May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Patrick O'Connor, State Bar No. 2777316.

To the Grievance Committee:

The Grievance Committee must discipline Patrick O'Connor[1] for his repeated, blatant, and egregious misconduct in multiple cases. In *People v. Negron*, O'Connor knowingly withheld exculpatory evidence, leading the Court of Appeals to reverse the conviction in 2015.[2] Upon remand, the Queens Supreme Court denounced O'Connor for his "utterly misleading" conduct in the grand jury.[3] The Queens Supreme Court noted that O'Connor was "aware that there was significantly more evidence pointing away from the defendant's identity as the perpetrator of the crimes than there was pointing towards it," but he "failed to present any of this exculpatory evidence." Mincing no words, the court dismissed the case, concluding that O'Connor's "deception" before the grand jury by withholding "an unusual volume of exculpatory evidence" was "indisputably deliberate."[4]

In *People v. Singleton*, O'Connor "unjustifiabl[ly] circumvent[ed]" the constitutional *Bruton* rule and repeatedly disobeyed the judge's orders, committing misconduct in opening statement and closing argument, leading the Appellate Division to reverse the conviction.[5]

In seven other cases, ranging from 2005 to 2011, Appellate Division had to address appellate

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[1] Patrick Lynn O'Connor, State Bar No. 2777316, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201. Phone: (718) 250-2000. Email: oconnorp@brooklynda.org. We do not have personal knowledge of any of the facts or circumstances of O'Connor or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. Negron*, 26 N.Y.3d 262 (2015).

[3] Exhibit B, Dismissal Order, *People v. Negron*, Ind. No. 398/05 (Queens Sup. Ct. September 6, 2017); Exhibit B1, Amended Complaint (filed March 10, 2021), *Negron v. City of New York*, 2018 WL 6075654 (E.D.N.Y 2018) (the original Complaint, which is a public record and was filed November 20, 2018, was not included due to length but can be provided upon request); Exhibit B2, O'Connor Affirmation, *People v. Fernando Caban and Monica Guartan*, Ind. No. 396/2005 (Queens Sup. Ct. October 23, 2006).

[4] *Id.* at 13, 15.

[5] Exhibit C, *People v. Singleton*, 111 A.D.3d 769, 770 (2d Dep't 2013) (quotation in original, citing to *People v. Manuel*, 182 A.D.2d 711, 712 (2d Dep't 1992)); Singleton Appellant Brief; Trial Transcript, *People v. Singleton*, Ind. 500-06 (Queens Sup. Ct. October – November 2009).

claims that O'Connor had committed summation misconduct.[6] In one case, the trial judge repeatedly intervened to warn O'Connor about his improper argument and eventually told O'Connor to sit down—effectively ending his summation argument—to prevent a mistrial based on O'Connor's "invocation of hyperbole" that was "totally inappropriate."[7] In some of the seven cases, the Appellate Division impliedly found that O'Connor had made improper arguments to the jury.

O'Connor's misconduct in Queens was far from unique; serious misconduct at the Queens District Attorney's Office (QDAO) has been regularly reported for years. For example, beginning in 2007, Queens prosecutors utilized interviewing practices that undermined suspects' *Miranda* rights, according to the Appellate Division and the Court of Appeals.[8] Another QDAO policy established a wall between different units in the office, leading to trial prosecutors failing to disclose exculpatory material in the hands of another unit.[9] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office better train its trial prosecutors.[10] There are numerous court decisions finding that QDAO

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[6] Exhibit D, *People v. Bowman*, 58 A.D.3d 747, 747 (2d Dep't 2009); Transcript Page, *People v. Bowman*, Ind. No. 2598-04 (Queens Sup. Ct. April 11, 2005); Exhibit E, *People v. Lawton*, 81 A.D.3d 663, 664 (2d Dep't 2011); Transcript Page, *People v. Lawton*, Ind. No. 2195/05 (Queens Sup. Ct. October 4, 2006); Exhibit F, *People v. Fernandez*, 78 A.D.3d 726, 726 (2d Dep't 2010); Transcript Page, *People v. Fernandez*, Ind. No. 2789/06 (Queens Sup. Ct. January 16, 2008); Exhibit G, *People v. Naqvi*, 132 A.D.3d 779, 779 (2d Dep't 2015); Transcript, *People v. Naqvi*, Ind. No. 2848/06 (Queens Sup. Ct. October 4, 2013); Exhibit H, *People v. Deokoro*, 137 A.D.3d 1297, 1297 (2d Dep't 2016); Transcript Page, *People v. Deokoro*, Ind. No. 1279-2008 (Queens Sup. Ct.); Exhibit I, *People v. Edwards*, 120 A.D.3d 1435, 1435 (2d Dep't 2014); Transcript Page, *People v. Edwards*, Ind. No. 2811/08 (Queens Sup. Ct. February 22-23, 2011); Exhibit J, *People v. Choi*, 137 A.D.3d 808, 810 (2d Dep't 2016); Transcript Page, *People v. Choi*, Ind. No. 248/07 (Queens Sup. Ct. May 20, 2011); Exhibit K, *People v. Baez*, 137 A.D.3d 805, 805-06 (2d Dep't 2016).

[7] Transcript, *People v. Edwards*, Ind. No. 2811/08 (Queens Sup. Ct. February 22-23, 2011).

[8] *People v. Dunbar*, 104 A.D.3d 198 (2d Dep't 2013), *aff'd*, 24 N.Y.3d 304 (2014). *See also People v. Perez*, 37 Misc. 3d 272 (Queens Sup. Ct. 2012) (deeming QDAO's *Miranda* interview practice an ethical violation of Rule 8.4(c)); Russ Buettner, *Script Read to Suspects Is Leading to New Trials*, New York Times (January 30, 2013) https://www.nytimes.com/2013/01/31/nyregion/appellate-panel-overturns-3-queens-convictions-based-on-rights-preamble.html.

[9] Sarah Maslin Nir, *Murder Conviction Tossed Out in Queens*, New York Times (March 18, 2013) https://www.nytimes.com/2013/03/19/nyregion/murder-conviction-reversed-over-withheld-information.html. *See also People v. Petros Bedi*, Ind. No. 4107/96, NYLJ 1202592836531 (Queens Sup. Ct. March 13, 2013) (Witness Security Program documents, which were not made part of prosecutor's file "as matter of custom," were *Rosario* and *Brady* materials; failure to disclose required vacating murder conviction).

