Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Kenneth Arthur Rigby, State Bar No. 2345189.

To the Grievance Committee,

We write to complain about attorney Kenneth Rigby,[1] whose misconduct contributed to the wrongful conviction of Sami Leka in a murder trial.[2] Leka was imprisoned for over 11.5 years before finally being released[3] and eventually settled his civil rights lawsuit for $3.1 million.[4]

The United States Court of Appeals for the Second Circuit granted Leka *habeas* relief and reversed his conviction because of Rigby's *Brady* violation.[5] Rigby had withheld the identity of an exculpatory eyewitness—Garcia, a police officer—until the eve of trial, and did not disclose Garcia's account of what had transpired.[6] The Second Circuit recognized that the witness' testimony would have had "seismic [favorable] impact" at trial, because it "cast doubt," and even rendered "untenable," the two eyewitness accounts that Rigby presented at trial.[7]

While the Second Circuit's reversal rested on Rigby's *Brady* violation, Leka raised other instances of potential prosecutorial misconduct and are worthy of investigation. Rigby seemingly delayed disclosure—until days before trial—of two *other* eyewitness accounts that were favorable to the defense.[8] Moreover, Rigby appears to have misrepresented Officer Garcia's account, telling the defense that the officer could identify Leka, when in fact no identification procedure took

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[1] Kenneth Arthur Rigby, State Bar No. 2345189. Law Offices of Kenneth Arthur Rigby, 15 Maiden Lane, Suite 803, New York, New York 10038. Email: karigby@karigbylaw.com. These writers do not have personal knowledge of any of the facts or circumstances of Rigby or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[2] Exhibit A, *Leka v Portuondo*, 257 F3d 89 (2d Cir 2001). Available at: https://casetext.com/case/leka-v-portuondo.

[3] Complaint in *Leka v City of New York*, US Dist Ct, SD NY, Nov. 5, 2004, case No. 04 CV 8784 at 18 (hereafter "Civil Complaint").

[4] *NYPD Paid Nearly $1 Billion To Settle Lawsuits*, CBS New York, October 14, 2020.

[5] *Leka*, 257 F3d at 107.

[6] *Id.* at 94-95, 99 (exculpatory eyewitness's account was litigated in the C.P.L. § 440 proceeding as newly discovered evidence).

[7] *Id.* at 106-07.

[8] *See id.* at 93-103.

place.[9] Rigby claimed to the court and the defense that he would call Officer Garcia to testify at trial, but never called him.[10]

Rigby is still an active member of the New York State Bar. Although the court's finding of Rigby's misconduct occurred in 2001, as of the writing of this grievance, the New York Attorney Detail Report still lists "Disciplinary History: No record of public discipline" for Rigby.[11]

Because of this serious misconduct, the Grievance Committee should seek disbarment for Rigby.

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.[12] When any attorney errs, it can cause harm, typically to an individual person. But a prosecutor's misconduct can not only destroy a person's life, and that of their family, but also derail the legal system's promises of fairness and equality for all. When state actors harness the punitive power of the state in a manner that violates the state's own rules, it sends the message that power—not justice—is the driving force behind legal actions. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[13]

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."[14] 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."[15]

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[9] *Id.* at 99 n 3.

[10] *Id.*

[11] *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Kenneth Rigby, click on Name hyperlink].

[12] *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice."); *see also* ABA Criminal Justice Standards: Prosecution Function 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.").

[13] *Rain*, 162 AD3d at 1462.

[14] *Berger v United States,* 295 US 78, 88 (1935) (emphasis added); *see also People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 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."); *People v Levan*, 295 NY 26, 36 (1945).

[15] Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (Apr. 3, 2013), https://tinyurl.com/t2ryucec.

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[16] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees otherwise "almost never took serious action against prosecutors."[17] Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.[18] 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.[19] 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."[20]

B. Prosecutors are Required to Provide Exculpatory Evidence to the Defense under the *Brady* Doctrine, State Discovery Laws, and Rule of Professional Conduct 3.8, Yet Often Fail to Comply with these Obligations.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[21] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[22] Consequently, a conviction must be overturned when the suppressed evidence is "material"[23] and where there is a

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[16] *Id.*

[17] *Id.*

[18] *Id.*; *see also In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005) (holding, following a Grievance Committee disciplinary proceeding, that a prosecutor's misconduct warranted a three-year suspension from the practice of law).

[19] *See* Sapien & Hernandez.

[20] Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), https://tinyurl.com/4ntvsv85.

[21] *See generally Brady v Maryland*, 373 US 83 (1963); *Giglio v United States*, 405 US 150 (1972).

[22] *Brady*, 373 US at 87.

