Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Javier Solano, State Bar No. 2809796

To the Grievance Committee,

We write to complain about the professional misconduct of attorney Javier Solano[1] in prosecuting *People v. Lonnie Jones.*[2] In *Jones*, the Appellate Division took the highly unusual step of reversing a murder conviction—on the basis of Solano's misconduct. The court found that Solano "failed to correct false trial testimony" by the only eyewitness who testified for the prosecution at trial.[3] The eyewitness falsely testified that she had identified Jones's nephew in a lineup, even though the nephew was never in the lineup.[4] In another highly unusual step, the appellate prosecutors did not oppose reversal of the conviction, demonstrating just how indefensible Solano's misconduct was.[5]

Solano committed further misconduct in *Jones* when he vouched for the credibility of the eyewitness—the only prosecutorial eyewitness, who Solano knew had just lied in her testimony.[6]

After the Appellate Division vacated the conviction, prosecutors re-tried Jones for the alleged murder.[7] The jury in the second trial acquitted Jones.[8] Yet by that time, Jones had spent nearly six

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[2] Exhibit A*, People v. Jones*, 31 AD3d 666 (2d Dept 2006). The decision does not name Solano. However, the prosecution's appellate brief does name him. Exhibit B, Brief for Respondent at *44, in *People v. Jones*, 31 AD3d 666 (2d Dept 2006), available at 2006 WL 3356009 (hereafter "Respondent Brief").

[3] *Jones*, 31 AD3d at 667; *see also* Respondent Brief at *58.

[4] *Jones*, 31 AD3d at 667; *see also* Respondent Brief at *55-56.

[5] *Id.* ("As the People correctly concede, the error cannot be said to be harmless"); *see also* Respondent Brief at *55-58.

[6] *Jones*, 31 AD3d at 667-68.

[7] Exhibit C, *Jones v State of New York*, Ct Cl, Aug. 19, 2009, Nadel, J., claim No. 113849, UID No. 2009-014-051, available at: https://tinyurl.com/f89rhrh2.

[8] *Id*.

years in prison,[9] including during the period following the wrongful conviction obtained by Solano.

Solano's professional misconduct constituted multiple, serious violations of the attorney professional rules. When he committed the misconduct, Solano was no novice: he was a Senior Trial Attorney at the Kings District Attorney's Office, having worked as a prosecutor for six years.[10] Though Solano is no longer a prosecutor, he advertises his prosecutorial experience to potential clients online in his private practice, while the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline."[11]

The Grievance Committee should seek to discipline Solano.

1. The Grievance Committee has a Unique Duty to Protect the Public by Holding Prosecutors Accountable for Misconduct.

A. Prosecutorial Misconduct is Pervasive and Unchecked.

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

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one."[14] Hal Lieberman, former Chief Counsel for the

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[9] *Id.*

[10] *See* Law Offices of Javier Solano, Attorney Profile: Javier A. Solano, https://tinyurl.com/39p5hn93 (stating Solano began prosecuting in 1996 and became a Senior Trial Attorney in 2001).

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

[12] *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice."); *see also* ABA Criminal Justice Standards: Prosecution Function Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

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

[14] *Berger v United States,* 295 US 78, 88 (1935) (emphasis added); *see also People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility—determining facts relevant to guilt or innocence."); *People v Levan*, 295 NY 26, 36 (1945).

Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[15]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[16] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees otherwise "almost never took serious action against prosecutors."[17] Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.[18] None of the other implicated prosecutors were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[19] As *The New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[20]

B. 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"[21] and are not permitted to make arguments that rely on facts that are not in evidence.[22] Prosecutors are not permitted to engage in prejudicial or misleading argument, that are sometimes referred to as a "cardinal sin."[23] These missteps include making "irrelevant and inflammatory comments;"[24] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[25] also known as vouching; appealing to the jurors'

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

[16] *Id.*

[17] *Id.*

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

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

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

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

[22] *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).