[10] *See, e.g.*, *People v. Velez*, 2014-09698, Oral Argument, Appellate Division, 48:30-50:15 (March 16, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1521208616.External_(PubliP).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1521208616.External_(Public).mp4; *People v. Cherry,* 2014-10909*,* Oral Argument, Appellate Division, 26:34-29:31 (March 13, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1520949280.External_(Public).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?

prosecutors acted improperly—a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.[11] O'Connor's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Despite his publicly-documented misconduct, O'Connor has suffered no apparent disciplinary or professional repercussions. To the contrary, just one year after the Appellate Division's 2013 reversal of the conviction in *People v. Singleton* based on O'Connor's misconduct, the Brooklyn District Attorney hired veteran Queens prosecutor O'Connor to be the Deputy Chief of the Gang Homicides Bureau.[12]

After O'Connor joined the Brooklyn District Attorney's Office, more misconduct came to light. The next year, in 2015, the Court of Appeals found that O'Connor committed a *Brady* violation in *People v. Negron*. In 2017, the Queens Supreme Court dismissed the *Negron* shooting case entirely, finding that O'Connor's "utterly misleading" Grand Jury presentation was "indisputably deliberate."[13] In 2018, Negron filed suit against O'Connor, NYPD Investigator Robert Moscoso, and the City of New York.[14] The Complaint—which is a public record—was filed on November 20, 2018, alleging not just a detailed account of O'Connor's misconduct in the *Negron* case, but also that in the *Singleton* case, the Appellate Division had "vacated Singleton's conviction based on extensive misconduct by O'Connor."[15]

By the time the case against him was dismissed, Julio Negron had spent almost 10 years behind bars, fighting his legal battle in the courts.[16] Prior to his incarceration, he worked as a cleaner in two public schools, starting his work day early in the morning and finishing up late in the evening.[17]

Meanwhile, despite this steady drumbeat of public documents and cases revealing O'Connor's misconduct, O'Connor himself has apparently suffered no professional consequences; to the contrary, he appears to have been promoted to a Bureau Chief in the Brooklyn District Attorney's Office. As of the writing of this grievance, the New York Attorney

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source=ad2&video=VGA.1520949280.External_(Public).mp4.

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

[12] Christina Carrega-Woodby, *Thompson is trying to steal lawyers from other boroughs' DA offices*, NY Post (May 5, 2014), https://nypost.com/2014/05/05/thompson-is-trying-to-steal-lawyers-from-other-boroughs-da-offices/; Benjamin Fang, *Brooklyn DA launches new anti-gun violence bureau*, Brooklyn Downtown Star (August 26, 2020), www.brooklyndowntownstar.com/view/full_story/27770567/article-Brooklyn-DA-launches-new-anti-gun-violence-bureau?instance=lead_story_left_column.

[13] Ex. B, Dismissal Order, *People v. Negron*.

[14] Ex. B1, Amended Complaint.

[15] *Id.*

[16] *Id.* at 3.

[17] Jim Dwyer, *Withholding Evidence from a defendant, on "The Night Of" and in Real Life*, N.Y. TIMES, Sept. 6, 2016, at https://www.nytimes.com/2016/09/07/nyregion/withholding-evidence-from-a-defendant-on-the-night-of-and-in-real-life.html.

Detail Report lists "Disciplinary History: No record of public discipline" for O'Connor.[18]

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.[19] When any attorney missteps, it can cause harm, typically to an individual client. But a prosecutor's misconduct can destroy a person's life—and that of their family. Moreover, a prosecutor's misconduct negatively affects both law and society. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[20]

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."[21] 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."[22]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 analysis of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[23] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees "almost never took serious

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

[19] *Matter of Rain*, 162 A.D.3d 1458, 1462 (3d Dep't 2018) ("prosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice"); *see also* 2017 ABA Prosecution Function Standards, Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

[20] *Rain*, 162 A.D.3d at 1462.

[21] *Berger v. United States,* 295 U.S. 78, 88 (1935) (emphasis added); *People v. Jones*, 44 N.Y.2d 76, 80 (1978) (quoting *Berger*, 295 U.S. at 88). *See also People v. Calabria*, 94 N.Y.2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility--determining facts relevant to guilt or innocence.") (citation omitted); *People v. Levan*, 295 N.Y. 26, 36 (1945).

[22] Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (April 3, 2013), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[23] *Id.*

action against prosecutors."[24] In the 30 cases where judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[25] 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."[26]

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"[27] and are not permitted to make arguments that rely on facts that are not in evidence.[28] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[29] These missteps include making "irrelevant and inflammatory comments;"[30] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[31] also known as vouching; appealing to the jurors' sympathies or fears;[32] shifting the burden from the prosecution to the defense;[33] and denigrating the defense, defense counsel or the defendant.[34] Engaging in these

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[24] *Id.*

[25] *Id.*

[26] New York Times Editorial Board, *Prosecutors Need a Watchdog*, N.Y. Times, (August 14, 2018), https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html.

[27] *People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (internal quotation marks and citation omitted).

[28] *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976). *See also People v. Wright*, 25 N.Y.3d 769, 779-780 (2015); *People v. Singh*, 128 A.D.3d 860, 863 (2d Dep't 2015).

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

[30] *Mehmood*, 112 A.D.3d at 853.

[31] *People v. Bailey,* 58 N.Y.2d 272, 277 (1983) (citation omitted).

[32] *See, e.g., Ashwal,* 39 N.Y.2d at 110; *People v. Lindo*, 85 A.D.2d 643, 644 (2d Dep't 1981); *People v. Fernandez*, 82 A.D.2d 922, 923 (2d Dep't 1981); *People v. Fogarty*, 86 A.D.2d 617, 617 (2d Dep't 1982); *People v. Brown,* 26 A.D.3d 392, 393 (2d Dep't 2006).

[33] *People v. DeJesus*, 137 A.D.2d 761, 762 (2d Dep't 1988); *People v. Lothin*, 48 A.D.2d 932, 932 (2d Dep't 1975).

[34] *See, e.g., People v. Damon*, 24 N.Y.2d 256, 260 (1969); *People v. Lombardi*, 20 N.Y.2d 266, 272 (1967); *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); *Brown,* 26 A.D.3d at 393; *People v. LaPorte,* 306 A.D.2d 93, 95 (1st Dep't 2003).

forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[35]

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."[36] 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.[37]

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."[38] 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."[39]

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

> At what point does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?… why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[40]

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such remarks are *effective* at winning cases—they go beyond the evidence, to manipulate biases, prejudice, and passions. Discussing prosecutorial misconduct

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[35] *DeJesus*, 137 A.D.2d at 762.

[36] *People v. Fielding*, 158 N.Y. 542, 547 (1899).

[37] *People v. Wolf*, 183 N.Y. 464, 471-76 (1906) (emphasis added).

[38] *Ashwal*, 39 N.Y.2d at 109.

[39] *People v. Payne,* 187 A.D.2d 245, 247 (4th Dep't 1993).

[40] V*elez*, 2014-09698, Oral Argument at 0:46:55-0:48:05.