[23] *United States v Bagley*, 473 US 667, 669, 676 (1984); *Kyles v Whitley*, 514 US 419, 433 (1995). The U.S. Supreme Court has not addressed, and courts and scholars disagree, whether the appellate-level "materiality" standard applies to a prosecutor's pre-trial disclosure burden. *See, e.g.*, *Boyd v United States*, 908 A2d 39, 60 (D.C. 2006) (the "Supreme Court in *Strickler* contemplated the existence of a broad 'duty of disclosure,' but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. *The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.*") (emphasis added). This appears to coincide with Justice Kennedy's understanding, as summed up in a 2012 oral argument: "I think you misspoke when you [were asked] what is the test for when *Brady* material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." Transcript of Oral Argument at 49, *Smith v Cain*, 565 US 73 (2012) (No. 10-8145), https://tinyurl.com/dmmu7b44; *see also* Janet C. Hoeffel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 NYU Rev L & Soc Change 467, 473 (2015) ("[B]y the very nature of appellate

"reasonable probability" that the undisclosed evidence would have changed the result.[24] New York places an even greater burden on prosecutors, as it uses a less stringent standard for *Brady* reversals than the U.S. Supreme Court.[25] In New York, if the defense requested the evidence and the prosecution still failed to provide it, the conviction must be reversed if there is a "reasonable possibility"—less than the "reasonable probability" required under *United States v. Bagley*—that the failure to disclose contributed to the verdict.[26]

In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads, present evidence that the prosecution's case is inaccurate, present evidence that the testimony of the prosecution's witnesses is inaccurate or false, present evidence of the accused's innocence to the jury, and ultimately, to protect the accused from a wrongful conviction. It is unsurprising, then, that suppression of *Brady* evidence has played a role in over 44 percent of known wrongful convictions and 61 percent of known wrongful convictions for murder.[27]

A prosecutor has an affirmative duty to search for favorable and material evidence in their own records and those of related agencies—and to turn these over to the defense.[28] Under federal law, a prosecutor who commits an intentional *Brady* violation could seemingly be charged with a felony.[29]

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform legislation, New York State's discovery statute required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.[30] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[31] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[32]

The prosecutor's obligation to provide helpful evidence to the defense is of such import that it is codified into its own subsection in New York Rule of Professional Conduct 3.8(b):

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and post-conviction review, the Court has not had to decide the proper standard for the prosecution's pretrial duty to disclose favorable evidence."). The ethical rules governing a prosecutor's pretrial disclosure obligations, however, do not include a materiality requirement.

[24] *Bagley*, 473 US 667.

[25] *People v Vilardi*, 76 NY2d 67 (1990).

[26] In the 1990 *Vilardi* case, the New York Court of Appeals emphasized the importance of "elemental fairness to the defendant and … concern that the prosecutor's office discharge its ethical and professional obligations." The Court maintained the New York rule that if the defense has requested the favorable evidence, the suppression of that evidence mandates reversal if there is just a "reasonable possibility" that the failure to disclose contributed to the verdict.

[27] National Registry of Exonerations, Government Misconduct and Convicting the Innocent at 81 (Sept. 1, 2020), https://tinyurl.com/yha56e4b.

[28] *See Kyles v Whitley*, 514 US 419, 432 (1995); *Strickler v Green,* 527 US 263, 280-281 (1999).

[29] 18 USC § 242.

[30] McKinney's Cons Laws of NY, CPL 240.20(1)(h) (repealed); *Doorley v Castro*, 160 AD3d 1381, 1383 (4th Dept 2018).

[31] McKinney's Cons Laws of NY, CPL 240.20 (repealed).

[32] CPL § 245.20(1)(k).

> A prosecutor . . . shall make timely disclosure…of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.[33]

Rule 3.8, which binds New York prosecutors, is broader than the *Brady* obligation in an important respect: the prosecutor must provide *all* evidence that tends to negate the guilt of the accused, not just *materially* exculpatory evidence.[34] That is, there is no requirement that disclosure of the evidence would have any probability of changing the result of the proceeding. As a consequence, a significant amount of conduct will violate Rule 3.8 but not the constitutional rule. Similarly, the Standards of the American Bar Association Standards extend beyond the *Brady* rule with respect to materiality, requiring the prosecutor to "diligently seek to identify" and disclose all mitigating, exculpatory and impeachment evidence "regardless of whether the prosecutor believes it is likely to change the result of the proceeding."[35]

Despite the significance of the *Brady* rule and Rule 3.8 in the criminal legal system, the New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence." The New York State Bar has acknowledged that "New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction."[36]

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and multiple prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[37] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[38] Because

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[33] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). This Rule was previously codified in New York's Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)). As is evident from the text of the rule (quoted above), Rule 3.8 only applies to evidence known to the prosecutor, unlike *Brady*, which applies to evidence in the possession of the entire prosecution team, including evidence in the possession of investigative agencies of which the prosecutor is unaware. *See, e.g., United States v. Agurs*, 427 U.S. 97, 110 (1976); *Kyles*, 514 US at 437.