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

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

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

sympathies or fears;[26] shifting the burden from the prosecution to the defense;[27] and denigrating the defense, defense counsel or the defendant.[28] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[29]

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."[30] In 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.[31]

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."[32] 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."[33]

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

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[26] *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).
[27] *See e.g. People v DeJesus*, 137 AD2d 761, 762 (2d Dept 1988); *People v Lothin*, 48 AD2d 932, 932 (2d Dept 1975).
[28] *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).
[29] *DeJesus*, 137 AD2d at 762.
[30] *People v Fielding*, 158 NY 542, 547 (1899).
[31] *People v Wolf*, 183 NY 464, 471-476 (1906) (emphasis added).
[32] *Ashwal*, 39 NY2d at 109.
[33] *People v Payne,* 187 AD2d 245, 247 (4th Dept 1993).

> jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[34]

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."[35]

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."[36] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[37] 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."[38]

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.[39]

Despite the courts' clear prohibition of summation misconduct, prosecutors often ignore the law in an attempt to win their cases.

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[34] 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.

[35] 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 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.").

[36] 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.").

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

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

[39] 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).

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury, and multiple prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[40] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[41] Prosecutors, as they are representatives of the state, not lawyers for an individual, possess a "special duty" not to mislead a judge, jury, or defense counsel.[42]

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.[43] 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.[44]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[45] A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct

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

[41] *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)).

[42] *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.")

[43] *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").

[44] *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).

[45] *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).

between 1963 and 2013. Of those, only 63 prosecutors—less than two percent—were ever publicly disciplined.[46]

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."[47] 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."[48] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[49] "Prosecutors engage in misconduct because they know they can get away with it."[50]

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.[51] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[52] But even a short suspension like that received by Rain and Kurtzrock[53]—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 Solano will continue unabated and undeterred.

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[46] 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).

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

[48] *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).

[49] Sapien & Hernandez.

[50] *Id.*

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

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

[53] 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 Appellate Division Found That Solano Committed Misconduct by Knowingly Allowing Critical Perjured Testimony to Stand, and Vouching for the Only Eyewitness in the Case.

A prosecutor is under a duty to correct inaccurate trial testimony that is relevant to the case, even if the testimony is relevant solely to the matter of a witness's credibility.[54] Solano's failure to do so here becomes clear through a survey of both the Appellate Division's decision and the prosecution appellate brief.

Solano prosecuted Jones for murder,[55] which can carry a life sentence in prison. At trial, the prosecution presented the testimony of only one eyewitness, Fludd.[56] The prosecution's own appellate brief confirmed how critical her testimony was for Solano's ability to win the trial:

> In this case, Fludd was the sole eyewitness to the shooting to testify for the People at trial, and the sole witness linking defendant to the shooting. Fludd observed the shooting from a vantage point nine stories above the scene of the shooting, the shooting took place at night, and the shooters were visible to Fludd for less than fifteen seconds. Consequently, the issues of Fludd's credibility and reliability were central to the jury's determination of whether defendant was guilty.[57]

At trial, Fludd testified that Jones and his nephew were the two people who shot at a group of people, which included the deceased, and that she had identified Jones's nephew in a lineup.[58] However, Fludd had never identified the nephew in a lineup. In fact, the nephew was never even in a lineup, had testified at trial as Jones's witness, and had not been arrested on these charges.[59] But Solano did not correct Fludd's false testimony.[60]

Solano only spoke up during deliberations. After the jury left to deliberate, they sent a note asking if they could discuss Jones's nephew "as part of the evidence as stated by Robin Fludd."[61] "It was not until that point," the prosecution appellate brief noted, that Solano spoke up, telling the court and the defense that the nephew was never in the lineup.[62] Solano also disclosed that "as early as the second day of the trial"—more than a week prior—he had been "aware" that Fludd's

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[54] *Napue*, 360 US at 269-70.