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."[41]

For that reason, summation misconduct is not trivial or a "mere technicality." Summation misconduct increases the likelihood of a guilty verdict—and of the prosecutor winning their case. However, the prosecutor's role in a criminal trial is not just to win the case: the law requires that prosecutors "seek justice…not merely to convict."[42] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[43] 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."[44]

Improper summations have been a particular problem at the Queens District Attorney's Office in recent years, distorting numerous trials, and sometimes resulting in reversal. As Justice Miller of the Appellate Division stated in oral argument:

> I could read this summation and without knowing what office it is from would say it is from Queens. That's the reputation that your office is building with this court. Because this [summation misconduct] happens repeatedly.[45]

Similarly, commenting on the Queens District Attorney's Office's opening and closing statement misconduct, Justice Austin of the Appellate Division stated in oral argument:

> I feel like a broken record because I address this every time. Almost every time the Queens DA is before us . . . When do we say to your office, enough is enough? . . . I've got to tell you, it distresses me to no end, the line that you consistently cross. Consistently! . . . You always agree [that these remarks are improper] when you're here [in the Appellate Division]. But you keep doing it and you keep doing it and you keep doing it … I've heard somebody from your office standing there every time I've been here saying the same exact thing [agreeing remarks were improper]. And I'm here 9 years this week. It's 9 years of the same thing.[46]

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[41] *Cherry,* 2014-10909*,* Oral Argument at 0:27:45-0:28:13.

[42] American Bar Association, Standard 3-1.2 Functions and Duties of the Prosecutor (2017) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[43] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[44] Commentary, Criminal Justice Standards Comm., Am. Bar Ass'n, Standards for Criminal Justice: Prosecution and Defense Function Standards 3-5.8 (3d ed. 1993).

[45] *Velez*, 2014-09698, Oral Argument at 0:48:30-0:49:00.

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

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[47]

Professor and former prosecutor Bennett Gershman highlights the broad shadow that summation misconduct continues to cast over the entire criminal justice system:

> The problem is not new … [M]isconduct by prosecutors in oral argument has indeed become staple in American trials. Even worse, such misconduct shows no sign of abating or being checked by institutional or other sanctions … Virtually every federal and state appellate court at one time or another has bemoaned the 'disturbing frequency' and 'unheeded condemnations' of flagrant and unethical prosecutorial behavior.[48]

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

C. The *Brady* Rule and State Discovery Laws are Fundamental to the Constitutional Rights to a Fair Trial and Due Process, Yet Prosecutors Often Fail to Provide Favorable Evidence to the Defense.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[49] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[50] In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads and to protect the defendant from wrongful convictions. It is unsurprising, then, that suppression of favorable evidence has played a role in over 30% of known wrongful convictions and 44% of known wrongful convictions for murder.[51]

A prosecutor has an affirmative duty to search for favorable material in their own records and those of related agencies—and to turn these over to the defense.[52]

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

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[47] *Velez*, 2014-09698, Oral Argument at 0:49:30-0:50:15.

[48] Bennett L. Gershman, *Prosecutorial Misconduct*. § 11:1. Introduction (2d ed.) (August 2018 update) (internal citations omitted.) Gershman is a former New York prosecutor. See also Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 Hastings Const. L. Q.915 (2011).

[49] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

[50] *Brady*, 373 U.S. at 87.

[51] *Government Misconduct and Convicting the Innocent*, National Registry of Exonerations (September 1, 2020): https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[52] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Strickler v. Green,* 527 U.S. 263, 280-81 (1999).

reform, 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.[53] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[54] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[55] Additionally, under federal law, a prosecutor who commits an intentional *Brady* violation can be charged with a felony.[56]

Indeed, the *Brady* rule is of such import that it has been 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….[57]

Rule 3.8 makes clear that the professional rule is broader than the *Brady* obligation: all evidence that tends to exculpate the defendant must be turned over, rather than just *materially* exculpatory evidence. As a consequence, more conduct will violate Rule 3.8 than the constitutional rule.

Despite the significance of the *Brady* rule in the criminal legal system, New York prosecutors often violate it. 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."[58] 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."[59]

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[53] C.P.L. § 240.20(1)(h) (McKinney) (repealed); *Doorley v. Castro*, 160 A.D.3d 1381, 1383 (4th Dep't 2018).

[54] C.P.L. § 240.20 (McKinney) (repealed).

[55] C.P.L. § 245.20(1)(k).

[56] 18 U.S.C. § 242.

[57] 22 N.Y.C.R.R. Part 1200, 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).

[58] N.Y. State Bar Ass'n, *Report of the Task Force on Criminal Discovery*, at 52 (Jan. 30, 2015) https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf.

[59] N.Y. State Justice Task Force, *Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform*, at 2 (July 2014), http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf.

D. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and many prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[60] 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.[61] Prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[62]

E. 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.[63] 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.[64]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[65]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.[66]

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[60] *See, e.g., Miller v. Pate*, 386 U.S. 1 (1967).

[61] *See People v. Waters*, 35 Misc.3d 855 (Bronx Sip. Ct. 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 U.S. 264, 269 (1959) (prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony).

[62] *See, e.g.,* Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and its Impact on the Innocent,* 80-81 (2012); *Connick*, 563 U.S. at 65-66. *See also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309, 316 (2001), http://digitalcommons.pace.edu/lawfaculty/128/ ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.").

[63] *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v. Auburn Police Dep't*, 138 A.D.3d 1468, 1469 (4th Dep't 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.") (internal quotation marks omitted); *see also Ryan v. State*, 56 N.Y.2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[64] *Imbler,* 424 U.S. at 429; *see also Matter of Malone*, 105 A.D.2d 455, 459 (3d Dep't 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[65] Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 242–43 (2012).

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously." Indeed, "neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly … [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes."[67] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica. "Prosecutors engage in misconduct because they know they can get away with it."[68]

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.[69] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[70] But even a short suspension like that received by Rain and Kurtzrock[71]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not held accountable themselves. Absent strong, public discipline by the Grievance Committee, misconduct like that of O'Connor will continue unabated and undeterred.

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[66] Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013) www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf; *see also Proj. On Gov't Oversight*, Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards (Mar. 12, 2014), http://pogoarchives.org/m/ga/opr-report-20140312.pdf; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[67] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 65 (2017) (internal citations omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697 (1987).

[68] *ProPublica Investigates Prosecutorial Misconduct in New York,* Innocence Project (April 3, 2013) https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[69] *Rain*, 162 A.D.3d at 1462.

[70] *Matter of Kurtzrock*, 192 A.D.3d 197 (2d Dep't 2020).

[71] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State, HuffPost (September 20, 2017)*, https://www.huffpost.com/entry/the-most-dangerous-prosec_b_12085240; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (October 1, 2016), https://www.huffpost.com/entry/a-most-dangerous-prosecutor-a-sequel_b_57effb8fe4b095bd896a0fba; Nina Morrison, "What Happens When Prosecutors Break the Law?" *New York Times*, June 18, 2018 https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html (see also Morrison's twitter thread following the *Kurtzrock* decision, https://twitter.com/Nina_R_Morr/status/1344413003903602688)

2. Courts Found that O'Connor Withheld *Brady* Evidence and Misled the Grand Jury in *People v. Negron*.

A. O'Connor Suppressed Exculpatory Evidence of an Alternative Perpetrator of the Crime.

The Court of Appeals held that O'Connor violated the *Brady* rule and deprived Negron of his constitutional right for a fair trial.[72] The details of the *Negron* case highlight the gravity of O'Connor's suppression of exculpatory evidence and how he misled the grand jury and the trial court.

