State of New York Grievance Committee for the
Second, Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Lindsay Gerdes, State Bar No. 4581690

To the Grievance Committee,

We write to ask that attorney Lindsay Gerdes[1] be investigated and sanctioned for repeated and serious misconduct. In *People v. Rowley*,[2] the Appellate Division reversed a conviction for gun possession because Gerdes' cross-examination and summation violated Mr. Rowley's right to a fair trial.[3] In a second case, *People v. Soto*, a court found that Gerdes "impaired" the grand jury proceeding thorough a biased colloquy with the grand jurors, resulting in dismissal of the indictment.[4]

Despite this history of misconduct, Gerdes has seemingly faced no professional repercussions. To the contrary, after becoming "Of Counsel" to the Kings County District Attorney's Office (KCDA), Gerdes became an Assistant United States Attorney in the Eastern District of New York and is now a partner at the Dinsmore law firm.[5] The firm's website makes no mention of Gerdes' past misconduct, rather advertising that at the KCDA, "based on her trial performance, [Gerdes] was one of the youngest ever ADAs to be promoted to senior trial attorney, and, before leaving that office, her caseload consisted exclusively of homicide trials."[6] The firm website issued an article when Gerdes joined, titled *Award-Winning Federal Prosecutor Lindsay Gerdes Joins Dinsmore's Litigation Department*, noting that Gerdes, as a federal prosecutor, was named

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[1] Lindsay Kristine Gerdes, State Bar No. 4581690, Dinsmore, 255 E. 5th Street Suite 1900, Cincinnati, OH 45202-4720. *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Lindsay Gerdes, click on Name hyperlink]. These writers do not have personal knowledge of any of the facts or circumstances of Gerdes or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v Rowley*, 127 AD3d 884 (2d Dept 2015), https://tinyurl.com/z2t4fsfk. The decision does not refer to Gerdes by name, but both the appellate brief and the trial transcript identify her. *See* Exhibit B, Brief of Defendant-Appellant in *People v Rowley*, 127 AD3d 884 (2d Dept 2015), available at 2013 WL 9988790 (hereafter "Appellant Brief").

[3] *Id.*; Transcript at 717 in *People v. Rowley*, Sup Ct, Kings County, Jan. 14, 2011, indictment No. 4328-2009 (emphasis added) (hereafter "Transcript").

[4] Exhibit C, *People v Soto* at 3, Sup Ct, Kings County, Feb. 28, 2012, Shillingford, J., indictment No. 9517/11 (hereafter "Soto Decision"). The decision does not identify Gerdes by name, but the decision in Soto's subsequent civil lawsuit does. *See Soto v City of New York*, 132 F Supp 3d 424 (ED NY 2015) (dismissing Soto's suit).

[5] *Award-Winning Federal Prosecutor Lindsay Gerdes Joins Dinsmore's Litigation Department*, https://tinyurl.com/4kee5upk

[6] Lindsay K. Gerdes, Partner, Dinsmore, https://tinyurl.com/2p984auu

"Prosecutor of the Year" in 2017 and 2018 by Gang Land News and was given a "Prosecutor of the Year" award by the FBI's New York Office in 2019.[7]

Moreover, despite the public, judicial findings of misconduct noted in this grievance, as of this writing, the New York Attorney Detail Report lists "No record of public discipline" for Gerdes.[8] The Grievance Committee must investigate and appropriately sanction Gerdes for her misconduct.

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.[9] 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.[10]

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."[11] 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."[12]

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.[13] Yet these appellate courts "did not routinely refer prosecutors for investigation by

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[7] *Id*.

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

[9] *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.").

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

[11] *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).

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

[13] *Id.*

the state disciplinary committees," and the disciplinary committees otherwise "almost never took serious action against prosecutors."[14] 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.[15] 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.[16] 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."[17]

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"[18] and are not permitted to make arguments that rely on facts that are not in evidence.[19] Prosecutors are not permitted to engage in prejudicial or misleading argument, which are sometimes referred to as a "cardinal sin."[20] These missteps include making "irrelevant and inflammatory comments";[21] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[22] also known as vouching; appealing to the jurors' sympathies or fears;[23] shifting the burden from the prosecution to the defense;[24] and denigrating the defense, defense counsel or the defendant.[25] Engaging in these forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[26]

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[14] *Id.*

[15] *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).