[55] *Jones*, 31 AD3d 666.

[56] Respondent Brief at *58.

[57] *Id*.

[58] *Jones*, 31 AD3d at 667; Respondent Brief at *55.

[59] *Jones*, 31 AD3d at 667; Respondent Brief at *31, 55.

[60] *Jones*, 31 AD3d at 667; Respondent Brief at *55.

[61] *Id.*

[62] *Id.* at *55-56. The defense attorney had not known whether a lineup with the nephew had taken place. *Id.*

testimony was incorrect.[63] Based on this serious misconduct, the Appellate Division reversed the murder conviction.[64] Solano's appellate colleagues did not object.[65]

In other words, Solano knew that Fludd had testified falsely, but he did not disclose this until he was put on the spot by a direct question on the subject from the jurors. This raises the question of whether Solano would have spoken at all if not led to by the jury's actions.

Perhaps most shockingly, Solano opposed curative instructions to this perjured testimony. The trial court suggested it would strike Fludd's testimony and instruct the jury that Fludd had not viewed the nephew in a lineup.[66] Solano "registered his opposition" and this initiative was dropped.[67]

Even the prosecution's appellate brief explains the importance of the jury knowing that a witness had testified falsely:

> If the jury—which had questions about Fludd's testimony regarding [the nephew]—had known that Fludd had incorrectly testified…that information might have affected the jury's determination of whether Fludd was a credible and reliable witness.[68]

As noted, Fludd's credibility was seemingly critical for Solano's efforts to secure a win—a conviction. If the jury had known about her false testimony, her credibility would have been damaged, undermining the possibility of conviction.

Solano himself emphasized the centrality of Fludd's credibility to his case through his summation misconduct. The law prohibits prosecutors from vouching for their witnesses, for fear that the jury would be persuaded by the prestige and beliefs of the prosecutor, rather than the evidence.[69] But Solano did just that, telling the jury that Fludd was "'not making [testimony up] out of the blue,' and the jury could take her testimony 'to the bank.'"[70] Solano vouched for the credibility of his only eyewitness, who had just proved herself untrustworthy through her prejudice, of which the jury knew nothing about. The Appellate Division held that these remarks "went beyond the permissible bounds of broad rhetorical comment." [71]

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[63] *Id.* at *56.

[64] *Jones*, 31 AD3d at 667.

[65] Respondent Brief at *58.

[66] *Id.* at *57.

[67] *Id.*

[68] *Id.* at *58.

[69] *See People v Paperno*, 54 NY2d 294, 300-01 (1981) (a prosecutor "may not inject his own credibility into the trial" 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); *see also People v Walters*, 251 AD2d 433, 434-35 (2d Dept 1998).

[70] *Jones*, 31 A.D.3d at 667.

[71] *Id.* at 668.

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."[72] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[73] Grievance Committees are "committed to…recommending discipline for lawyers who do not meet the high ethical standards of the profession."[74]

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[75]

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, "Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[76]

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence."[77] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving the maximum number of convictions.[78] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[79] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

A. Solano's Misconduct Violated the 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.[80] As the Court of Appeals explained, "the privilege to practice law is not a personal or liberty interest,

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

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

[74] *How to File a Complaint*.

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

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

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

[78] 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.").

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

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

but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required."[81]

The applicable professional set off rules in 2002, when Solano committed misconduct in *Jones,* was the Code of Professional Responsibility. Under Rule 7-102, attorneys were not to knowingly make a false statement to the court or use evidence they knew to be false.[82] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[83] Rule DR 7-102 prohibited attorneys from knowingly using perjured testimony or false evidence.[84]

Solano violated these Rules when, knowing that his key witness had testified falsely, he did not correct her or alert the court or defense counsel for over a week. He only said something when the jury note prompted the subject of Fludd's false testimony. Even then, Solano opposed a remedy that would address Fludd's prejudiced testimony. Even Solano's colleagues agreed that this misconduct was so problematic it required a reversal.