[34] NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 (2016) ("While *Brady* has been held to require a prosecutor to disclose only 'material' evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation."); *see also*, ABA Comm on Ethics and Prof Responsibility Formal Op 09–454 (2009); *United States v. Gatto,* 316 F.Supp.3d 654, n 17 (2018); and *People v Waters*, 35 Misc 3d 855, 859-60 (Sup Ct, Bronx County 2012) (Rule 3.8(b) is "[i]ndependent of *Brady*").

[35] ABA Criminal Justice Standards: Prosecution Function Standard 3-5.4(c).

[36] NY State Bar Assn, *Report of the Task Force on Criminal Discovery* at 52 (Jan. 30, 2015), https://tinyurl.com/f78tjetx.

[37] *See, e.g.*, *Giglio v United States*, 405 US 150, 153-154 (1972); *Miller v Pate*, 386 US 1, 7 (1967).

[38] *See People v Waters*, 35 Misc 3d 855, 861 (Sup Ct, Bronx Cty 2012) (violation of due process when prosecutor "although not soliciting false evidence, allows it to go uncorrected when it appears" (quoting *Napue v. Illinois*, 360 US 264, 269 (1959)); *see also Napue*, 360 US at 271 (finding a due process

they are representatives of the state, not lawyers for an individual, prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[39]

D. 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.[40] 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.[41]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[42] 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.[43]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for

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violation when prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony)).

[39] *See, e.g.*, Daniel S. Medwed, Prosecution Complex: America's Race to Convict and its Impact on the Innocent, 80-81 (2012); *Connick v Thompson*, 563 US 51, 65-66 (2011); *see also* Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo J Legal Ethics 309, 316 (2001) ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.")

[40] *See, e.g.*, *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 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 NY2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[41] *Imbler,* 424 US at 429; *see also Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[42] *See* 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, 242–243 (2012).

[43] Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) https://tinyurl.com/rpxyadhb; *see also* Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), https://tinyurl.com/vjkfr2eh; 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 NC L Rev 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

misconduct, and if so, not very seriously."[44] 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.[46] "Prosecutors engage in misconduct because they know they can get away with it."[47]

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.[48] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[49] But even a short suspension like that received by Rain and Kurtzrock[50]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not being held accountable for their own misconduct. Absent strong, public discipline, misconduct like that of Rigby will continue unabated and undeterred.

2. Rigby Caused a Wrongful Conviction by Knowingly Withholding Exculpatory Evidence.

Two men shot at each other in the street and one died; Rigby prosecuted Leka for murder.[51] During the incident, a passenger in a car opened fire at the deceased.[52] Rigby's prosecution of Leka for that shooting centered on the testimony of two eyewitnesses, Torres and Modica.[53]

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[44] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

[45] *Id.* at 65 (citation omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

[46] Sapien & Hernandez.

[47] *Id.*

[48] *Rain*, 162 AD3d at 1462.

[49] *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

[50] 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 (Sept. 20, 2017), https://tinyurl.com/yhvmd43k; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), https://tinyurl.com/fp9yfs8x; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), https://tinyurl.com/52ar9tjx.

[51] *Leka*, 257 F3d at 91. The Second Circuit decision does not identify Rigby as the trial prosecutor who committed the misconduct. However, the prosecution's appellate brief identifies him by his last name, and Leka's civil complaint identifies him by his full name. *See* Exhibit B, Brief for Respondent-Appellee at *3, *Leka v Portuondo*, 257 F3d 89 (2d Cir 2001), available at 2001 WL 34090841; Civil Complaint at 14.

[52] *Leka*, 257 F3d at 91.

[53] *Id.* at 91-92.

Modica testified that as she walked by right before the shooting, she observed a white double-parked car with a passenger who stared at her and joked with the driver.[54] Modica and Torres passed the car, walking "at a slow pace" for approximately "five car lengths,"[55] when Modica heard shots and hid behind a parked car.[56] Modica identified the man who stared at her from the car, as she walked by, as Leka.[57]

Torres testified that while hiding, he lifted his head to see what was going on.[58] He first saw an extended arm shooting a gun from the front passenger window of a light colored car.[59] Lifting his head again, he saw a man standing in the street, shooting downwards.[60] Torres identified the man as Leka.[61]

Importantly, it was apparently undisputed that the deceased had also fired a gun.[62] On the basis of these testimonies, the jury convicted Leka of murder,[63] and the judge sentenced him to 20 years to life in prison.[64] After extensive post-conviction litigation, the Second Circuit granted Leka *habeas* relief and reversed his conviction. It did so because of Rigby's knowing withholding of *Brady* evidence.[65]