Negron was arrested and charged with Attempted Murder in the Second Degree (and related charges) for a shooting that occurred after a "'road rage'" incident.[73] During the police investigation of the shooting, four out of five eyewitnesses failed to identify Negron as the shooter. Out of the three eyewitnesses who viewed Negron in a lineup,[74] two identified a "filler" (an unaffiliated person used to "fill" the lineup) as the shooter,[75] while the third said that "nobody in the lineup looked familiar."[76] The fourth eyewitness—who lived on Negron's block and said she recognized the shooter—viewed Negron at a precinct show up *and said Negron was not the shooter*.[77] The fifth eyewitness—the shooting victim—viewed Negron in a line up but only equivocally identified him: "I believe it's him" and "I think it's him."[78] Upon making these equivocal statements, the victim left the lineup to spend 15 minutes in a room with two detectives and O'Connor.[79] When the victim reemerged, his equivocal identification suddenly became unequivocal.[80]

Still, O'Connor prosecuted Negron. At trial, Negron's attorney tried to introduce evidence that a third party, Caban, was responsible for the shooting.[81] At the time, defense counsel knew

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[72] Ex. A, *Negron*, 26 N.Y.3d 262. https://www.nycourts.gov/reporter/3dseries/2015/2015_08610.htm. The decision does not identify O'Connor by name, but other documents identify him as the prosecutor, including at the grand jury stage and at trial. *See*, e.g., Ex. B1, Amended Complaint; Ex. B2, O'Connor Affirmation, *People v. Caban*.

[73] Ex. A, *Negron*, 26 N.Y.3d at 264.

[74] Ex. B, Dismissal Order at 4-5.

[75] *Id.*; Ex. A, *Negron*, 26 N.Y.3d at 265 (2015).

[76] *Id*.

[77] *Id*.

[78] Ex. B, Dismissal Order at 13, *People v. Negron*, Ind. No. 398/05 (Queens Sup. Ct. September 6, 2017). Mr. Negron has alleged that upon this equivocal identification, O'Connor told defense counsel, who was present at the lineup, that Negron would be released—only to proceed to speak to the victim in private, after which the victim made a positive identification. *See* Ex. B1, Amended Complaint.

[79] Ex. B, Dismissal Order at 13.

[80] *Id.* The trial court later seemingly suppressed this identification as suggestive but permitted an in-court identification. Ex. A, *Negron*, 26 N.Y.3d at 265, n.1.

[81] Ex. A, *Negron*, 26 N.Y.3d at 265.

that Caban—who O'Connor had also prosecuted—looked like Negron, lived in the same building as Negron, and the police had arrested Caban the day after the shooting for weapon possession charges.[82] O'Connor opposed, claiming that Caban did not look like Negron and Caban's firearm was not used in the shooting.[83] Based on O'Connor's argument, the trial court kept out evidence related to Caban's possible guilt.[84] The jury convicted Negron.[85]

Negron uncovered O'Connor's misconduct after he obtained related records from a FOIL (Freedom of Information Law) request.[86] In the records, Negron discovered the exculpatory evidence that O'Connor had suppressed.

First, O'Connor suppressed the circumstances of Caban's arrest, which demonstrated Caban's consciousness of guilt.[87] Upon arriving at the building to search Negron's apartment, the officers learned that Caban had forced his way into an apartment with roof access in a neighboring building, demanded that the owner lock the apartment's door, and discarded on the roof multiple plastic bags containing "weapons, armor, ammunition, counterfeit money, and identification cards with [his] photograph."[88]

Second, the Court of Appeals found that O'Connor suppressed the fact that the plastic bags that Caban discarded contained .45-caliber ammunition—the same kind of ammunition used in the shooting.[89]

The Court of Appeals concluded that O'Connor violated the *Brady* rule. The Court noted that the evidence against Negron was "far from overwhelming": there was no physical evidence tying Negron to the incident, and only one out of five eyewitnesses identified him.[90] The Court held that evidence that Caban possessed the .45 caliber ammunition was "plainly favorable to the defense."[91] It vacated the conviction and ordered a new trial.[92]

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id*. at 266.

[86] *Id*.

[87] *Id*. at 269.

[88] Ex. B1, Amended Complaint; Ex. A, *Negron*, 26 N.Y.3d at 267.

[89] Ex. A, *Negron*, 26 N.Y.3d at 268-69; Ex. B1, Amended Complaint. The Court of Appeals rejected the trial court's determination that the prosecution had provided this evidence as having "no support in the record" and the prosecution conceded it had "no record of ever providing the defense with such evidence." Ex. A, *Negron*, 26 N.Y.3d at 269, FN5. Judge Lasak noted the issue in a footnote in the court's Dismissal Order, stating that an inventory had been submitted to the court that listed .45 caliber ammunition. Ex. B, Dismissal Order at 7, FN7.

[90] Ex. A, *Negron*, 26 N.Y.3d at 270.

[91] *Id*.

[92] *Id*.

But O'Connor's conduct was arguably worse than the more common *Brady* case, involving the suppression of exculpatory evidence, because O'Connor was the prosecutor who prosecuted Caban for the weapon possession charges, so that O'Connor "was quite familiar with the circumstances" of Caban's arrest.[93] O'Connor's *Brady* violation, then, did not seem to result from the failure of a different prosecutor or police officer to inform him about such material.

O'Connor seems to have compounded his misconduct when he argued to the trial court about Caban. Though O'Connor must have been aware of the suppressed *Brady* evidence tying Caban to Negron's prosecution, O'Connor characterized Caban's arrest as "'irrelevant'" and his connection with the shooting as "'tenuous at best.'"[94] In the words of the Court of Appeals,

> The prosecutor also attempted to portray defendant's application as a mere attempt to pin the crime on another individual who lived in the same building and happened to be of the same ethnicity, all while *aware* that defense counsel was not fully familiar with the relevant information surrounding Caban's arrest.[95]

O'Connor's summation argument to the jury, while not addressed by the Court of Appeals in *People v. Negron*, may have included improper statements that should be investigated by the Grievance Committee. In the pending civil lawsuit regarding his wrongful conviction, Negron alleges that O'Connor "exploited his success in keeping [the exculpatory] evidence hidden."[96]

According to Negron's Amended Complaint in the civil lawsuit, O'Connor was aware that Caban more closely resembled the shooter than Negron did and they both lived in the same house, but still argued to the jury that the person who came out of the car "just happens to looks like the defendant" and "just happens to go into the defendant's house," and asked whether that sounded like a "reasonable coincidence," or "completely and utterly unreasonable and not worthy of belief."[97] Negron also alleges that O'Connor also falsely told the jury that "everything was done by the book with this case, nothing is being hidden from you."[98]

Negron further alleges that O'Connor, despite knowing that the complaining witness Fevrier was initially uncertain about whether Negron was the shooter, misleadingly asked the jury rhetorically, "[D]o you think for a moment that Mervin [Fevrier] would forget ever, ever in his life what this person looks like[?] . . . I submit to you that that is completely unreasonable to believe, and if something is unreasonable to believe, it cannot be the basis for a reasonable doubt."[99] Negron's Amended Complaint also posits that O'Connor improperly vouched for the credibility of the prosecution witnesses, requiring the trial court to admonish O'Connor, "Don't

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[93] *Id*. at 269.