[16] *See* Sapien & Hernandez.

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

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

[19] *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).

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

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

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

[23] *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).

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

[25] *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).

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

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."[27] 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.[28]

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."[29] 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."[30]

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?… [W]hy 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?[31]

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."[32]

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

[28] *People v Wolf*, 183 NY 464, 471-476 (1906) (emphasis added).

[29] *Ashwal*, 39 NY2d at 109.

[30] *People v Payne,* 187 AD2d 245, 247 (4th Dept 1993).

[31] 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.

[32] 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

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."[33] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[34] 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."[35]

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.[36]

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

C. The Grievance Committee, as the Only Body Entrusted with Checking Prosecutorial Misconduct, has an Important Duty to Hold Prosecutors Accountable.

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[37] In 1976, the U.S. Supreme Court partly justified absolute immunity for

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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.").

[33] 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.").

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

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

[36] 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).

[37] *See, e.g.*, *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process." (internal quotation marks omitted)); *see also Ryan v. State*, 56 NY2d 561, 562 (1982) (holding

prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[38]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[39] 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.[40]

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."[41] 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."[42] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[43] "Prosecutors engage in misconduct because they know they can get away with it."[44]

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.[45] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[46] But even a short suspension like that received by Rain and Kurtzrock[47]—indeed, public discipline of any kind—remains rare.

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

[38] *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).

[39] *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).

[40] 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).

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

[42] *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).

[43] Sapien & Hernandez.

[44] *Id.*

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

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

[47] 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*

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 Gerdes will continue unabated and undeterred.

2. In Two Different Cases, Courts Found Improper Conduct by Gerdes.

A. The Grievance Committee Should Investigate Gerdes's Cross-Examination that Seemingly Caused a Mistrial in Rowley's First Trial.

Gerdes prosecuted Marc Rowley for possessing a gun while sitting in the backseat of a car.[48] According to Rowley's appellate brief, the first trial ended in a mistrial because of Gerdes's prejudicial misconduct.[49] Rowley's brief recites the following facts from the first trial: While cross-examining Rowley, Gerdes asked him whether he remembered speaking to his friend about a gun during a different car trip.[50] Gerdes immediately followed this question with another, asking, "Would it refresh your recollection to hear a call of your voice, this conversation with [your friend], actually talking about the gun?"[51] The defense objected and the trial court granted a mistrial.[52] The trial judge ruled that Gerdes inquired about Rowley's prior gun possession without a *Sandoval* ruling permitting her to do so, and thus caused prejudice necessitating a mistrial.[53]

This issue was not addressed by the Appellate Division in its decision following the second trial, but the Grievance Committee must investigate and determine whether Gerdes's misconduct caused the mistrial in the first trial.

B. The Second Department Appellate Division Found that Gerdes's Misconduct in Cross-Examination and Summation in Rowley's Second Trial Required a Reversal of the Conviction.

Following the mistrial in Rowley's first trial, Gerdes committed misconduct in the second trial, obtaining a conviction and 13-year prison sentence.[54] Upon appeal, the Second Department vacated the conviction because of Gerdes's misconduct throughout the trial.[55]

The Appellate Division identified five different instances in which Gerdes committed misconduct. First, the Appellate Division held that Gerdes "improperly suggested facts not in evidence" and "improperly functioned as an unsworn witness" during her cross-examination of

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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.

[48] *Rowley*, 127 AD3d at 884.

[49] Appellant Brief at *12-13.

[50] *Id.*

[51] *Id.*

[52] *Id.* at *13.

[53] *Id.*

[54] *Rowley,* 127 AD3d at 884.

[55] *Id.* at 885.

Rowley.[56] It has long been recognized as fundamental to a fair trial that the prosecutor may not suggest facts not in evidence or otherwise act as an unsworn witness.[57] As the Court of Appeals has explained, a prosecutor may not, through cross-examination, "suggest[] facts not in evidence," because such conduct "amounts to a subtle form of testimony against the defendant, as to which the defendant may have no effective means of cross-examination."[58]

But the documents suggest that Gerdes did use cross-examination to imply facts that were not in evidence. At trial, police officers testified that they stopped the car at 9:35 pm, but Rowley testified that they stopped the car between 8 and 8:30 pm, while he was on his way to a restaurant.[59] During Gerdes's cross-examination of Rowley, Gerdes implied—but did not demonstrate—that the District Attorney's office had called the restaurant to ascertain its hours of operations.[60] Gerdes then asked Rowley whether he testified that the traffic stop occurred before 9:35 pm because he knew the restaurant was not open at 9:35 pm.[61] Thus, Gerdes improperly suggested to the jury—without presenting any actual evidence—that the restaurant was not open.[62] It seems that this fact was not in evidence and came only from Gerdes, an unsworn witness.

