.

⁵ 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).

⁶ *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?>

finding that QDAO prosecutors acted improperly—a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.⁷ Basso’s misconduct falls within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Just as prosecutors hold individuals accountable for crimes, so should prosecutors be held accountable for their misconduct. Despite the findings of misconduct noted in this grievance, as of the writing of this grievance, the New York Attorney Detail Report lists “Disciplinary History: No record of public discipline” for Basso.⁸

We urge the Grievance Committee to suspend Basso from the practice of law for at least two years.

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

[http://wowza.nycourts.gov/vod/wowzapl原因er.php?source=ad2&video=VGA.1521208616.External_\(Public\).mp4](http://wowza.nycourts.gov/vod/wowzapl原因er.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](http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1520949280.External_(Public).mp4) or [http://wowza.nycourts.gov/vod/wowzapl原因er.php?source=ad2&video=VGA.1520949280.External_\(Public\).mp4](http://wowza.nycourts.gov/vod/wowzapl原因er.php?source=ad2&video=VGA.1520949280.External_(Public).mp4).

⁷ Amended Complaint, *Julio Negron v. The City of New York et al.*, No.18-cv-6645 (DG) (RLM) (filed March 10, 2021).

⁸ See *Attorney Detail Report*, Attorney Online Services -- Search, New York Unified Court System, available at <https://iapps.courts.state.ny.us/attorneyservices>.

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

Departmental 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 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”¹⁷ and are not permitted to make arguments that rely on facts that are not in evidence.¹⁸ Prosecutors are not permitted to make prejudicial or misleading arguments, a practice some call a “cardinal sin.”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’

responsibility--determining facts relevant to guilt or innocence.”) (citation omitted); *People v. Levan*, 295 N.Y. 26, 36 (1945).

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).

sympathies or fears;²² shifting the burden from the prosecution to the defense;²³ and denigrating the defense, defense counsel, or the defendant.²⁴ Engaging in these prejudicial forms of arguments is improper and can violate the accused’s 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 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 repeatedly remind prosecutors 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

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).

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).

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

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 during oral argument, “It’s obvious that the prosecutor who tried this case was saying things for the purpose of winning it.”³¹

For this 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...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 during 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

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

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.

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

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train 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

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

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).

between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.⁴²

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 Kurtzrock⁴⁷—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 Basso will continue unabated and undeterred.

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 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 *Matter of 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).

2. The Appellate Division Found that Basso Improperly Elicited Bolstering Testimony in *People v. Baez*; the Transcript Suggests She Also Disobeyed the Court’s Ruling.

Basso prosecuted Baez for a robbery and related charges, stemming from the robbery of a beauty salon owned by complainant Salcedo.⁴⁸ Within hours of the robbery Salcedo went to the precinct and identified Baez in a photo array shown to her by the police.⁴⁹ Three months later, Salcedo identified Baez in a lineup.⁵⁰ A jury convicted Baez after a trial.⁵¹

To understand the full impropriety of Basso’s bolstering misconduct necessitates surveying some basic evidentiary rules—“Evidence 101,” or the bread-and-butter of a prosecutor like Basso. The term “bolstering” means the presentation of evidence at trial of a prior consistent statement—that is, a testifying witness’s prior statement that is in sum and substance the same as that witness’s testimony at trial.⁵² Bolstering evidence is generally excluded as hearsay, and thus inadmissible at trial.⁵³ However, the Criminal Procedure Law in New York created a narrow exception: a witness can testify at trial to a prior, out-of-court identification only when the witness is testifying about *that witness’s own* prior identification and only in some instances.⁵⁴ There is no hearsay exception, and thus it is completely impermissible, for a witness to testify (or imply) that *another person* identified the defendant on a previous occasion.⁵⁵

At trial, Salcedo’s first identification of Baez (on the night of the robbery) from the photo array would have been an important fact for Basso’s case; it demonstrated that immediately after the crime—not three months later, as in the lineup—the complainant knew and recognized the person who had robbed her.

However, at the time of the trial, the law dictated that a photo array identification (and testimony about it) was not admissible at trial.⁵⁶ In other words, Salcedo would not be able to testify that she had identified Baez as the perpetrator within hours of the crime. She would only be able to testify about the lineup identification, three months later.