[94] *Id*.

[95] *Id*. (emphasis added).

[96] Ex. B1, Amended Complaint at 15.

[97] *Id.* at 15-17.

[98] *Id.*

[99] *Id.*

vouch for your witness."[100]

Following O'Connor's violation of constitutional and state laws, Julio Negron was sentenced to 12 years in prison. He spent almost 10 years incarcerated before the Court of Appeals finally vacated his conviction and ordered a new trial.[101]

B. O'Connor Misled the Grand Jury by Withholding Exculpatory Identification Evidence.

After Negron's successful appeal, the case returned to the trial court. Upon remand, the trial court dismissed the indictment due to O'Connor's misconduct when he originally presented the case to the Grand Jury.[102]

As legal advisor to the Grand Jury, the prosecutor performs dual functions: that of public officer and that of advocate.[103] Consequently, the prosecutor is "charged with the duty not only to secure indictments but also to see that justice is done."[104] As the Court of Appeals has stated, "[t]hese duties and powers, bestowed upon the District Attorney by law, vest that official with substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion."[105] Consequently, a prosecutor is responsible for "protecting individuals from needless and unfounded prosecutions" at the Grand Jury stage,[106] and must be mindful of the Grand Jury's role as "the shield of innocence."[107] When a "complete defense" exists—that would eliminate a "needless or unfounded prosecution"—the prosecutor must present the evidence supporting that defense to the Grand Jury.[108]

The Queens Supreme Court found that O'Connor's withholding of "a plethora of exculpatory evidence" from the Grand Jury "impaired [its] integrity."[109] O'Connor presented the Grand Jury with the complainant's identification of Negron—but *withheld* from the Grand Jury that this identification was equivocal before O'Connor himself intervened.[110] In the words of the court, O'Connor's "failure to share this crucial episode with the Grand Jury was indisputably

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[100] *Id.* at 16.

[101] Ex. B1, Amended Complaint at 1.

[102] Ex. B, Dismissal Order, *People v. Negron*.

[103] *People v. Huston*, 88 N.Y.2d 400, 406 (1996).

[104] *People v. Lancaster*, 69 N.Y.2d 20, 26 (1986).

[105] *People v. Di Falco*, 44 N.Y.2d 482, 487 (1978).

[106] *Lancaster,* 69 N.Y.2d at 25-26.

[107] *Huston,* 88 N.Y.2d at 410 (*quoting People v. Minet,* 296 N.Y. 315, 323 (1947)).

[108] *Lancaster,* 69 N.Y.2d at 27. A "complete" defense stands in contrast to "mitigation" defense, which is an "attempt to reduce the gravity of the offense committed" and does not have to be presented to the grand jury.

[109] Ex. B, Dismissal Order at 14-15.

[110] *Id.* at 13.

deliberate."[111]

This "deception," in the words of the Supreme Court, was "merely the tip of the iceberg."[112] O'Connor also withheld from the Grand Jury the exculpatory testimony of four other eyewitnesses,[113] including the eyewitness who knew the shooter and said Negron was not the shooter. The testimony of the eyewitness who stated Negron was not the shooter, if believed, may have served as a "complete defense," eliminating a "needless or unfounded prosecution."[114] It presumably would have been bolstered by the testimony of the other three eyewitnesses who did not identify Negron as the shooter, all pointing to the fact that Negron was not the shooter. But O'Connor did not present the testimony of these eyewitnesses to the grand jury. The court thus found that O'Connor "utterly misl[ed]" the Grand Jury by choosing to withhold "a plethora of exculpatory evidence."[115] It dismissed the case.

3. The Appellate Division Found that O'Connor Disobeyed Judicial Orders and Violated the Constitutional *Bruton* Rule in *Singleton*.

In 2010, O'Connor prosecuted Antoine Singleton for murder, who was convicted by the jury.[116] Based solely on O'Connor's serious misconduct in that case, the Appellate Division reversed the conviction.[117]

A. The Appellate Division Found That O'Connor Violated Singleton's *Bruton* Right by Disobeying the Judge's Order That Limited Evidence of Co-Defendant's Inculpatory Statements.

Prior to trial, Singleton moved to sever his case from that of his co-defendant because of *Bruton* and *Crawford* concerns: the co-defendant had made statements implicating Singleton, but Singleton would not be able to cross-examine the co-defendant, who had a right not to testify.[118] The judge denied the severance motion, a decision that meant Singleton and his co-defendant would be tried together.[119] However, the judge did order that the co-defendant's statement to the police, which implicated Singleton, would be redacted to eliminate Singleton's name, so that it

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[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Lancaster,* 69 N.Y.2d at 27.

[115] Ex. B, Dismissal Order at 14-15.

[116] Ex. C, *People v. Singleton*, 111 A.D.3d at 769, https://www.nycourts.gov/reporter/3dseries/2013/2013_07509.htm. The decision does not identify O'Connor by name, but the trial transcript does. *See Singleton* Opening Transcript.

[117] Ex. C, *Singleton*, 111 A.D.3d at 769 ("we conclude that a new trial is required in light of certain conduct of the prosecutor.").

[118] *Id*.; Singleton Appellant Br. at 5-6.

[119] Ex. C, *Singleton*, 111 A.D.3d at 769.

did not inculpate him.[120]

But in his opening statement, O'Connor "improperly implied" that the co-defendant had implicated Singleton in the crime:[121]

> You will hear that… When they apprehended [the co-defendant], they got the name Live, and with that name Live, they did some telephone checks. And, eventually… they were able to apprehend Mr. Singleton.[122]

Thus, O'Connor circumvented the judge's order, which sought to protect Singleton's constitutional right to question an accuser. This was not lost on the trial judge, who admonished O'Connor, telling him he was "not happy with the remarks."[123]

"Despite this admonishment" regarding his opening statement, the Appellate Division noted, O'Connor "again implied" that the co-defendant had implicated Singleton in his summation. O'Connor "unequivocally suggested" that the co-defendant's statement referred to Singleton—even though the judge had ordered it redacted to protect Singleton's identification.[124]

Still undeterred by the judge's pretrial order, the judge's admonishment and constitutional rights, O'Connor projected on a video screen a copy of the co-defendant's statement with the word "we" highlighted in red.[125] With "we" on display, O'Connor told the jury Singleton and the co-defendant had been acting in concert: a "direct[] suggest[ion]" that the "we" in the statement "referred to the co[-]defendant and the defendant."[126]

In light of the above misconduct, the Appellate Division held that O'Connor's conduct constituted "an unjustifiable circumvention" of the *Bruton* rule, necessitating reversal of the conviction.[127]

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[120] *Id.*

[121] *Id*. at 769-70.