The court found that Gerdes also improperly acted as an unsworn witness in summation. In her closing argument, Gerdes "again improperly implied" that Rowley had lied about what he was doing at the time he was stopped by the police, an argument that was based on Gerdes's unsworn testimony during cross-examination about the restaurant's opening hours.[63]

Second, the court found that Gerdes made "improper remarks" in summation when she suggested that Rowley possessed the gun with an intent to harm someone, though such an intent was not an element of the crime and therefore had nothing to do with the case:

> It is not as if the defendant leaves his house in the Bronx, and is by himself and is afraid that he could be ambushed so he has his gun with him. No. This is a defendant who is in a Jaguar with out-of-state plates with two people from North Carolina, a third person who is picked up according to the defendant in Harlem, and then wants to get dropped off in Brooklyn. *This defendant is essentially in a car that is not traceable to him. He is in the back seat of that car with a gun that has hollow point bullets. It's a revolver. So no evidence of a shooting is going to be left behind.*[64]

Thus, Gerdes suggested that Rowley could not have carried the firearm in self-defense (because he was in Brooklyn, and not by himself—a logically questionable argument), and therefore he possessed it to carry out a shooting. Whether true or not, Rowley's intent had nothing

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[56] *Id.*

[57] *See, e.g.*, *People v Ashwal*, 39 NY2d 105 (1976); *People v Duncan*, 13 NY2d 37 (1963); *People v Lovello*, 1 NY2d 436 (1956).

[58] *People v Paperno*, 54 NY2d 294, 301 (1981).

[59] *Rowley,* 127 AD3d at 885.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Transcript at 806:19-807:4; *see also* Appellant Brief at *40; *Rowley*, 127 A.D.3d at 886.

to do with the crime of possession with which he was charged. It was irrelevant. Additionally, the argument was inflammatory, eliciting the jurors' anger and prejudice against Rowley.[65]

Third, Gerdes improperly questioned Rowley about one of his tattoos, raising the "inflammatory and unsupported inference" that Rowley had shot someone before.[66] During cross-examination, Gerdes asked Rowley:

> [Gerdes]: Mr. Rowley, you are saying then that you were never nearly murdered on February 18th [sic]?
>
> [Rowley]: No, I wasn't, ma'm [sic]. That's correct.
>
> [Gerdes]: You were close enough to hear the shots?
>
> [Rowley]: So were the other 200 people, yes.
>
> [Gerdes]: And close enough that you ducked down after you started hearing the shots?
>
> [Rowley]: Yes, ma'm [sic].
>
> [Gerdes]: Mr. Rowley, why then do you have a tattoo that says, "Lord forgive me, but I thought he was going to kill me," [the tattoo was near another tattoo depicting a gun] if you were never nearly murdered?[67]

There was no evidence connecting the tattoo to any shooting, rendering this line of questioning irrelevant. Moreover, the propensity inference was inflammatory: Gerdes was suggesting that Rowley had committed a shooting before, and therefore was more likely to have committed the crime in the case.

Fourth, Gerdes "improper[ly]" argued in summation that Rowley had learned certain information during the pretrial hearing, although there was no evidence that he had learned of it then—and not before.[68] From Rowley's appellate brief, it appears that Rowley had testified that during the stop of the car, an officer used a Code "92," rather than a different code ("hot lunch").[69] In her summation, Gerdes argued that Rowley knew about this Code because of the pretrial hearing,[70] a remark that implied that Rowley was untrustworthy and that he had tailored his testimony based on what he had previously heard.[71] As the Appellate Division found, this was just another instance of Gerdes making an argument with "no evidence to support" it.[72]

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[65] *See Rowley*, 127 A.D.3d at 886 (citing to a discussion of irrelevant and inflammatory prosecutorial remarks in *People v. Ashwal*, 39 NY2d 105, 110 (1976)).

[66] *Rowley,* 127 AD3d at 886.