A. The Second Circuit Found that Rigby Failed to Disclose Evidence of an Exculpatory Eyewitness: A Police Officer.

Rigby withheld the exculpatory testimony of Police Officer Garcia—a key eyewitness with exculpatory testimony. According to Officer Garcia, he was in his apartment and looked through his window, expecting his friend's arrival.[66] He heard gunfire, and looked in that direction to see a light-colored car pull over in front of a man in the street, at which point more shots were fired.[67] Officer Garcia saw that the deceased "went down with a gun." [68] After running downstairs, Officer Garcia found the deceased lying face down on the floor, with a gun next to him.[69] Thus, if the shooting began when the white car pulled over, as per Officer Garcia, then it was "very unlikely"

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[54] *Id.*

[55] *Id.* at 92 (quotation in original).

[56] *Id.*

[57] *Id.* at 91.

[58] *Id.* at 92.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 106.

[63] *Id.* at 91.

[64] *Id.* at 95.

[65] *Id.* at 97.

[66] *Id.* at 92.

[67] *Id.*

[68] *Id.* at 106.

[69] *Id.* at 92-93.

that the shooter was the man sitting in the double-parked car whom Modica had identified as Leka.[70] Instead, Officer Garcia's testimony would have suggested that the shooter was in a car that had just pulled up, not the one that Modica had seen.[71] Similarly, if the deceased had pulled a gun and shot back—a fact that was not in dispute[72]—then it was "very unlikely" that the man that Torres saw standing and shooting downward was Leka, as opposed to the deceased himself.[73] As a consequence, the Second Circuit found that Officer Garcia's account was favorable to the defense.[74]

Indeed, Officer Garcia's testimony would have had a "seismic [favorable] impact" on the trial, leading the Second Circuit to recognize its materiality to Leka's defense.[75] Officer Garcia's account "render[ed] Torres' observations untenable," and "likewise cast doubt" on Modica's identification of Leka.[76] Moreover, these two identification were the only evidence tying Leka to the crime,[77] and the identifications themselves were highly suspect.[78] Finally, Officer Garcia would have been a reliable witness in the eyes of the jury: he was "trained and impartial," had a good vantage point above the incident, and "had reason to be on the lookout (for a visitor)."[79] His account was material.

But Rigby had withheld this information from the defense. About two years before trial, during plea negotiations, Rigby told the defense that a police officer had witnessed the shooting and could identify Leka as the shooter.[80] During the next two years, Rigby disclosed no further information regarding this presumably-central prosecution witness; he did not even disclose his name.[81]

Three business days before the start of the trial, during an identification pre-trial hearing, Rigby finally disclosed the name of this police officer: Officer Garcia.[82] That same day, for the first time,

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[70] *See id.* at 99.

[71] *See id.* at 93.

[72] *See id.* at 106.

[73] *Id.* at 106-07. Torres's affidavit, filed after the trial, stated that once he saw a photo of the deceased, he recognized him as the person he had seen shooting. Torres recanted his identification and blamed police pressure for it. Modica similarly filed an affidavit where she partially recanted her identification. *See id.* at 105-06.

[74] *Id.* at 99.

[75] *Id.* at 106.

[76] *Id.* at 106-07.

[77] *Id.* at 104.

[78] *Id.* at 104-06.

[79] *Id.* at 106.

[80] *Id.* at 93.

[81] *Id.* at 99.

[82] *Id.*

Rigby disclosed that Officer Garcia would not identify Leka.[83] He disclosed no further details regarding Officer Garcia's account of the incident.[84]

Based on this new evidence, the defense attempted to speak to Officer Garcia for the first time, just days before trial began.[85] Rigby, however, claimed that Officer Garcia declined to speak to the defense, and represented that the defense investigator used deceptive tactics to try to communicate with the officer.[86] Based on these claims, Rigby requested a court order barring the defense from making further attempts to contact the officer.[87] The court granted this request, but only after securing Rigby's "assurance that he intended to call" Officer Garcia to testify.[88]

Rigby never called Officer Garcia to testify at trial.[89] After all, Officer Garcia's version of the events was favorable and material to the defense, and would have made it more difficult for Rigby to win a conviction. At this point, again, Rigby did not provide the defense with any details about Officer Garcia's version of the events.[90] Leka's attorney did not seek to review the court's order barring contact with Officer Garcia.[91]

In finding a *Brady* violation, the Second Circuit reasoned that there was "no doubt" Rigby had Officer Garcia's information from the start of the case, so "there [was] really no question"[92] that Rigby "actively suppressed" it for the years leading to the trial.[93] Although Rigby had finally disclosed the officer's name (and perhaps address) before the trial, this late disclosure left the defense in an investigative and tactical disadvantage too close to trial, rendering the disclosure "insufficient."[94]

Since Officer Garcia's testimony was favorable, material and undisclosed, the Second Circuit reversed the conviction.[95] Six months later, the Kings County District Attorney's Office dismissed the indictment against Leka; it did not seek to retry him.[96]

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[83] *Id.* at 93.

