Attorney Grievance Committee
Supreme Court, Appellate Division
First Judicial Department
180 Maiden Lane
New York, New York 10038
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Re: Grievance Complaint Regarding Attorney Jason Petri, State Bar No. 4142733

To the Grievance Committee,

Jason Petri,[1] former Assistant District Attorney at the Office of the Bronx District Attorney, who currently works at the Office of Court Administration, violated his *Brady* obligations in *People v. Waters* by withholding a witness's inconsistent statements from defense counsel, in what the Bronx Supreme Court called "an affirmative act of deceit."[2]

The court found that prosecutor Petri knowingly failed to disclose to the defense that the prosecution's primary witness had dramatically changed his testimony from that which he gave under oath at the grand jury proceeding. The court further found that the witness's two versions were so starkly distinct that the witness either committed perjury in his previous sworn testimony or committed perjury at the jury trial.[3] Finally, the court found that Petri knew—weeks before the trial—that the witness was telling a new story and that Petri's decision to withhold the contradictory statements caused a "trial by ambush," leading to the denial of the accused's due process rights.[4]

As a consequence of Petri's "inexcusable"[5] failure to disclose, the Bronx Supreme Court declared a mistrial. At the second trial, Waters was acquitted of all charges.[6] Waters's civil rights lawsuit based on this mistreatment alleges other potential misconduct that should be investigated by the Grievance Committee.[7] According to the lawsuit, Waters had spent six years incarcerated pretrial at Rikers Island, including 360 days in solitary confinement.[8]

Troublingly, Petri's *Brady* violation occurred just eight years after another Bronx *Brady* violation was settled. In 2003, Mr. Alberto Ramos received a $5 million dollar settlement for his wrongful conviction and seven-year incarceration caused by a *Brady* violation committed

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[1] Jason Peter Petri, State Bar No. 4142733, Office of Court Admin, 265 E. 161st St. Bronx, NY 10451-3503. Phone: (718) 618-3633. An email address is not listed on the Attorney Registration website. These writers do not have personal knowledge of any of the facts or circumstances of Petri or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[2] Exhibit A, *People v Waters*, 35 Misc 3d 855, 858 (2012).

[3] *Id.* at 861.

[4] *Id*.

[5] *Id*.

[6] *See* Exhibit B, Summons at 7 in *Waters v Clark et al.* ("*Waters* (civil)"), Sup Ct, Bronx County, filed Jan. 15, 2016, available at 2016 WL 348495.

[7] *Id*.

[8] *Id.*; *see also* Plaintiff's Affirmation in Support of Motion to Compel Discovery in *Waters* (civil), filed Aug. 10, 2020.

by a Bronx prosecutor.[9] In discovery, the documentary evidence suggested that the Bronx District Attorney's Office had no code of conduct, investigative or disciplinary procedures or records of sanctions for prosecutors who committed misconduct.[10] In records dated up to 2007, "officials could identify just one prosecutor since 1975 who, according to the Office's records, has been disciplined in any respect."[11] Just eight years after the City settled the *Ramos* case for $5 million, Bronx prosecutor Jason Petri was seemingly undeterred from committing serious prosecutorial misconduct, as outlined below.

Petri's misconduct is no secret; the decision is available online and he is named as the prosecutor in public documents from Waters's subsequent civil rights lawsuit. Despite this judicial finding of misconduct, as of the writing of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Petri.[12] Petri's misconduct in failing to disclose *Brady* material and his reliance on perjured testimony resulted in an enormous cost both to Mr. Waters's fundamental rights and personal liberty and to the efficient and fair administration of our system of justice.

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.[13] 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.[14]

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*

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[9] *See Ramos v City of New York*, 729 NYS 2d 678 (1st Dept 2001).

[10] See Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 Fordham L Rev 537, 544 (2011); Andrea Elliott, *Prosecutors Not Penalized, Lawyer Says*, NY Times (Dec. 17, 2003) https://tinyurl.com/atnhzsc.