⁴⁸ Brief for Appellant at 5, *People v. Baez*, (2d Dep’t); Ex. A, *Baez*, 172 A.D.3d at 893.

⁴⁹ Br. for Appellant at 5.

⁵⁰ *Id.*

⁵¹ Ex. A, *Baez*, 172 A.D.3d at 893. The decision does not name Basso, but the trial transcript names the trial prosecutor as Ms. Fernandez. Franchesca Fernandez appears to have taken the last name Basso upon marriage. See <http://www.newyorklawyerindex.com/attorney/Franchesca%20Fernandez-69927964> (listing Franchesca Fernandez’s state bar number, which is the same one as Franchesca Basso’s); <https://registry.theknot.com/franchesca-fernandez-hugo-basso-january-2015-ny/8521852> (wedding registry for Franchesca Fernandez and Hugo Basso); Tr. Transcript (naming trial prosecutor as Ms. Fernandez).

⁵² *People v. Smith*, 22 N.Y.3d 462, 465 (2013).

⁵³ *Id.*

⁵⁴ C.P.L. § 60.30; *Smith*, 22 N.Y.3d at 466. At the time of the trial, the law dictated that a photo array identification was not admissible at trial, as discussed below.

⁵⁵ *Id.* (“Testimony by one witness (e.g., a police officer) to a previous identification of the defendant by another witness (e.g., a victim) is inadmissible.”)

⁵⁶ Br. for Appellant at 66 n.8; C.P.L. § 60.30 (McKinney Supplementary Practice Commentaries). The statute was amended in 2017 to permit such evidence at trial.

It is in this context that Basso decided she needed to bolster. If Salcedo could not testify about the identification on the night of the crime, maybe such identification could be implied, using a different witness—for example the officer who conducted the night-of identification.

The Appellate Division found that Basso elicited “improper bolstering” testimony and made opening and summation remarks that were “improper.”⁵⁷ Although the court declined to reverse the conviction, finding that Basso’s misconduct was “harmless,”⁵⁸ a review of the appellate brief and the trial transcript reveals that in the process of bolstering her witness, Basso committed further misconduct by repeatedly violating the court’s ruling in an attempt “to get in through the back door what [she] could not get in the front door.”⁵⁹

In her opening statement, Basso set up the bolstering inference: that Salcedo had identified Baez on the eve of the crime. Basso told the jury that the police suspected Baez within hours of the crime.⁶⁰ Combined with what the jury would soon hear from her witness, and later from Basso, the Appellate Division found this statement had “implicitly bolstered the complainant’s identification” of Baez.⁶¹

The trial judge recognized this bolstering attempt:

[The court:] Let me raise something in light of your opening statement... that might be somehow objectionable. I want to nip it in the bud. You said to the jury that [they] are going to hear that within hours of the crime that [the police] had a suspect. And is that going to have something to do with this officer’s testimony.

[Basso:] [The Officer is] just going to testify that there is an investigative card that was issued for the defendant.

[The court:] It [the investigative card] has nothing to do with the complainant going down to the station house and looking [i.e., making an identification].

[Basso:] No. [The officer] knows not to testify about that.⁶²

In other words, Basso assured the judge that the officer will not testify about how the witness identified Baez.

Nevertheless, when the officer testified on direct, Basso elicited testimony implying that the Salcedo had identified Baez:

⁵⁷ Ex. A, *Baez*, 172 A.D.3d at 894.

⁵⁸ *Id.*

⁵⁹ Tr. Transcript at 389:24-390:7. *See also* Br. for Appellant at 21-22.

⁶⁰ Tr. Transcript at 316:8-11 (“You will hear that as of that same evening less than 2 hours later or maybe a few minutes over 2 hours the New York City Police Department had a suspect. This defendant Jose Baez.”). *See also* Br. for Appellant at 11, 64.

⁶¹ *See* Ex. A, *Baez*, 172 A.D.3d at 894 (referring to both opening and closing remarks challenged by Baez).