[84] *See id.* at 94-95, 99 (Garcia's account was litigated in the CPL § 440 proceeding as newly discovered evidence).

[85] *Id.* at 93-94.

[86] *See id.* at 94.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 94-95, 99 (Garcia's account was litigated in the CPL § 440 proceeding as newly discovered evidence).

[91] *Id.* at 94.

[92] *Id.* at 100.

[93] *Id.* at 91.

[94] *Id.* at 101-02.

[95] *Id.* at 107.

[96] Civil Complaint at 19.

B. While Not the Basis of the Second Circuit's Ruling, the Grievance Committee Should Investigate Rigby's Actions in Delaying Disclosure of Two Other Exculpatory Eyewitness Accounts.

Leka argued on appeal that Rigby delayed disclosure of other favorable evidence besides Officer Garcia's information. First, Leka claimed that Rigby suppressed the information from eyewitness Chiusano. According to this eyewitness, a light-colored car stopped behind his bus at a light.[97] When the light turned, the car out-accelerated the bus, double-parked, and gun fire broke out from its rear passenger-side window.[98] Like Garcia's account, Chiusano's account would have undermined Modica's identification of Leka: the shooting began as soon as a car pulled up, while Modica testimony indicated that the car had been idling for some time.[99] Like Officer Garcia's testimony, Chiusano's testimony would have suggested that the shooter was in a car that had just pulled up, not the one that Modica had seen, and where she identified Leka to have been.[100] Consequently, Chiusano's account was favorable to the defense.

Leka also claimed that Rigby had suppressed information about a second, favorable eyewitness. The second eyewitness, Gonzalez, saw through his home's window a man falling backwards and firing a gun at a white car, even as the car sped away around a bus.[101] As with Officer Garcia's account, Gonzalez's account supported the inference that the man that Torres saw shooting was the deceased, and not Leka.[102] Consequently, Gonzalez's account was favorable to the defense.

Rigby only disclosed a police report about Chiusano, and Gonzalez's grand jury testimony, on February 19 and 22, respectively—mere days before the trial commenced on February 26.[103] The police report misspelled Chiusano's name, and by the time of Rigby's disclosure, Gonzalez had moved to Florida.[104] Thus, through a late disclosure, Rigby rendered early investigation of favorable accounts by the defense ineffective, if not outright impossible.

The Second Circuit determined that Leka's *Brady* claims regarding Chiusano and Gonzalez were "not so clear-cut" as the claim regarding Officer Garcia.[105] Therefore, the Court chose not to rule on these two claims,[106] effectively leaving the District Court's ruling—that there was no suppression regarding these two eyewitnesses—in place.[107] Specifically, the District Court found that after Rigby's delayed disclosure, Leka "could have tracked down" Chiusano (under a different

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[97] *Leka*, 257 F3d at 92.

[98] *Id.*

[99] *Id.* at 93.

[100] *Id.*

[101] *Id.* at 92.

[102] *Id.* at 93.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 98-99.

[106] *Id.* at 99.

[107] *Id.* at 96.

name) through the bus company, and that Leka knew the Florida town where Gonzalez resided as of four days before opening arguments.[108]

It seems clear that Rigby delayed disclosure of two favorable eyewitnesses until the beginning of trial, regardless of the District Court's finding that the defense could have located the witnesses with the benefit of what sounds like an unusually fast and effective investigation. As the Second Circuit opinion thoroughly explained in its discussion of Officer Garcia's account, a delayed disclosure puts the defense in a disadvantage in terms of investigation, adaptation the defense, and management of counsel's resources.[109]

C. The Second Circuit's Findings Regarding Rigby's *Brady* Violation Demonstrate the Severity of the Misconduct.

While not necessary for a *Brady* analysis, several aspects of Rigby's misconduct are noteworthy, suggesting a more serious form of misconduct.

Most importantly, the Second Circuit noted, repeatedly, that Rigby knew the value of the information he withheld. "It is ridiculous to think," the Court wrote, that Rigby did not know "what a police officer saw as a witness to the shooting."[110] Thought the Second Circuit noted that it was not deciding whether Rigby's actions were deliberate or the result of mismanagement, the court's decision makes clear that this was not a case where the prosecutor withheld evidence because he did not know it existed, or the police kept it from him. Rigby knowingly withheld exculpatory evidence.