[11] Rudin at 549

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

[13] *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.").

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

to use every legitimate means to bring about a just one."[15] 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."[16]

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.[17] 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."[18] 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.[19] 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.[20] 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."[21]

B. 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.[22] 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

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[15] *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).

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

[17] *Id.*

[18] *Id.*

[19] *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).

[20] *See* Sapien & Hernandez.

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

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

steps.[23] Because 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.[24]

C. 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.[25] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[26] Consequently, a conviction must be overturned when the suppressed evidence is "material"[27] and where there is a "reasonable probability" that the undisclosed evidence would have changed the result.[28] 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.[29] 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.[30]

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

[24] *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.")

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

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

[27] *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 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.

[28] *Bagley*, 473 US 667.

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

[30] 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.

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.[31]

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.[32] Under federal law, a prosecutor who commits an intentional *Brady* violation could seemingly be charged with a felony.[33]

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.[34] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[35] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[36]

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):

> 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.[37]

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

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

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

[33] 18 USC § 242.

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

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

[36] CPL § 245.20(1)(k).

[37] 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.

accused, not just *materially* exculpatory evidence.[38] 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."[39]

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."[40]

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.[41] 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.[42]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[43] A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial

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[38] 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*").

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

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

[41] *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").

[42] *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).

[43] *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).

misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.[44]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously."[45] 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."[46] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[47] "Prosecutors engage in misconduct because they know they can get away with it."[48]

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.[49] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[50] But even a short suspension like that received by Rain and Kurtzrock[51]—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 Petri will continue unabated and undeterred.

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[44] 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).

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

[46] *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).

[47] Sapien & Hernandez.

[48] *Id.*

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

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

[51] 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.

2. The Bronx Supreme Court Found that Petri Committed Misconduct and Acted Dishonestly in *People v. Waters* by Knowingly Suppressing Exculpatory Evidence.

Petri's misconduct in *People v. Waters* centered around the testimony of the prosecution's star witness, Ronald Baker, regarding the stabbing death of Carolyn Vargas. Baker testified at the grand jury that he was in a bedroom in the apartment when he heard a loud thump and, upon investigation, saw Vargas's body and the defendant leaving the apartment.[52] In addition to testifying under oath at the grand jury, prior to trial Baker provided a consistent written statement, and repeated this narrative to detectives, defense counsel, and his probation officer.[53] In interviews with defense counsel, Baker "consistently informed" counsel that he had not witnessed the incident and merely heard a thump.[54]

During trial, the court held a hearing to determine the admissibility of 911 recordings. Baker testified at this hearing and claimed that he had actually seen the defendant stab Vargas, contradicting his previous testimony.[55] On the court's inquiry, ADA Petri admitted that he had known for several weeks that Baker planned to change his testimony, but never informed defense counsel.[56]

The trial court found that this was clearly *Brady* material, because it "would bear not only on defendant's trial strategy but also on the credibility of . . . the People's main witness."[57] Due process required Petri to apprise the defendant of favorable evidence, including impeachment materials.[58] Not only did Petri fail to disclose *Brady* material, but the court also found that Petri intentionally tried to mislead the defense during discovery. Prior to trial, Petri tendered to the defense Baker's statement to his probation officer, even though Petri knew that Baker's actual trial testimony would be different.[59]

The court ordered a mistrial because of the *Brady* violation. The Bronx DA's Office argued that the evidence was not exculpatory because in Baker's new testimony he claimed to have seen Waters stab Vargas.[60] But the DA's Office also acknowledged that Petri's failure to disclose was "motivated by an intent to secure defendant's conviction."[61] As the trial court noted, this argument "clearly indicates that [Petri] believed that the information would be favorable to the accused."[62]

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[52] *Waters*, 35 Misc 3d at 856.

[53] *Id.* at 856-57.

