Grievance Committee for the Second,
Eleventh and Thirteenth Judicial Districts
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**Re: Grievance Complaint Regarding Attorney Bernarda Villalona,**
**State Bar No. 4444451.**

To the Grievance Committee:

We write to complain about the professional misconduct of Bernarda Villalona[1] in prosecuting *People v. Irving*.[2] The Appellate Division found that Villalona made "improper" remarks in her summation. The court specifically identified Villalona's improper arguments as ones that denigrated the defense, vouched for the strength of her case, and asked the jury for inferences not based on the evidence.[3]

Villalona's improper remarks were especially problematic because Irving faced a life sentence for murder charges.[4] Prosecutorial misconduct is never acceptable, but it is particularly dangerous when the stake is a life sentence in prison.

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 Villalona.[5] Moreover, Villalona practices law in private practice now, advertising her prosecutorial experience, claiming to have tried well over 100 trials, including "numerous homicides," and stating that she provides legal commentary on cases from around the country, on various media outlets including Court TV, Law & Crime Trial Network, and Univision.[6]

For this misconduct, the Grievance Committee should seek public discipline for Villalona.

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[1] Bernarda Altagracia Villalona, State Bar No. 4444451. Villalona's registration information on the New York State Unified Court System website lists her address as: Joey Jackson Law, PLLC, 5 Penn Plaza, 23rd Floor, New York, N.Y. 10001. Phone: 833-563-9522. *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Bernarda Villalona, click on Name hyperlink]. These writers do not have personal knowledge of any of the facts or circumstances of Villalona or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[2] Exhibit A, *People v Irving*, 130 AD3d 844 (2d Dept 2015).

[3] *Id.* 844 at 846.

[4] *Id.* at 844.

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

[6] Joey Jackson Law, PLLC, Bernarda Villalona, https://tinyurl.com/y3x6r3w6.

## 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.[7] 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 can 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.[8]

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."[9] 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."[10]

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.[11] 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."[12] Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly

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[7] *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.").

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

[9] *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).

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

[11] *Id.*

[12] *Id.*

disciplined by a New York disciplinary committee.[13] 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.[14] 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."[15]

### 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"[16] and are not permitted to make arguments that rely on facts that are not in evidence.[17] Prosecutors are not permitted to engage in prejudicial or misleading argument, that are sometimes referred to as a "cardinal sin."[18] These missteps include making "irrelevant and inflammatory comments;"[19] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[20] also known as vouching; appealing to the jurors' sympathies or fears;[21] shifting the burden from the prosecution to the defense;[22] and denigrating the defense, defense counsel or the defendant.[23] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[24]

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."[25] In

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[13] *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).

[14] *See* Sapien & Hernandez, *supra* n. 5.

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

[16] *People v Mehmood*, 112 AD3d 850, 853 (2d Dept 2013) (internal quotation marks and citation omitted).

[17] *People v. Ashwal*, 39 NY2d 105, 109-110 (1976); *see also People v Wright*, 25 NY3d 769, 779-780 (2015); *People v Singh*, 128 AD3d 860, 863 (2d Dept 2015).

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

[19] *Mehmood*, 112 AD3d at 853.

[20] *People v Bailey,* 58 NY2d 272, 277 (1983) (quotation marks omitted).

[21] *See e.g. Ashwal,* 39 NY2d at 110; *People v Lindo*, 85 AD2d 643, 644 (2d Dept 1981); *People v Fernandez*, 82 AD2d 922, 923 (2d Dept 1981); *People v. Fogarty*, 86 AD2d 617, 617 (2d Dept 1982); *People v. Brown,* 26 AD3d 392, 393 (2d Dept 2006).

[22] *See e.g. People v DeJesus*, 137 AD2d 761, 762 (2d Dept 1988); *People v Lothin*, 48 AD2d 932, 932 (2d Dept 1975).

[23] *See e.g. People v Damon*, 24 NY2d 256, 260 (1969); *People v. Lombardi*, 20 NY2d 266, 272 (1967); *People v Gordon*, 50 A.D.3d 821, 822 (2d Dept 2008); *Brown,* 26 AD3d at 393; *People v LaPorte,* 306 AD2d 93, 95 (1st Dept 2003).

[24] *DeJesus*, 137 AD2d at 762.

[25] *People v Fielding*, 158 NY 542, 547 (1899).