[67] Appellant Brief at *30-31(quoting trial transcript).

[68] *Rowley,* 127 AD3d at 888.

[69] Appellant Brief at *14, *22.

[70] Transcript at 788:19-790:16.

[71] Transcript at 788:19-790:16; *see also* Appellant Brief at *50.

[72] *Rowley,* 127 AD3d at 886.

Fifth, Gerdes "improper[ly]" speculated to the jury that Rowley had committed multiple gun possession offenses in the past.[73] Commenting on Rowley's behavior in the car when the officers stopped it, Gerdes stated:

> I want you to think about this. When someone knows that they are doing something wrong and they make a conscious decision to continue that behavior, and when someone decides that they are going to walk out of their house with a gun, they know that there is a chance that they are going to get caught. *When you do something over and over again*, I suggest to you that in your minds you play out the scenario of what could possibly happen if I get caught. The defendant didn't make any sudden movements [in the car] because at that time he wasn't necessarily prepared to take the weight of that gun before he knew for sure that the police had seen it. But he had played out this exact scenario in his mind. *He knew that every time he left his house with that gun . . . .*[74]

It is improper for the prosecutor to argue an "inflammatory and unsupported insinuation."[75]

Based on these five instances of misconduct, the Appellate Division reversed Rowley's conviction, reasoning that the "cumulative effect" of Gerdes's "misconduct" deprived Rowley of his constitutional right to a fair trial.[76]

C. The Kings County Supreme Court Found That Gerdes Impaired the Grand Jury While Seeking an Indictment in *People v. Soto*.

Gerdes's improper handling of the grand jury in prosecuting Rafael Soto led the Kings County Supreme Court to take the unusual step of dismissing the indictment in that case.[77]

In *Soto*, Gerdes presented the charge of Robbery in the First Degree to the grand jury, but she failed to obtain an indictment on the charge; the jurors voted no true bill.[78] Gerdes subsequently presented further evidence and sought an indictment for Kidnapping in the Second Degree and multiple counts of Robbery in the Second Degree.[79] The grand jury deadlocked,[80] indicating that they needed more evidence and raising questions about legal terms used in the charges.[81]

Gerdes then had a "colloquy" with the grand jury that "impaired" the proceeding and created "a potential of prejudice."[82] Specifically, as set forth in the Kings County Supreme Court's decision to dismiss the indictment, her responses to the grand jury's questions resulted in "extensive marshalling [sic] of the evidence to the point of deliberation in the process."[83] Gerdes

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[73] *Id.*

[74] Transcript at 793:17-794:5; *see also* Appellant Brief at *39.

[75] *People v Spence*, 92 AD3d 905, 906 (2d Dept 2012).

[76] *Rowley*, 127 AD3d at *Rowley* at 85.

[77] Soto Decision at 5.

[78] *Id.* at 2.

[79] *Id.* at 1-2.

[80] *Id.* at 3.

[81] *Id.*

[82] *Id.*

[83] *Id.*

also highlighted portions of the legal instructions "deemed supportive of the People's position" and inaccuracies in Soto's grand jury testimony.[84] Finally, she "emphasiz[ed]" her "confrontation" with Soto, his purchase of zip ties, and his apparently inculpatory employment with FedEx.[85]

It was only after this improper intervention in the grand jury process that the jurors finally delivered an indictment on all the pending charges.[86] The Kings County Supreme Court dismissed the entire indictment because of Gerdes's interference.[87]

A prosecutor's discretion during Grand Jury proceedings is not absolute.[88] As legal advisor to the Grand Jury, the prosecutor performs dual functions: that of public officer and that of advocate.[89] Consequently, the prosecutor is "charged with the duty not only to secure indictments but also to see that justice is done."[90] With this authority comes responsibility, including that of fair dealing.[91] 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."[92] Gerdes's intervention violated these rules.

The Kings County Supreme Court noted that dismissal of an indictment is an "exceptional remedy."[93] It conceded that Gerdes's actions were not "as egregious as" that of the prosecutor another case,[94] but were nevertheless egregious enough to warrant the exceptional remedy of dismissal.

The Kings County Supreme Court granted Gerdes leave to present the evidence another time to another grand jury, but the Kings County District Attorney subsequently dismissed all charges against Soto.[95]

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."[96] Professional misconduct occurs with a "violation of any of the Rules of Professional

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[84] *Id.*

[85] *Id.*

[86] *Id.* at 4.