[54] *Id*. at 856.

[55] *Id.* at 857.

[56] *Id.*

[57] *Id.* at 858.

[58] *See Brady,* 373 US at 87; *Bagley*, 473 US at 676.

[59] *Waters*, 35 Misc 3d at 858.

[60] *Id.* at 857. It is not up to a prosecutor to determine what evidence is useful to the defense. *People v Baxley*, 84 NY2d 208, 213 (1994) ("[N]ondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved [the witness's] recantation. The 'good faith' of a prosecutor is not a valid excuse for nondisclosure.").

[61] *Waters*, 35 Misc 3d at 858.

[62] *Id.*

Petri apparently understood that the change in Baker's story impeached the credibility of the primary witness and was therefore favorable to the defense. The due process guarantees of *Brady* and its progeny have no meaning if a prosecutor is excused from disclosure simply by his desire to convict the defendant. The Supreme Court found Petri's behavior "egregious" and "antithetical to the role of a prosecutor in our criminal justice system."[63]

Petri's "trial by ambush tactic resulted in both unfairness and inefficiency."[64] Though not discussed in the trial court's written opinion, the documents from Waters's civil suit suggest additional issues with Petri's provision of discovery to the defense. According to the civil documents, the court admonished Petri for playing a "game of gotcha" for providing seven DVDs of recorded jail calls on the day jury selection was scheduled to begin despite having agreed to provide them earlier.[65] The civil litigation documents also allege that the prosecution waited to provide defense counsel with Baker's prior criminal convictions until the trial had already begun, *after* opening statements, despite having had access to the documents for three years prior to trial.[66] The Grievance Committee should investigate these allegations as well.

In addition to the *Brady* violations, the findings by the Supreme Court about Petri's behavior in the *Waters* case reflect poorly on Petri's honesty to the court and fitness as a lawyer. The Supreme Court suggested that Baker's trial testimony, offered for the prosecution, could be false. As the trial court noted, "it is a clear violation of a defendant's right to due process for a prosecutor to present testimony that he knew, or should have known, was perjured."[67] On the other hand, the court found that if Baker's new story was true—despite its inconsistency with more than one previous statement—Baker's sworn grand jury testimony was necessarily false.

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."[68] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[69] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[70]

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

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[63] *Id.* at 862.

[64] *Id.* at 861.

[65] *See* Summons at 5, in *Waters* (civil).

[66] *Id.*

[67] *Waters*, 35 Misc 3d at 861.

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

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

[70] *How to File a Complaint*.

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."[71]

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."[72]

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."[73] 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.[74] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[75] 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. Petri's Misconduct Violated Rules of the New York Code of Professional Responsibility.

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.[76] 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."[77]

The court's findings suggest multiple violations of the Rules of Professional Conduct. Rule 3.8(b) requires that prosecutors "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… ."[78] The rule applies beyond "material" evidence to "require[] prosecutors to disclose *favorable* evidence so that the defense can decide on its utility."[79] Rules 3.4(a)(1) and 3.4(a)(3) prohibit New York attorneys from suppressing "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

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

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

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

[74] 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.").

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

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

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

[78] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

[79] NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 (2016).

to reveal . . . ."[80] The Third Department has upheld a disciplinary referee's finding that a prosecutor's violation of *Brady* violated Professional Rules 3.4(a)(1) and 3.8(b).[81] Petri's failure to provide the favorable witness statements—favorable because they suggest the witness is lying—violated these rules. In an unusual step, the Supreme Court of Bronx County cited Rule 3.8 specifically in the *Waters* opinion.[82]

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.[83] The Third Department has upheld a disciplinary referee's finding that prosecutor Rain's violation of *Brady* violated Professional Rules 8.4(d) and 8.4(h).[84] Petri ignored his foundational constitutional obligations when he suppressed *Brady* evidence. As explained above, Petri's *Brady* violation was so egregious that the court characterized it as "an affirmative act of deceit" and a display of "trial by ambush" tactics.[85]

B. Petri Should be Disbarred For His Misconduct.

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."[86] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[87]

Such egregious prosecutorial misconduct has grave consequences, the real-world effects of which are starkly evident in this case. Mr. Waters spent six years in custody, including 360 days in solitary confinement, before ultimately being acquitted of all charges. Petri's misconduct resulted in a costly mistrial and contributed to injustice and inefficiency within the criminal justice system. To these writers' knowledge, Petri has received no professional discipline related to his misconduct.