[122] *Singleton* Opening Transcript at 443:5-10.

[123] Ex. C, *Singleton*, 111 A.D.3d at 770 (quotes in original).

[124] *Id*.

[125] *Id*.

[126] *Id*.; *Singleton* Summation Transcript at 1253:14-1254:4.

[127] Ex. C, *Singleton*, 111 A.D.3d at 770 (quotation in original, citing to *People v. Manuel*, 182 A.D.2d 711, 712 (2d Dep't 1992)).

B. O'Connor Repeatedly Disobeyed Judicial Orders.

The Appellate Division emphasized that O'Connor engaged in "deliberate defiance" of the judge's pretrial order in his circumvention of *Bruton*.[128] But the Appellate Division did not stop there: "[w]e further take this opportunity to note that [the above listed] examples of the prosecutor's defiance of a court ruling were not isolated in this trial."[129]

First, in opening statement, on top of his violation of the trial court's *Bruton* order, O'Connor made improper arguments and violated another judicial order. O'Connor urged the jury to "do justice in this case" and told them that "as the Judge will tell you, justice is what's on [O'Connor's] side of the room."[130] The judge sustained defense's objection to this improper argument.[131] Yet O'Connor immediately "continued with that line of argument:"[132] "Justice is what the People require, demand of you as jurors, to do what's right, because this is a tragic situation."[133] The judge again sustained the defense's objection, and ordered O'Connor to "[j]ust tell us what the evidence will show."[134]

Second, in summation, after O'Connor's improper use of the video projector to circumvent *Bruton*, the trial judge ordered him to take down the video projection of co-defendant's statement: "Get [it] off the screen."[135] But O'Connor continued his summation "without doing so."[136]

Third, in summation, O'Connor gave "an effective instruction to the jury on the law":[137]

> [The judge] is about to instruct you on the law…. Why are you going to be considering these charges? Because of acting in concert. I told you in openings it doesn't matter whether or not he fired his gun.[138]

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[128] Ex. C, *Singleton*, 111 A.D.3d at 770.

[129] *Id*.

[130] *Singleton* Opening Transcript at 446:6, 446:10-12.

[131] *Id*. at 446:13-15; *See also People v. Cuevas*, 232 A.D.2d 234, 235 (1st Dep't 1996) (a prosecutor's comment to "do justice" is "better left unsaid."); *People v. Robinson*, 260 A.D.2d 508, 510 (2d Dep't 1999) ("[S]ummation 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.").

[132] Ex. C, *Singleton*, 111 A.D.3d at 770.

[133] *Singleton* Opening Transcript at 446:16-18.

[134] *Id.* at 446:19-22.

[135] *Singleton* Summation Transcript at 1254:23; Ex. C, *Singleton*, 111 A.D.3d at 770.

[136] Ex. C, *Singleton*, 111 A.D.3d at 770.

[137] *Id*.

[138] *Singleton* Summation Transcript at 1250:10-17.

The judge sustained the defense's objection, but—at this point, unsurprisingly—O'Connor "nonetheless persisted," stopping only after defense counsel objected again.[139]

The Appellate Division "recount[ed] these examples of the [O'Connor's] misconduct" in an effort to encourage prosecutors to behave appropriately.[140] But in the case of O'Connor—and so many other New York prosecutors—such urging fell on deaf ears.

4. Between 2005 and 2011, O'Connor's Summation Arguments Were Challenged on Appeal in Seven Other Cases.

O'Connor's egregious misconduct in *Singleton* and *Negron* included—but went far beyond—improper summation arguments. But O'Connor appears to have made improper summation arguments in other cases as well: in at least seven other cases, the defense raised claims of summation misconduct by O'Connor on appeal. Though appellate courts did not reverse the convictions in these seven cases, in none of these cases did the Appellate Division exonerate O'Connor and in some of the cases, the court impliedly or explicitly found that he committed misconduct.

In 2005, O'Connor prosecuted Ernest Bowman, who was convicted by the jury.[141] On appeal, Bowman argued that O'Connor committed summation misconduct that violated the right to a fair trial. The 2009 Appellate Division opinion only decided that no constitutional violation occurred, noting that O'Connor's remarks were either proper or improper, but if improper, "harmless."[142]

In 2006, O'Connor prosecuted Franklin Lawton, who was convicted by the jury.[143] On February 1, 2011, the Appellate Division found that "the majority of [O'Connor's] challenged remarks" were proper, and that to the extent that "some of the challenged remarks were improper, any error was harmless."[144] Since only the "majority" of the remarks were proper, some of them must have been improper.

In 2008, O'Connor prosecuted Ruben Fernandez, who was convicted by the jury.[145] In November 2010, the Appellate Division declined to reverse the conviction, finding that "[a]ny

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[139] Ex. C, *Singleton*, 111 A.D.3d at 770.

[140] *Id*. at 771.

[141] Ex. D, *Bowman*, 58 A.D.3d at 747, https://www.nycourts.gov/reporter/3dseries/2009/2009_00397.htm. The decision does not identify O'Connor by name, but a page from the trial transcript does. *See Bowman* Transcript Page.

[142] Ex. D, *Bowman*, 58 A.D.3d at 748.

[143] Ex. E, *Lawton*, 81 A.D.3d at 664, https://www.nycourts.gov/reporter/3dseries/2011/2011_00706.htm. The decision does not identify O'Connor by name, but a page from the trial transcript does. *See Lawton* Transcript Page.

[144] Ex. E, *Lawton*, 81 A.D.3d at 664.

[145] Ex. F, *Fernandez*, 78 A.D.3d at 726, https://www.nycourts.gov/reporter/3dseries/2010/2010_07956.htm. The decision does not identify O'Connor by name, but a page from the trial transcript does. *See Fernandez* Transcript Page.

error resulting from the challenged comments [made by O'Connor] was harmless."[146] The Appellate Division noted O'Connor's misconduct:

> [T]he trial court sustained those objections to [O'Connor's] *most troublesome* comments and instructed the jury that comments by the attorneys, and, more particularly, comments by the prosecutor to which objections were made and sustained, were to be disregarded "completely."[147]

It seems that some of O'Connor's comments were improper, but the trial judge cured any prejudice.

In 2009, O'Connor prosecuted Tahir Naqvi, who was convicted by the jury.[148] In 2015, the Appellate Division found that certain remarks by O'Connor in *voir dire* and summation were "improper."[149] However, the court declined to reverse, finding that O'Connor's remarks did not deprive Naqvi of a fair trial.[150]

In 2010, O'Connor prosecuted Omo Deokoro, who was convicted by the jury.[151] In 2016, the Appellate Division found that "most" of O'Connor's summation remarks challenged on appeal were proper, and that "[t]o the extent that some of [O'Connor's] summation remarks were improper, those remarks did not deprive the defendant of a fair trial."[152] The court added that, "any other error in this regard was harmless," and declined to reverse the conviction.[153]

In 2011, O'Connor prosecuted Lee Edwards, who was convicted by the jury.[154] Specifically, O'Connor delivered his summation on February 22, 2011,[155] by which time O'Connor should have been on notice from *Bowman* (where misconduct was raised on appeal, but not found by the court), *Lawton,* and *Fernandez* about his summation practice.