[87] *Id.* at 3.

[88] *People v Huston*, 88 NY2d 400, 406 (1996).

[89] *Id.*

[90] *People v Lancaster*, 69 NY2d 20, 26 (1986).

[91] *People v Huston*, 88 NY2d 400, 406 (1996).

[92] *People v Di Falco*, 44 NY2d 482, 487 (1978).

[93] Soto Decision at 3 (quoting *People v Huston*, 88 NY2d 400, 409 (1996)).

[94] *See id.* (stating Gerdes's actions were not as egregious as the actions of the prosecutor in *People v. Huston*, 88 NY2d 400, 409 (1996)).

[95] *Soto,* 132 F Supp 3d at 438.

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

Conduct."[97] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[98]

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."[99]

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."[100]

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."[101] 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.[102] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[103] 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. Gerdes's Misconduct Violated Rules of the New York Rules of Professional Conduct.

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.[104] As the Court of Appeals explained, "the privilege to practice law is not a personal or liberty interest, but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required."[105]

Gerdes violated the professional rules by prejudicing the administration of justice and conducting herself in a manner not befitting of 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

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

[98] *How to File a Complaint*.

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

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

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

[102] 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.").

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

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

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

conduct that adversely reflects on the lawyer's fitness as a lawyer.[106] The Court of Appeals has stated that a prosecutor's improper summation remarks amount to prosecutorial misconduct.[107] A prosecutor's summation misconduct violates Rules 8.4(d) and 8.4(h) by prejudicing the administration of justice and reflecting adversely on the prosecutor's fitness as a lawyer.[108]

The Grievance Committee should investigate Gerdes's conduct in Rowley's first trial under Rule 8.4 and determine whether Gerdes committed misconduct that resulted in a mistrial.

The court found that Gerdes's misconduct in Rowley's second trial was so prejudicial that it mandated a reversal of the conviction. Thus, the misconduct violated Rules 8.4(d) and 8.4(h), as it prejudiced Rowley and the administration of justice in multiple ways, from acting as an unsworn witness in cross-examination to inflaming the passions of the jurors in summation.

In Soto's case, the court found that Gerdes intervened improperly in the grand jury process, leading to the dismissal of the indictment. In doing so, Gerdes's actions prejudiced the administration of justice, in violation of Rule 8.4.

B. For Her Misconduct, Gerdes Should 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."[109] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[110]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[111] 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."[112] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[113]

Though the ethical rules may be obscure to the general public, attorneys must know and follow them. The District Attorneys Association of the State of New York apparently mailed an ethical guide to *every prosecutor in the state* warning prosecutors to comply with the ethical rules and

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

[107] *People v Wright*, 25 NY3d 769, 780 (2015).

[108] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(d), (h); *Rain*, 162 AD3d at 1459.

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

[110] *Id.*

[111] *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.").

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

[113] *Id.*

even specifically quoting several of the Rules of Professional Conduct, including Rule 8.4—one of the rules that Gerdes violated.[114]

To our knowledge, Gerdes has never been held accountable for the judicial findings of misconduct described in this complaint. Instead, she ascended to a position of considerable power and status as an Assistant United States Attorney in the Eastern District of New York.

The Grievance Committee must investigate the cases cited herein—as well as other cases Gerdes handled before a grand or petit jury—and issue an appropriate public discipline.

Conclusion

Gerdes committed misconduct in two different cases. As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[115] 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."[116]

The judicial findings 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 findings 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 Gerdes. 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."[117] 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 Gerdes's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

   This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic

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

[115] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, o

[116] *Id.*

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

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.[118] 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."[119]

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.[120] 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.[121] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[122]

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.[123] The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[124] which the report characterized as a "potential systemic issue."[125]

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[118] *Kurtzrock*, 192 AD3d 197.

[119] *Id.* at 220.

[120] 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.

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

[122] 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).

[123] 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.

[124] *Id.* at 5.

[125] *Id.* at 4.

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**.[126] These disclosures have already spurred applications to review convictions.[127] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[128] 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"[129] 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.[130]

3. The Grievance Committee should investigate whether the Kings County District Attorney's Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.[131]

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[126] *Id.* at 6.

[127] *Id.*

[128] *Id.* at 7.

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

[130] 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.

[131] 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."

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