Systematically, *Brady* violations lead to wrongful convictions, erode constitutional protections, and undermine the public's confidence in the criminal legal system. It is clear in this case that Petri intentionally suppressed the evidence, knowing that it was favorable and that disclosing it to the defense would make it more difficult for him to secure a conviction.

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[80] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4.

[81] *Rain*, 162 AD3d at 1460-61.

[82] *Waters* at 860. Though the court cites Rule 3.8 and concludes that "[e]vidence or information which impugns the credibility of the People's principal witness against the defendant tends to negate his guilt and, therefore, these rules obligate the prosecutor to disclose this material to the defense as soon as possible," the NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 suggests in a footnote that a category of evidence used to "solely impeach" would not fall within Rule 3.8. The Grievance Committee should accept the finding of the Supreme Court, Bronx County, in this case, but whether deemed "exculpatory" or "pure impeachment," the evidence suppressed here was deemed to constitute *Brady* evidence—which must be disclosed. Thus, Petri's failure to do so violated Rule 3.4.

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

[84] *Rain*, 162 AD3d at 1460-61

[85] *Waters*, 35 Misc 3d at 861.

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

[87] *Id.*

This is precisely the kind of prosecutorial behavior forbidden both by *Brady*'s constitutional guarantees and the New York Rules of Professional Responsibility.

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

Jason Petri prosecuted Benjamin Waters for murder. Petri's key witness testified under oath that he had not seen the murder, then changed his story before trial to say he had. Petri chose to withhold that information from the defense, claiming later that it was inculpatory, so disclosure was unnecessary. The court granted a mistrial and in a subsequent trial, Waters was finally acquitted.

But to these writers' knowledge, though the Supreme Court found Petri's conduct to be improper, he remains publicly unsanctioned. To the contrary, Petri is now a court attorney, likely researching and drafting opinions on legal issues including allegations of *Brady* violations.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[88] 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."[89] 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 Petri. 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

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

[89] *Id.*

that only a disciplinary investigation can uncover."[90] 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 Petri'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.[91] 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."[92]

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.[93] 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.[94] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[95]

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

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

[91] *Kurtzrock*, 192 AD3d 197.

[92] *Id.* at 220.

[93] 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.

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

[95] 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).

discovery issues.[96] 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,"[97] which the report characterized as a "potential systemic issue."[98]

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**.[99] These disclosures have already spurred applications to review convictions.[100] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[101] 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"[102] 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 Bronx 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, 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.[103]

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[96] 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.

[97] *Id.* at 5.

[98] *Id.* at 4.

[99] *Id.* at 6.

[100] *Id.*

[101] *Id.* at 7.

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

[103] 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.

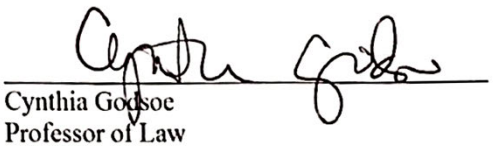
3. The Grievance Committee should investigate whether the Bronx District Attorney's Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.[104]

4. The Committee should identify any prosecutors trained and/or supervised by Petri 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.

[104] 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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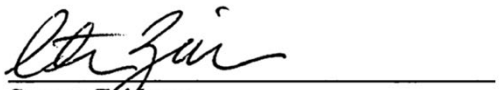

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