⁶² Tr. Transcript at 379:25-380:13. *See also* Br. for Appellant at 21.

[Basso:] Did there come a time that you returned to the 104 Precinct [on the night of the crime]?

[Officer:] Yes.

[Basso:] Did any of the women of the 3 women that you interviewed go to the 104 Precinct?

[Officer:] Yes the owner went, [Salcedo]....

[Basso:] Did you drive [Salcedo] to the precinct or did she go by herself?

[Officer:] I believe that she came on her own.

[Basso:] Now, at this point on the evening of the December 13 of 2011 that you had a suspect in connection with the robbery that occurred at that salon?

[Officer:] Yes.

[Basso:] And who was that suspect.⁶³

Through this testimony, Basso committed misconduct. First, she elicited bolstering testimony—the officer’s testimony implied the inadmissible evidence that Salcedo had identified Baez that same day—over objection. The court sustained the objection, stating:

There was testimony from the complainant that she was at the precinct immediately or within an hour or two after the incident in question. Now you are asking this officer whether he had a suspect in mind at that point. I think now the inference I see can be drawn that *you are trying to get in through the back door what you could not get in the front door* that something happened at that precinct.⁶⁴

Second, Basso committed further misconduct by violating the judge’s ruling and making misrepresentations to the court. In the earlier exchange, Basso assured the trial court that she would not elicit this exact bolstering testimony, and that her officer knew not to testify in this way. And yet the officer did testify to it—prompted by Basso’s questioning. Basso thus both violated the judge’s ruling and misrepresented her intentions to the court. While the trial court, Baez’s appellate brief, and the Appellate Division fail to address this misconduct, it is clear from the transcript.

To put a stop to any further bolstering, the judge directed Basso not to have the officer testify about issuing an investigative card for Baez on the night that Salcedo came to the precinct (which would imply an identification had occurred):

⁶³ Tr. Transcript at 386:24-387:18. *See also* Br. for Appellant at 21.

⁶⁴ Tr. Transcript at 389:24-390:7 (emphasis added); *See also* Br. for Appellant at 21-22.

[Basso:] ... Am I permitted to ask [the officer] regarding the issuance of the investigative card that evening.

[The court:] You are going to ask him did you—what is an investigative card. Did you create one. And once again there is an inference that he had information [an identification] which led him to it create one... So I am not going to allow that question either.⁶⁵

But right after this exchange, Basso again disobeyed the court's ruling:

[Basso:] [Officer,] are you familiar with the term investigative card.

[Officer:] Yes.

[Basso:] What is that?

[Officer:] That's—it's basically like a warrant that you issue for somebody.

[Basso:] And in connection with your investigation of the robbery... did you ever issue an investigative card?

[Officer:] Yes.

[Basso:] And for whom.

[Officer:] Jose Baez.

[Basso:] ... What was the next step with respect to your investigation or what if any other steps did you take?

[Officer:] I also made wanted flyers of the defendant. And posted them up throughout the precinct.⁶⁶

The jury, having just heard that the officer spoke with Salcedo on the night of the robbery, could only have inferred that the officer issued the investigative card (and put up the flyers) because Salcedo had identified Baez.⁶⁷ At this point, defense counsel objected, and the court sustained the objection for the “same basis” as before.⁶⁸

But Basso ignored the court's ruling and violated it yet again:

[Basso:] Now you testified that there was an investigative card issued for the defendant. What if any efforts did you make to attempt to locate the defendant?

⁶⁵ Tr. Transcript at 390:13-21. *See also* Br. for Appellant at 22.

⁶⁶ *Id.* at 391:12-392:3. *See also* Br. for Appellant at 22.

⁶⁷ Br. for Appellant at 67.

⁶⁸ Tr. Transcript at 392:4-11. *See also* Br. for Appellant at 22.

[Officer:] I did computer searches for addresses that were listed for previous -- ⁶⁹

The judge sustained an objection and warned Basso, “Be careful of your line of questioning.”⁷⁰ After disobeying the judge’s ruling multiple times—after the damage had been done—Basso finally relented.