1906, the Court of Appeals reversed a criminal conviction because of the prosecutor's improper comments to the jury and expressed its frustration with the frequency of such misconduct:

> We have repeatedly laid down the rule governing prosecuting officers in addressing the jury…We have repeatedly admonished [prosecutors] at times with severity…not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer…*Why should court and counsel violate the law in order to enforce it?* What a pernicious example is presented when such officers, intrusted [sic] with the most important duties, in attempting to punish the guilty, are themselves guilty of departing from the law.[26]

But those early rebukes from the courts seem to have had little impact on prosecutors' practices. Over the last few decades, New York courts have had to remind prosecutors over and over that "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command."[27] 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."[28]

Summation misconduct continues—apparently unabated—to this day. During oral argument in 2018, Justice LaSalle of the Appellate Division sharply criticized the regularity of summation misconduct:

> At what point does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?…why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[29]

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such arguments are *effective* at winning cases—they go beyond the evidence, to manipulate biases, prejudice, and passions. Discussing prosecutorial misconduct in opening statements—where attorneys are even more limited than in summation—Justice Alan D. Scheinkman of the Appellate Division remarked in oral argument, "It's obvious that the prosecutor who tried this case was saying things for the purpose of winning it."[30]

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[26] *People v Wolf*, 183 NY 464, 471-476 (1906) (emphasis added).
[27] *Ashwal*, 39 NY2d at 109.
[28] *People v Payne,* 187 AD2d 245, 247 (4th Dept 1993).
[29] Oral Argument at 0:46:55-0:48:05 in *People v Velez*, 164 AD3d 622 (2d Dept 2018), available at https://tinyurl.com/52jhn78a. (Justice LaSalle is now the Presiding Justice.) In *Velez*, the court ultimately found that the evidence of guilt was overwhelming so any impropriety did not affect the verdict. *See* 164 AD3d. at 622.
[30] Oral Argument at 0:27:45-0:28:13 in *People v Cherry,* 163 AD3d 706 (2d Dept 2018), available at https://tinyurl.com/4mc9hv26 or https://tinyurl.com/2wwtdwsm; *see also Cherry*, 163 AD3d at 707 ("We agree . . . that the prosecutor's comments in his opening statement about the grand jury's indictment were

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 at trial is not just to win the case: the law requires that prosecutors "seek justice…not merely to convict."[31] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[32] 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."[33]

Professor and former New York 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.[34]

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.[35] In 1976, the U.S. Supreme Court partly justified absolute immunity for

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improper. The prosecutor's comments in his opening statement about the victim and his family, which could only have been intended to evoke the jury's sympathy, were also improper.").

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

[32] Rules of Professional Conduct 22 NYCRR 1200.0, Rule 3.8(b) (McKinney Commentary).

[33] ABA Criminal Justice Standards: Prosecution and Defense Function Standard 3-5.8 (1993).

[34] Bennett L. Gershman, Prosecutorial Misconduct § 11:1 (2d ed Aug. 2018) (internal citations omitted); *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).

[35] *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

prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[36]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[37] 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 two percent—were ever publicly disciplined.[38]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green point out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously."[39] 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."[40] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[41] "Prosecutors engage in misconduct because they know they can get away with it."[42]

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.[43] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn

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that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[36] *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).

[37] *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).

[38] 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).

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

[40] *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).

[41] Sapien & Hernandez.

[42] *Id.*

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

Kurtzrock.[44] But even a short suspension like that received by Rain and Kurtzrock[45]—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 Villalona will continue unabated and undeterred.

**2. Villalona Committed Misconduct in Summation by Denigrating the Defense, Vouching for the Strength of Her Case, and Urging for Inferences not Based on the Evidence.**

Prosecutors have long been on notice that certain comments and arguments are improper during summation. The Court of Appeals has explained that a prosecutor must not vouch for the strength of her own case because of the "possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor."[46] The Court of Appeals has similarly held that in summation, a prosecutor must not "call upon the jury to draw conclusions which are not fairly inferable from the evidence."[47] Finally, the Court of Appeals has condemned prosecutors for resorting to name-calling and directing disparaging remarks towards defendants.[48]

Villalona—with over eight years of experience as a prosecutor in Brooklyn and Philadelphia when she prosecuted Irving—violated these rules established by New York's highest court. She did so in a murder trial, where the defendant was facing the gravest consequences of our criminal system: life imprisonment.

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

[45] 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.

[46] *People v Paperno*, 54 NY2d 294, 301 (1981); *see also People v Jamal*, 307 AD2d 267, 268 (2d Dept 2003) (holding it was improper for prosecutor to give "personal opinion . . . as to defendant's guilt"); *People v Anderson*, 83 AD3d 854, 856 (2d Dept 2011).

[47] *Ashwal*, 39 NY2d at 110-11; *see also People v Lantigua*, 228 AD2d 213, 219 (1st Dept 1996) (in absence of any evidence that defendant had threatened any prosecution witness, prosecutor improperly argued in summation that a key witness was "intimidat[ed]" and "afraid.").