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[146] Ex. F, *Fernandez*, 78 A.D.3d at 727.

[147] *Id*. (emphasis added).

[148] Ex. G, *Naqvi*, 132 A.D.3d 779, https://www.nycourts.gov/reporter/3dseries/2015/2015_07518.htm. The decisions do not identify O'Connor by name, but O'Connor's testimony in the C.P.L. § 440 proceedings in the case identified him as the prosecutor. *See Naqvi* Transcript.

[149] Ex. G, *Naqvi*, 132 A.D.3d at 781.

[150] *Id*.

[151] Ex. H, *Deokoro*, 137 A.D.3d 1297, https://www.nycourts.gov/reporter/3dseries/2016/2016_02376.htm. The decision does not identify O'Connor by name, but a page from the trial transcript does. *See Deokoro* Transcript Page.

[152] Ex. H, *Deokoro*, 137 A.D.3d at 1297-98.

[153] *Id*.

[154] Ex. I, *Edwards*, 120 A.D.3d 1435, https://www.nycourts.gov/reporter/3dseries/2014/2014_06328.htm. The decision does not identify O'Connor by name, but a page from the trial transcript does. *See Edwards* Transcript Page.

[155] *Edwards* Trial Transcript.

During O'Connor's closing argument in *Edwards*, the defense objected repeatedly. The trial judge intervened on multiple occasions, telling O'Connor, "Let's stick to the evidence the case, Mr. O'Connor. The jury will disregard this last entire argument in entirety. Let's cut back on the hyperbole itself, Mr. O'Connor."[156] Later, the court warned O'Connor, "I'm going to require that you sit down in one minute, Mr. O'Connor, before your hyperbole attempts to carry this jury away to places where they should not go. The jury is to disregard these emotional outbursts by Mr. O'Connor."[157]

Finally, the court ended O'Connor's summation, telling the jury: "Mr. O'Connor's constant invocation of hyperbole is totally inappropriate and should be disregarded by [the jury] entirely. I will instruct you on the law and anything that Mr. O'Connor says in that regard is to be disregarded. You may sit down, Mr. O'Connor."[158]

In 2014, the Appellate Division found that, while some of O'Connor's remarks in *Edwards* were proper, others were "stricken [by the trial judge], thereby dissipating any prejudice resulting from the improper comment… or constituted harmless error."[159]

Also in 2011, O'Connor prosecuted co-defendants Aram Choi and Christopher Baez, who were convicted by the jury.[160] The Appellate Division found in 2016 that "the majority" of O'Connor's challenged remarks in *Choi* were proper, but that to "the extent that some of the comments and slides were improper, these errors were not, either individually or collectively, so egregious as to deprive the defendant of a fair trial."[161]

When considered alongside O'Connor's improper conduct in *Negron* and *Singleton*, these seven summation cases paint a picture of prosecutor who has bent and broken ethical rules in multiple cases.

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[156] *Id*. at 648.

[157] *Id.* at 658.

[158] *Id*. at 660-661.

[159] Ex. I, *Edwards*, at 1436.

[160] Ex. J, *Choi*, 137 A.D.3d at 810, https://www.nycourts.gov/reporter/3dseries/2016/2016_01507.htm; Ex. K, *Baez*, 137 A.D.3d at 805-06, https://www.nycourts.gov/reporter/3dseries/2016/2016_01504.htm. The decisions do not identify O'Connor by name, but a page from the trial transcript does. *See Choi* Transcript Page.

[161] Ex. J, *Choi*, 137 A.D.3d at 810; Ex. K, *Baez*, 137 A.D.3d at 805-06 (same).

5. The Grievance Committee Must Discipline O'Connor 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."[162] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[163] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[164]

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."[165]

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."[166]

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."[167] 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.[168] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[169] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

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[162] *How to File a Complaint*, Attorney Grievance Committee — First Department (July 30, 2020), https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/How%20to%20File%20a%20Complaint%2007.30.2020.pdf.

[163] 22 N.Y.C.R.R. Part 1240.

[164] *How to File a Complaint*, Attorney Grievance Committee — First Department.

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

[166] *Kurtzrock*, 192 A.D.3d 197.

[167] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[168] 2017 ABA Functions and Duties of the Prosecutor, Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[169] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

A. O'Connor Violated Multiple Professional Rules.[170]

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.[171] The Court of Appeals explained, "[T]he privilege to practice law is *not a personal or liberty interest, but 'is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.*'"[172]

First, in *People v. Negron*, O'Connor violated the Rules when he suppressed *Brady* evidence. Rule 3.8(b) requires a prosecutor to make "timely disclosure…of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."[173] Two other rules similarly require disclosure, and prohibit knowing concealment, of evidence.[174]

O'Connor personally prosecuted both Negron and Caban, the other possible perpetrator. He suppressed evidence *he knew about* that demonstrated Caban's consciousness of guilt and possession of incriminatory evidence. O'Connor seems to have done this while he was aware that *four* eyewitnesses had not identified Negron as the shooter or explicitly ruled him out. O'Connor even argued to the trial court against permitting the defense to pursue a third party culpability defense: a defense that was supported by the evidence he was suppressing.

Second, O'Connor violated the Rules in *People v. Negron* when he deceived the grand jury. Under Rule 3.3(a)(1) and (3), attorneys must not knowingly make a false statement to the court or use evidence they know to be false, while under Rule 8.4(c), an attorney must not engage "in conduct involving dishonesty, fraud, deceit or misrepresentation."[175]

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[170] O'Connor's extensive misconduct fell both before 2009, when the Rules of Professional Responsibility regulated attorney professional conduct, and after 2009, when the Rules of Professional Conduct came into effect. Since the relevant rules for O'Connor's misconduct are essentially the same under both sets of rules, the section below discusses the relevant rules under the Rules of Professional Conduct and lists the relevant provisions from the Rules of Professional Responsibility in the footnotes.

[171] *See, e.g., Matter of Capoccia*, 59 N.Y.2d 549 (1983).

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

[173] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b). The Rules of Professional Responsibility equivalent was Code of Prof. Resp., DR 7-103(b) (22 N.Y.C.R.R. § 1200.34) (repealed).

[174] 22 N.Y.C.R.R. Part 1200, Rules 3.4(a)(1), (3) (a lawyer shall not "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce…[or] conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."). See also *Rain*, 162 A.D.3d at 1460-61 (suppression of exculpatory evidence violated Rule 3.4(a)(1)). The Rules of Professional Responsibility equivalents were Code of Prof. Resp., DR 7-102(a)(3) (22 N.Y.C.R.R. § 1200.33**)** (repealed); Code of Prof. Resp., DR 7-109(a) (22 N.Y.C.R.R. § 1200.40) (repealed).