However, during summation, Basso took up her bolstering strategy yet again by resurrecting the officer’s stricken testimony:

But again do not forget that both [Salcedo] and [the officer] testified that they had a conversation with one another. [Salcedo] told you that she gave [the officer] a description of the individual who robbed her. [The officer] said that he received that description and based on the information that he received from [Salcedo] that night he had a suspect. This defendant. *Based on the information that he received from [Salcedo] that night he made an arrest.* Yes, it was 3 months later. But that is because he was trying to find this defendant [in the meantime].⁷¹

With these words, Basso implied that Salcedo identified Baez on the night of the robbery, in order to bolster Salcedo’s identification of Baez at trial, contrary to the court’s order.

3. The Grievance Committee Must Discipline Basso 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.”⁷² Professional misconduct occurs with a “violation of any of the Rules of Professional Conduct.”⁷³ Grievance Committees are “committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession.”⁷⁴

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.”⁷⁵

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

⁶⁹ Tr. Transcript at 392:20-24. *See also* Br. for Appellant at 22.

⁷⁰ *Id.* at 393:1-3. *See also* Br. for Appellant at 22.

⁷¹ *Id.* at 605:23-606:7 (emphasis added). *See also* Br. for Appellant at 68.

⁷² *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>.

⁷³ 22 N.Y.C.R.R. Part 1240.

⁷⁴ *How to File a Complaint*, Attorney Grievance Committee — First Department.

⁷⁵ *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quotation marks omitted).

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.”⁷⁶

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.”⁷⁷ 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.⁷⁸ The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.⁷⁹ 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. Basso’s Misconduct Violated the Rules Professional of Conduct.

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.⁸⁰ 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.’*”⁸¹

Basso’s misconduct in *Baez* violated multiple professional rules. 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.⁸² The Court of Appeals has stated that a prosecutor’s improper summation remarks amount to prosecutorial misconduct.⁸³ A prosecutor’s summation misconduct violates Rules 8.4(d) and 8.4(h) by prejudicing the administration of justice and reflecting adversely on the prosecutor’s fitness as a lawyer.⁸⁴

Basso prejudiced the administration of justice repeatedly when she repeatedly disobeyed the judge’s explicit ruling about eliciting and remarking upon inadmissible testimony. Deliberately prejudicing a jury and repeatedly violating an explicit judicial ruling do not befit an attorney, especially a prosecutor.

⁷⁶ *Kurtzrock*, 192 A.D.3d 197 (2d Dep’t 2020).

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

⁷⁸ 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/.

⁷⁹ 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

⁸⁰ See, e.g., *Matter of Capoccia*, 59 N.Y.2d 549, 453 N.E.2d 497 (1983).

⁸¹ *Matter of Scudieri*, 174 A.D.3d 168, 173 (2019) (emphasis added, quoting *Matter of Seiffert*, 65 N.Y.2d 278, 280 [1985], quoting *Matter of Capoccia*, 59 N.Y.2d 549, 553 [1983]).

⁸² 22 N.Y.C.R.R. Part 1200, Rule 8.4.

⁸³ *Wright*, 25 N.Y.3d at 780.

⁸⁴ 22 N.Y.C.R.R. Part 1200, Rule 8.4(d), (h); *Rain*, 162 A.D.3d at 1459.

B. For Her Misconduct, Basso 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.”⁸⁵ The ABA’s Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline “exempt from all statutes of limitations.”⁸⁶

In considering discipline, the Appellate Division has considered the role of prosecutor as a “substantial factor in aggravation.”⁸⁷ 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.”⁸⁸ Similarly, extensive prosecutorial experience weights towards an aggravated sanction.⁸⁹

Though the ethical rules may be obscure to the general public, attorneys are required to know and follow them. In 2011, the District Attorneys Association of the State of New York mailed an ethical guide to every prosecutor in the state warning prosecutors to comply with the ethical rules and even specifically quoting and explaining Rule 8.4—the rule that Basso violated.⁹⁰

Basso’s experience as a prosecutor further supports her suspension. Basso was a seasoned prosecutor when she violated the professional rules in *Baez*. A prosecutor since 2006,⁹¹ Basso had about 6 years of prosecutorial experience when she tried *Baez* in 2013. As discussed above, prosecutorial misconduct—especially in summation—has been a regular occurrence in Queens courts. Indeed, Basso’s misconduct fits seamlessly with the harsh criticisms voiced by the Appellate Division judges (as quoted extensively above) about the Queens office’s opening and summation practices.