[48] *People v Shanis,* 36 NY2d 697, 699 (1975) (holding that name-calling, such as calling the defendant a "liar," exceeds bounds of legitimate advocacy); *People v Green*, 183 AD2d 617, 618 (1st Dept 1992) (holding improper prosecutor's remarks that "appear[ed] as a calculated appeal to the jury's emotions, in particular wrath toward the defendant, and sympathy for the victim."); *People v Bowie*, 200 AD2d 511, 513 (1st Dept 1994) ("A prosecutor who resorts to name-calling instead of confining her remarks to the facts commits a blatant act of prejudice which can only result in denying a defendant a fair trial, regardless of the merits of the case." (citations omitted)).

First, the Appellate Division found that Villalona "denigrated the defense" by characterizing Irving as a "methodical" liar who made up a "story," "a cliffhanger," and "a show."[49] Villalona characterized Irving's choice to testify in his own defense—a constitutional right—as a scheme to trick the jury. Pretending to voice Irving's thought process, Villalona said:

> I [Irving] have seen the evidence. I have to do something. So what does he decide to do? I'm [Irving] going to testify and I'm going to tell them that I was protecting myself. You see how he threw the word "scared" and "terrified" so many times…And the way he came [up] with the self defense…because it's just to show you how smart and methodical he is because he thinks about everything because it's a chess game for him.[50]

Villalona portrayed Irving as calculating and scheming, "thinking about his moves, quiet, sneaky, arrogant," and "methodical."[51] She warned the jurors that it was "the quiet ones you got to worry about."[52] In this same vain, Villalona referred to the defense as a "cliffhanger" and likened it to a "show."[53]

Second, the Appellate Division found that Villalona repeatedly vouched for the strength of the prosecution's case.[54] She twice told the jurors that she had presented proof "more than beyond a reasonable doubt,"[55] while also assuring them of the credibility of her witnesses.[56]

Finally, the Appellate Division found that Villalona asked the jury to "draw a conclusion concerning the victim's actions" that was "not fairly inferable from the evidence."[57] The Appellant's Brief explains that a central issue at trial was Irving's mental state: whether he was confrontational, and looking for a fight; or whether he was 'minding his own business,' and perhaps acted recklessly or in self-defense in response to the victim's actions.[58] Villalona addressed this issue by telling the jury that Irving's "frustration" had been "gradually building up," and that he was "upset," "pissed off" and "had had enough."[59] According to the Appellant's Brief, there was no testimony to back up these assertions about Irving's mental state.[60]

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[49] *Irving* at 846.

[50] Trial Transcript at 433:21-434:6 in *People v. Irving*, Sup Ct, Kings County, Oct. 11, 2012, indictment No. 1137-11 (hereafter "Trial Transcript"); *see also* Brief for Defendant-Appellant at 23, 49, in *People* v *Irving*, 130 AD3d 844 (2d Dept 2015) (hereafter "Appellant Brief").

[51] Trial Transcript at 430:21-22; *see also* Appellant Brief at 49.

[52] Trial Transcript at 430:25, 434:6-7; *see also* Appellant Brief at 49.

[53] Trial Transcript at 439:13-14; *see also* Appellant Brief at 49.

[54] *Irving*, 130 AD3d at 846.

[55] Trial Transcript at 426:16-20, 430:6-7; *see also* Appellant Brief at 54.

[56] Trial Transcript at 425:1-19, 427:25-428:11; *see also* Appellant Brief at 54-55.

[57] *Irving,* 130 AD3d at 846.

[58] Appellant Brief at 52-54.

[59] Trial Transcript at 417:24-25, 418:7, 420:5-6; *see also* Appellant's Brief at 52-54.

[60] Appellant Brief at 53.

The Appellate Division reversed Irving's conviction on grounds of instructional error, but the court nonetheless went out of its way to note that Villalona's argument was improper, though the issue was not even preserved for appeal.

### 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."[61] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[62] Grievance Committees are "committed to…recommending discipline for lawyers who do not meet the high ethical standards of the profession."[63]

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."[64]

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."[65]

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."[66] 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.[67] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[68] 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.

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

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

[63] *How to File a Complaint*.

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

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

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

[67] 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.").