Second, Rigby withheld evidence for a prolonged period of time. The defense requested all *Brady* material 22 months before the start of the trial.[111] Although Rigby likely knew about Officer Garcia's exculpatory account from the start, he withheld it for almost two years, disclosing only a part of it—his witness's name and, perhaps, address—three business days before trial.

Third, the Second Circuit implied that Rigby's motivation may have involved a desire to avoid a defense investigation of the prosecution's case. Though the court noted that it was not deciding whether Rigby's suppression was deliberate or the result of mismanagement, in discussing Rigby's request for an order to block the defense from speaking to Officer Garcia, the Second Circuit concluded: "[i]t is on the whole more likely that [Rigby] sought the order to protect [his] case from investigation than to protect Garcia from imposition."[112] Later in its analysis, the Court reasoned that Rigby "pressed" his "advantages" to further delay disclosure.[113] He did so, first, by obtaining the court order, and second, by telling the court—twice—that he intended to call Officer Garcia as a trial witness, the condition on which the order was premised.[114] This was a "dubious"

[108] *Id.*

[109] *See id.* at 99-103.

[110] *Id.* at 101, 103.

[111] *Id.* at 99.

[112] *Id.*

[113] *Id.* at 102.

[114] *Id.*

representation, the Court noted, given Garcia's exculpatory testimony.[115] Rigby likely knew from the start about Officer Garcia's favorable account.[116] But because the defense was told that Officer Garcia was an inculpatory witness, there would be little reason for the defense to subpoena Officer Garcia to testify without knowing that he would testify favorably for the defense.

Fourth, Rigby's delayed disclosure of eyewitnesses Gonzalez and Chiusano, while not addressed by the Second Circuit, reinforces the inference that, just as with Officer Garcia's account, Rigby strategically delayed disclosure to gain a trial advantage—and win a conviction.

Fifth, the Grievance Committee should investigate whether Rigby's misrepresentation of Officer Garcia's testimony to the defense was tailored to gain an advantage in plea negotiations. About two years before trial, during plea negotiations, Rigby told the defense that a police officer had witnessed the shooting and could identify Leka as the shooter.[117] However, during pre-trial hearings, Rigby admitted that Officer Garcia had never actually been asked to make either an in-person or photographic identification of Leka.[118] Before trial, Rigby twice claimed that he would bring the officer to court, presumably to make an identification.[119] He never did. The Grievance Committee should investigate whether Rigby's misrepresentation during plea negotiations was designed to improperly pressure Leka to take a plea.

The Second Circuit declined to assign any intention to Rigby's knowing and prolonged suppression, [120] but the Grievance Committee must investigate the circumstances, as they seem to support the inference that Rigby suppressed the evidence intentionally and improperly to win a conviction.

3. The Grievance Committee Must Seek Discipline 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."[121] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[122] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[123]

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[115] *Id.*

[116] *Id.* at 101, 103 ("We can assume that the prosecutor knew the content of Garcia's exculpatory testimony.").

[117] *Id.* at 93.

[118] *Id.* at 99 n 3.

[119] *Id.*

[120] *Id.* at 103 ("But we need not decide whether the non-disclosure was a deliberate tactical concealment, or resulted from the mismanagement of information, or from sloppy thinking about the evidentiary significance of the material.").

[121] Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, https://tinyurl.com/39axvffr.

[122] Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

[123] *How to File a Complaint*.

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."[124]

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."[125]

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."[126] 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.[127] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[128] 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. Rigby's Misconduct Violated Rules of the New York Code of Professional Responsibility.[129]

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.[130] As the Court of Appeals explained, "the 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."[131]

Initially, Rigby violated the professional rules by withholding favorable and exculpatory evidence. Rule DR 7-103(b), applicable at the time of the misconduct, required a prosecutor to make "timely disclosure … of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense

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[124] *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

[125] *Kurtzrock*, 192 AD3d 197, 219.

[126] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

[127] ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[128] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

[129] The applicable professional set of rules in 1990, when Rigby tried Leka, was the Code of Professional Responsibility. The Rules of Professional Conduct, the set of rules in effect today, replaced the Code in 2009.

[130] *See, e.g.*, *Matter of Capoccia*, 59 NY2d 549, 551 (1983).