Solano also prejudiced the administration of justice. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[85] An attorney's misrepresentation during legal proceeding prejudiced the administration of justice and reflected adversely on the lawyer's fitness, in violation of Rule DR 1-102.[86] Moreover, the Court of Appeals has stated that a prosecutor's improper summation remarks amount to prosecutorial misconduct in violation of the modern successor to DR 1-102, Rule 8.4.[87] A prosecutor's summation misconduct violated Rule DR 1-102 by prejudicing the administration of justice and reflecting adversely on the prosecutor's fitness as a lawyer.[88]

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

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

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

[84] Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.4(a)(4) of the Rules of Professional Conduct replaced it in 2009.

[85] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). These rules were in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.

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

[87] *Wright*, 25 N.Y.3d at 780.

[88] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009. *See also Rain*, 162 A.D.3d at 1459 (summation misconduct violated Rules 8.4(d), (h)).

Solano knowingly let perjured testimony by a key witness stand. He then opposed correction of this perjured testimony, and improperly vouched for this untrustworthy eyewitness on summation. Solano thus prejudiced the administration of justice and acted in a manner not fit of a lawyer.

B. For His Misconduct, Solano Must Receive 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."[89] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[90]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[91] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[92] Similarly, extensive prosecutorial experience weights towards a more serious sanction.[93]

The Appellate Division has demonstrated that misconduct that affects the credibility of a prosecutor should not be taken lightly. It suspended a prosecutor for three years for misleading a trial court, and explained that, "such [mis]conduct strikes at the heart of [the prosecutor's] credibility as a prosecutor and an officer of the court."[94] In that same case, the Appellate Division demonstrated that a prosecutor's "ample opportunity" to correct or clarify the misrepresentation—and failure to do so—counts against him in evaluating proper disciplinary measures.[95]

In 2002, when he committed the misconduct in this case, Solano was already a Senior Trial Attorney with the Kings County District Attorney's Office.[96] Solano undoubtedly had ample opportunities, throughout the trial, to correct or clarify the critical perjured testimony—but instead he vouched for that witness in his summation. Though Solano is no longer a prosecutor, he still practices as an attorney without any public record of discipline, while advertising his prosecutorial experience on his firm website.[97]

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

[90] *Id.*

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

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

[93] *Id.*

[94] *See In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005).

[95] *See Id.*

[96] *See* Law Offices of Javier Solano, Attorney Profile: Javier A. Solano, https://tinyurl.com/39p5hn93.

[97] *Id*.

We believe a serious sanction, such as disbarment or a lengthy suspension, 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 state's large court system and the many criminal cases that pass through New York courts 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

Solano committed serious misconduct by permitting perjured testimony, leading to a reversal of the conviction and a rebuke of his actions by both the Appellate Division and his own appellate colleagues. In doing so, he violated Rules of the Code of Professional Responsibility. To these writers' knowledge, Solano remains unsanctioned publicly or privately for his serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[98] 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."[99] 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 Solano. 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."[100] 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 Solano's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal,

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

[99] *Id.*

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

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.[101] 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."[102]

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.[103] 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.[104] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[105]

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.[106] The investigation and resulting public report identified that numerous prosecutions by

[101] *Kurtzrock*, 192 AD3d 197.

[102] *Id.* at 220.

[103] 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.

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

[105] 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).

[106] 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.

Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[107] which the report characterized as a "potential systemic issue."[108]

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**. [109] These disclosures have already spurred applications to review convictions.[110] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[111] 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"[112] 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, 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.[113]

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,

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[107] *Id.* at 5.

[108] *Id.* at 4.

[109] *Id.* at 6.

[110] *Id.*

[111] *Id.* at 7.

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

[113] 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.

and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.[114]

4. The Committee should identify any prosecutors trained and/or supervised by Solano 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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[114] 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."