By suspending Basso, the Grievance Committee will begin to undo the damage caused by the prosecutorial executive brass’s dereliction of its duty to guard against misconduct. For

⁸⁵ 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/.

⁸⁶ *Id.*

⁸⁷ *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.”).

⁸⁸ *Kurtzrock*, 192 A.D.3d 197.

⁸⁹ *Id.* *See also Rain*, 162 A.D.3d at 1461 (prosecutor’s experience an aggravating factor).

⁹⁰ “*The Right Thing*” - *Ethical Guidelines for Prosecutors*, District Attorneys Association of the State of New York (August 2012) <http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf>. Note that this is the 2012 version. The introductory letter states that in 2011, the Ethics Handbook was mailed to “every District Attorney and Assistant District Attorney in the state.” It is unclear if this version is the exact same as the 2011 version that was mailed.

⁹¹ *Queens Gazette*, 22 *New Assistant DAs Sworn In As Class Of 2006* (September 13, 2006), <https://www.qgazette.com/articles/22-new-assistant-das-sworn-in-as-class-of-2006/> (naming Franchesca Fernandez as one of the new ADAs sworn in).

decades, prosecution executives have contributed to the spread of prosecutorial misconduct by ignoring it or rewarding it with promotion, rather than discipline. Queens prosecutors have engaged in a decades-long, publicly-documented history of prosecutorial misconduct, yet many of those committing misconduct have risen to hold supervisory, powerful positions in the Office.⁹² Perplexingly, executives have been disregarding misconduct findings by trial and appellate courts—not “mere” allegations made by the defense bar or the “liberal media”—thus demonstrating that even the institutional condemnations have failed to reverse the culture of impunity which engulfs prosecutorial offices.

This culture of impunity was on display in *Baez*. There is no other explanation for why a prosecutor would repeatedly violate an explicit order in front of the judge who issued it, in the face of sustained objections.

With no internal mechanisms of accountability in prosecutorial offices, the need for Grievance Committee to address prosecutorial misconduct is as urgent as ever. Only severe and public sanctions—in this case, suspension—will penetrate through the culture of impunity and hold the most powerful players in the criminal legal system accountable for their wrongdoings.

The Grievance Committee must suspend Basso.

Conclusion

Basso repeatedly violated a judge’s explicit ruling and committed opening, direct-examination, and summation misconduct. In doing so, she violated the legal professional rules. To our knowledge, Basso remains unsanctioned publicly or privately for her serious misconduct. Suspension is the only appropriate sanction for this serious misconduct.

As “officers of the court, all attorneys are obligated to maintain the highest ethical standards.”⁹³ 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.”⁹⁴ 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 Basso. As the comment to Rule 8.3 of the New York Rules of Professional Conduct

⁹² George Joseph, *Top Queens Prosecutors Broke The Rules, Then Got Promoted. Will The New DA Keep Them In Charge?*, Gothamist (January 9, 2020), <https://gothamist.com/news/top-queens-prosecutors-broke-rules-got-promoted>; Troy Closson, *Queens Prosecutors Long Overlooked Misconduct. Can a New D.A. Do Better?*, New York Times (January 27, 2021), <https://www.nytimes.com/2021/01/27/nyregion/melinda-katz-queens.html>.

⁹³ NYSBA Committee on Professional Discipline, Guide to Attorney Discipline, available at: <https://nysba.org/public-resources/guide-to-attorney-discipline/>

⁹⁴ *Id.*

reminds us, “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”⁹⁵ 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 Basso’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.⁹⁶
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 Basso and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

⁹⁵ Rule 8.3, Comment [1].

⁹⁶ 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

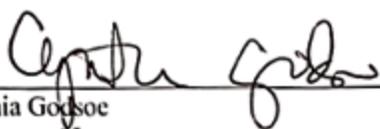
(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(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.



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