[131] *Matter of Seiffert,* 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).

or reduce the punishment."[132] Two other rules, DR 7-102(a)(3) and DR 7-109(a), similarly required disclosure, and prohibited knowing concealment, of evidence.[133] A prosecutor's duty to disclose under DR 7-103(b) applied even if the evidence was not material under a *Brady* analysis.[134]

The Second Circuit found that Rigby committed a *Brady* violation by suppressing the exculpatory statement of Officer Garcia. The opinion does not make any findings with respect to Rigby's very late disclosure of the statements of witnesses Gonzalez and Chiusano. Rigby revealed these accounts only days before the trial began; whether or not Rigby's belated disclosure of Gonzalez's and Chiusano's accounts satisfies the test for a *Brady* violation, the Grievance Committee should investigate whether it violates the "timely disclosure" requirement under Rule DR 7-103(b). As the Second Circuit indicates, Rigby clearly knew about these accounts himself, thus fulfilling the knowledge element.

Second, the Grievance Committee should investigate Rigby's multiple misrepresentations. Under Rule 7-102, attorneys were not to knowingly make a false statement to the court or use evidence they knew to be false.[135] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[136]

Rigby may have made a false statement and engaged in deceit when he told the defense, during plea negotiations, that Officer Garcia could identify Leka. In fact, Officer Garcia never viewed Leka in any police identification procedure. Rigby also may have made a false statement and engaged in deceit when he told the court that he intended to call Officer Garcia to testify—but never did. The Grievance Committee should investigate whether Rigby was actually misinformed about Officer Garcia's ability to identify Leka and whether Rigby actually intended to call Officer Garcia to testify, given the exculpatory nature of his testimony. Given the circumstances, the Grievance Committee should investigate whether evidence proves that Rigby actually believed that Officer Garcia identified Leka and whether Rigby took affirmative steps, such as a subpoena, to call Officer Garcia to testify.

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[132] Code of Professional Responsibility DR 7-103(b) (22 NYCRR 1200.34 (repealed)). This rule was in effect when the discussed misconduct occurred. However, Rule 3.8(b) of the Rules of Professional Conduct replaced it in 2009.

[133] Code of Professional Responsibility DR 7-102(a)(3) (22 NYCRR 1200.33 (repealed)); Code of Professional Responsibility DR 7-109(a) (22 NYCRR 1200.40 (repealed)). These two rule were replaced in 2009 by Rules of Professional Conduct (22 NYCRR 1200.0) rules 3.4(a)(1), (3) (a lawyer shall not "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce … [or] conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."). *See also Rain*, 162 AD3d at 1460-61 (suppression of exculpatory evidence violated Rule 3.4(a)(1)).

[134] *See supra* n 34.

[135] Code of Professional Responsibility DR 7-102 (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.3 of the Rules of Professional Conduct replaced it in 2009.

[136] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. *See also In re Muscatello*, 87 AD3d 156, 158-59 (2d Dept 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

Third, Rigby violated the rules by prejudicing the administration of justice and conducting himself in a manner not befitting of a lawyer. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[137] An attorney's misrepresentation during a legal proceeding prejudices the administration of justice and reflects adversely on the lawyer's fitness, in violation of Rule DR 1-102.[138] A prosecutor's violation of Rule DR 7-103(b) also violates Rule DR 1-102.[139]

Rigby withheld exculpatory evidence, prejudicing the administration of justice. Such gamesmanship is prejudicial to the administration of justice and completely at odds with the conduct expected from the legal profession.

B. For His Misconduct, Rigby Should be Disbarred.

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."[140] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[141]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[142] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "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."[143] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[144]

A prosecutor who *knowingly* withholds exculpatory evidence, leading to a wrongful conviction, is unfit to practice law. Rigby began practicing law in 1985, and by the time he tried Leka in 1990 he was handling a murder case. Thus, he was an experienced prosecutor when he

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[137] Code of Professional Responsibility DR 1-102 (22 NYCRR 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.

[138] *Muscatello*, 87 AD3d at 158-59 (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rules 8.4(d), (h), the modern equivalents of DR 1-102).

[139] Code of Professional Responsibility DR 1-102 (22 NYCRR 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 Kurtzrock*, 192 AD3d 197 (finding disclosure violation prejudiced the administration of justice and reflected adversely on the prosecutor in violation of Rules 8.4(d), (h)); *Rain*, 162 AD3d at 1461 (same).

[140] ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

[141] *Id.*

[142] *Kurtzrock*, 192 AD3d at 219; *see also Rain*, 162 AD3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[143] *Kurtzrock*, 192 AD3d at 219.

[144] *Id.*

knowingly withheld exculpatory evidence and misrepresented the existence of evidence and his intentions. Leka was wrongfully convicted and imprisoned for over 11.5 years before finally being released.[145] Prosecutorial misconduct such as Rigby's has real-world, grave consequences.

We believe disbarment is the appropriate sanction for the misconduct described in this grievance. As prosecutorial misconduct becomes increasingly identified as a stain on our legal system's promise of justice and fairness, some state courts have taken decisive action, disbarring prosecutors for egregious misconduct. While several states have disbarred prosecutors for on-the-job misconduct, including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona, we have not found a single such occurrence in New York, despite the many criminal cases that pass through the state's large court system every year.