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

### A. Villalona's Misconduct in Summation Violates New York Rule of Professional Conduct 8.4.

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.[69] 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."[70]

In New York, professional misconduct for an attorney includes any violation of the New York Rules of Professional Conduct. 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.[71] Summation misconduct violates these rules. The Court of Appeals has stated that a prosecutor's improper statements in summations amount to prosecutorial misconduct.[72] Specifically, such summation misconduct violates Rule 8.4. The Third Department found in *People v. Wright* that prosecutor Rain improperly appealed to the jury's sympathy and made other improper comments in her trial summation.[73] In a disciplinary action against Rain, stemming in part from her statements in *Wright*, the Third Department affirmed that Rain violated Rule 8.4 with her summation remarks, which were "prejudicial to the administration of justice" and constituted "conduct adversely reflecting on her fitness as a lawyer."[74]

Villalona's repeated improper remarks violated several of the fundamental rules of summation that the Court of Appeals has set forth. Prejudicing the administration of justice, Villalona's remarks violated Rule 8.4(d). At the same time, by making these remarks, Villalona demonstrated conduct that is not fit of an attorney, in violation of Rule 8.4(h).

### B. For Villalona's Misconduct, the Grievance Committee Should Seek Public Discipline.

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."[75] The ABA's Model Rule 32

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

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

[71] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4.

[72] *Wright*, 25 NY3d at 780.

[73] *People v. Wright*, 133 AD3d 1097, 1098 (3d Dept 2015).

[74] *Rain*, 162 A.D.3d at 1459.

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

for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[76]

Villalona was a seasoned prosecutor with eight years of experience when she violated the Professional Rules in *Irving.* She was already so experienced that she was handling a murder case. Though the ethical rules may be obscure to the general public, attorneys must know and follow them. The District Attorneys Association of the State of New York apparently mailed an ethical guide to *every prosecutor in the state* warning prosecutors to comply with the ethical rules and even specifically quoting several of the Rules of Professional Conduct, including Rule 8.4—the rule that Villalona violated.[77]

Professional discipline, through the Grievance Committee, is the mechanism entrusted by the Supreme Court of the United States to regulate prosecutorial behavior. "The purpose of a sanction in a disciplinary proceeding is…to protect the public, to deter similar conduct, and to preserve the reputation of the Bar."[78] Without appropriate sanctions, this Committee will derelict its duty and send a message—to prosecutors, defense attorneys, the courts, defendants and the public at large—that it does not take prosecutorial misconduct seriously. Only a strong message from the Grievance Committee can hold Villalona accountable and minimize repeated occurrences of this misconduct by other prosecutors.

The Grievance Committee must seek public discipline for Villalona.

## Conclusion

Prosecutorial misconduct in summation has a devastating impact on due process and the right to a fair trial. It is a long-standing, largely unaddressed problem in the court system. Here, even though the Appellate Division found Villalona to have committed misconduct in *People v. Irving*, to these writers' knowledge, Villalona remains unsanctioned for her misconduct. Instead, she was promoted to the position of a Senior Homicide Assistant District Attorney at the Kings County District Attorney's Office, and is now working as a private attorney. She has seemingly faced no professional or employment repercussions for her misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[79] 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."[80] 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

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[76] *Id.*

[77] *See* District Attorneys Association of the State of New York, Ethics Handbook (2012), https://tinyurl.com/w36fepwn. This is the 2012 version of the handbook. The introductory letter states that in 2011, the Ethics Handbook was mailed to "every District Attorney and Assistant District Attorney in the state."

[78] *Matter of Malone*, 105 A.D.2d 455, 460 (3d Dep't 1984).

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

[80] *Id.*

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 Villalona. 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."[81] 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 Villalona'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.[82] 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."[83]

   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.[84] 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-

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

[82] *Kurtzrock*, 192 AD3d 197.

[83] *Id.* at 220.

[84] 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.

to-life sentence, was released.[85] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[86]

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.[87] The 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,"[88] which the report characterized as a "potential systemic issue."[89]

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**. [90] These disclosures have already spurred applications to review convictions.[91] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[92] 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"[93] 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 violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct,

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

[86] 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).

[87] 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 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.

[88] *Id.* at 5.

[89] *Id.* at 4.

[90] *Id.* at 6.

[91] *Id.*

[92] *Id.* at 7.

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

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.[94]

3. The Grievance Committee should investigate whether the Kings County District Attorney's Office 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.[95]

4. The Committee should identify any prosecutors trained and/or supervised by Villalona 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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[94] 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:

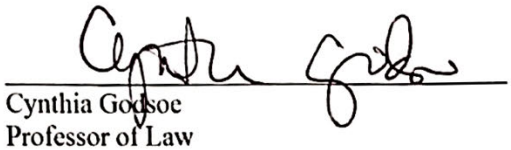
(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(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.

[95] 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."



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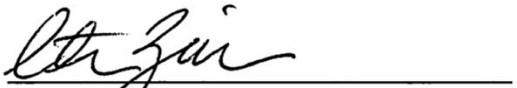

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