[175] 22 N.Y.C.R.R. Part 1200, Rule 3.3(a)(1), (3); 22 N.Y.C.R.R. Part 1200, Rule 8.4(c). *See also In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)). The Rules of Professional Responsibility equivalents were Code of Prof. Resp., DR 7-102 (22 N.Y.C.R.R. § 1200.33) (repealed); Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed).

The Queens Supreme Court, in dismissing the indictment, concluded that O'Connor practiced "deception by omission" at the Grand Jury and noted that his "failure to share [the witness's equivocation] with the Grand Jury was indisputably deliberate."[176] With this skewed representation, O'Connor misrepresented and deceived the grand jury.

Additionally, at trial, O'Connor objected to admission of evidence related to Caban, going so far as to argue that Caban's arrest was "irrelevant" and that his connection with the shooting was "tenuous at best." The Court of Appeals lambasted O'Connor's argument:

> The prosecutor also attempted to portray defendant's application as a mere attempt to pin the crime on another individual who lived in the same building and happened to be of the same ethnicity, all while *aware* that defense counsel was not fully familiar with the relevant information surrounding Caban's arrest.[177]

Third, O'Connor violated the Rules in *Negron*, *Singleton*, and at least some of the summation cases listed above, when he prejudiced the administration of justice and acted in a manner not befitting a lawyer. 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.[178] An attorney's misrepresentation during legal proceeding prejudices the administration of justice and reflects adversely on the lawyer's fitness, in violation of Rules 8.4(d) and (h).[179] A prosecutor's summation misconduct violates Rules 8.4(d) and 8.4(h).[180] A prosecutor's violation of Rule 3.8(b) also violates Rule 8.4(d) and 8.4(h).[181]

O'Connor violated each of these Rules 8.4(d) and 8.4(h) in a multitude of ways. In *Negron*, O'Connor violated these rules three times, when he: (i) knowingly withheld Brady evidence; (ii) misled the grand jury; and (iii) misled the trial court. In *Singleton*, O'Connor violated these rules six times: three times when he violated the judicial *Bruton* ruling (opening, summation, projection and highlighting of "we") and three times when he otherwise disobeyed the judge. Finally, in the seven other cases listed above, the Grievance Committee should investigate O'Connor's summations (and in one case, *voir dire*), as the Appellate Division implied that some of his arguments were improper.

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[176] Ex. B, Dismissal Order at 13.

[177] Ex. A, *Negron,* 26 N.Y.3d at 269 (emphasis added).

[178] 22 N.Y.C.R.R. Part 1200, Rule 8.4. The Rules of Professional Responsibility equivalent was the Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed)

[179] *In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury).

[180] *Matter of Rain*, 162 A.D.3d 1458, 1459 (3d Dep't 2018).

[181] *Kurtzrock*, 192 A.D.3d 197; *Rain*, 162 A.D.3d at 1461.

B. The Appropriate Discipline for O'Connor is Disbarment.

Though the misconduct discussed here occurred years ago, New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[182] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[183]

In considering the appropriate measure of discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[184] Simply being a prosecutor supports aggravated discipline because the law tasks them "with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[185] Similarly, extensive prosecutorial experience weights towards an aggravated sanction.[186]

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 making a "misleading" statement to 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."[187] 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.[188]

The nature of O'Connor's misconduct requires that he be disbarred. A prosecutor who *knowingly* withholds exculpatory evidence, leading to a wrongful conviction, is unfit to prosecute. A prosecutor who deceives the grand jury and the court, and who repeatedly and blatantly defies a judge's orders during *trial*, is unfit to practice law. Practicing law is a privilege, not a right.

O'Connor was not an uninformed novice when he handled the nine cases discussed above. To the contrary, O'Connor obtained his law license in New York in 1996 and has apparently worked as a prosecutor ever since.[189] At the time of all his misconduct, he was an experienced prosecutor handling the most serious felonies.

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[182] 2020 Model Rules for Lawyer Disciplinary Enforcement, Rule 32 and Commentary, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/.

[183] *Id.*

[184] *Kurtzrock*, 192 A.D.3d 197; *see also Rain*, 162 A.D.3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[185] *Id.*.

[186] *Id*. *See also*, *Rain*, 162 A.D.3d at 1461 (prosecutor's experience an aggravating factor).

[187] *See In re Stuart*, 22 A.D.3d 131, 133 (2d Dep't 2005).

[188] *Id*.

O'Connor's supervisory roles further supports his disbarment, so that other prosecutors do not follow improper practices. After transferring from the Queens to the Kings District Attorney's Office, O'Connor has served in a variety of leadership and supervisory roles. Initially a deputy chief in the Gang Homicide Bureau,[190] O'Connor quickly rose to the helm—ironically—of the newly-founded Law Enforcement *Accountability* Bureau, and later the Anti-Gun Violence Bureau.[191] In these roles—and as a senior trial attorney in Queens, prior to his departure—O'Connor undoubtedly tutored, supervised, and oversaw the conduct of more junior prosecutors, and served as a role model to them.

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 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.

The Grievance Committee must discipline O'Connor, not only because his misconduct must result in consequences, but also to send a clear message to his supervisees and colleagues that they must not follow the example described in the cases cited above.

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[189] Benjamin Fang, *Brooklyn DA launches new anti-gun violence bureau*, Brooklyn Downtown Star (August 26, 2020), www.brooklyndowntownstar.com/view/full_story/27770567/article-Brooklyn-DA-launches-new-anti-gun-violence-bureau?instance=lead_story_left_column.

[190] Christina Carrega-Woodby, *Thompson is trying to steal lawyers from other boroughs' DA offices*, NY Post (May 5, 2014), https://nypost.com/2014/05/05/thompson-is-trying-to-steal-lawyers-from-other-boroughs-da-offices/.

[191] Benjamin Fang, *Brooklyn DA launches new anti-gun violence bureau*, Brooklyn Downtown Star (August 26, 2020), www.brooklyndowntownstar.com/view/full_story/27770567/article-Brooklyn-DA-launches-new-anti-gun-violence-bureau?instance=lead_story_left_column

Conclusion

O'Connor committed repeated and extensive misconduct. In doing so, he violated the legal professional rules. To our knowledge, O'Connor remains unsanctioned publicly or privately for his serious misconduct. Disbarment is the only appropriate sanction for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[192] 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."[193]

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 O'Connor. 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."[194] 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 O'Connor's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

2. The Committee should promptly investigate whether any supervising attorney at the Queens District Attorney's Office (QDAO) is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[195]

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[192] NYSBA Committee on Professional Discipline, Guide to Attorney Discipline, available at: https://nysba.org/public-resources/guide-to-attorney-discipline/.

[193] *Id.*

[194] Rule 8.3, Comment [1].

[195] Rule 5.1 (d). A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

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

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

4. The Committee should identify any prosecutors trained and/or supervised by O'Connor 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 investigate all cases handled by this prosecutor and vacate convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the Queens District Attorney's Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.

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(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.