If disbarment is *never* applied as a sanction for prosecutorial misconduct—if it is *de facto* taken off the table—prosecutors can rest assured that, even if they are caught committing the most severe misconduct, they will face at most a short suspension of their law license. Career advancement by developing a reputation for winning cases at all costs is an obvious incentive for prosecutors to bend and break rules. If the Grievance Committee and courts do not apply an actual—rather than theoretical—disincentive, prosecutorial misconduct will continue unabated.

Conclusion

Rigby committed serious misconduct by withholding exculpatory and favorable evidence, and appears to have made deceptive misrepresentations to the court and the defense. In doing so, he violated the legal professional rules. To these writers' knowledge, Rigby remains unsanctioned publicly or privately for his serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[146] 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."[147] 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 Rigby. 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."[148] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should

[145] Civil Complaint at 18.

[146] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, https://tinyurl.com/47scv4pb.

[147] *Id.*

[148] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

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 Rigby'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.

This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed a wide range of egregious discovery violations, leading to his resignation and the Appellate Division's December 2020 ruling suspending his law license for two years.[149] In imposing this sanction, the Appellate Division highlighted as a mitigating factor that "there was no showing that [Kurtzrock] engaged in any similar conduct in any other cases."[150]

But at the time of the December 2020 Appellate Division ruling, there was in fact already significant evidence of similar misconduct by Kurtzrock in other cases, which would have been easily identified if a systematic investigation had been undertaken.[151] To start, after Kurtzrock's *Brady* violation was revealed during the 2017 *Booker* trial, defense counsel for a different murder case in which Kurtzrock had obtained a conviction, *People v. Lawrence*, then pending on appeal, requested a reexamination of the discovery in that case. The District Attorney's Office agreed, and the investigation revealed that Kurtzrock had failed to disclose more than 40 items of *Brady* and/or *Rosario* evidence in *Lawrence* as well, including a payment to a witness and exculpatory witness statements. Consequently, the judge dismissed the indictment in 2018, and Shawn Lawrence, who had served six years of incarceration of his 75-years-to-life sentence, was released.[152] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[153]

A systematic investigation of Kurtzrock ensued that uncovered even more suppressed evidence. Following the Appellate Division's December 2020 ruling, the Suffolk County District Attorney's Office ("SCDAO") worked with the New York Law School Post-Conviction Innocence Clinic to conduct a comprehensive review of Kurtzrock's trial cases and other cases where Kurtzrock's actions raised discovery issues.[154] The

[149] *Kurtzrock*, 192 AD3d 197.

[150] *Id.* at 220.

[151] Letter to Second Department (unfiled), Nina Morrison of the Innocence Project and Paul Shechtman of Bracewell LLP, January 20, 2021; see also Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

[152] Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, https://tinyurl.com/52ar9tjx.

[153] County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, https://tinyurl.com/2a7ba9cd (hereafter "Kurtzrock report") at 11 (discussing case of *People v. Shawn Lawrence*) (internal quotation marks omitted).

[154] The SCDAO "attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO, both as a homicide prosecutor and while

investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[155] which the report characterized as a "potential systemic issue."[156]

As a result of the investigation, the SCDAO provided new evidence to defendants in **100 percent of Kurtzrock's homicide cases and 76 percent of all trial cases reviewed**. [157] These disclosures have already spurred applications to review convictions.[158] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[159] an important step given that, in explaining the lenient two-year suspension for Kurtzrock's misconduct in *Booker*, the Appellate Division cited the ostensible lack of evidence of misconduct by him in other cases.

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 that "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover"[160] and the need for the Grievance Committee to systematically investigate this prosecutor's work.

2. The Committee should promptly investigate whether any supervising attorney at the Kings County District Attorney's Office is also culpable for the ethics violations 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.[161]

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serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases… that Kurtzrock did not try himself but in which Kurtzrock's actions prior to trial were identified as raising *Brady*/*Giglio* and/or *Rosario* compliance concerns." *Id.* at 4.

[155] *Id.* at 5.

[156] *Id.* at 4.

[157] *Id.* at 6.

[158] *Id.*

[159] *Id.* at 7.

[160] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

[161] Rules of Professional Conduct (22 NYCRR 1200.0) rule 5.1 (d) reads: 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.

3. The Grievance Committee should investigate whether the Kings County District Attorney's Office and its managing attorneys complied with their 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.[162]

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

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to systematically investigate all cases identified in #1-4 above and advise the court if this investigation casts doubt on the integrity of any convictions. To be clear, we do not mean a closed-door, cloaked process inside a 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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[162] District Attorney offices qualify as "law firms" under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). "'Firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."