

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Mark Hale, State Bar No. 2050235

To the Grievance Committee,

We write to complain about the professional misconduct of former Brooklyn prosecutor Mark Hale¹ and urgently request disciplinary action and a thorough and transparent investigation.

Following a long career as a Kings County (Brooklyn) homicide prosecutor, Mark Hale was appointed head of the Kings County District Attorney's Conviction Review Unit (CRU), a position he held from 2014 until his recent resignation. The public's expectation is that such a unit would impartially review past convictions, re-investigate old cases and evidence, and make sure the accused received a fair trial. Shockingly, Hale—the top prosecutor tasked with carrying out that mandate—was himself found to have committed prosecutorial misconduct during his earlier tenure as a homicide prosecutor. Even a cursory inspection of Hale's prior track record raises serious concerns about his commitment to justice as the head of the CRU.

In 1998, a trial court found that Hale committed a *Brady* violation and prosecutorial misconduct in his homicide prosecution of Vladymir Campos.² Hale did not inform the defense that a key witness had met with prosecutors, including Hale, prior to trial and told them that the initial story he provided was false.³ Hale even spoke with a polygraph examiner⁴ to help formulate questions⁵ for a polygraph examination that the District Attorney's Office administered to the

¹ Mark John Hale, State Bar No. 2050235. His publicly available registration information lists the Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201. Phone: (718) 250-3474. The undersigned to do not have personal or complete knowledge of the cases described in this complaint. This complaint is based on the documents cited herein, including court opinions, briefs, and sections of the *People v. Campos* and *People v. Thompson* transcripts. The Grievance Committee should review the entire record.

² Exhibit A, *People v Campos*, 281 AD2d 638, 639 (2d Dept 2001). The trial court denied the defense motion for a mistrial and struck the witness's testimony from the record. The appellate court upheld Campos' conviction and found the trial court's remedy sufficient. *See also* Transcript at 519:16.

³ Brief for Defendant-Appellant at 6-7, 15-20 in *People v Campos*, 281 AD2d 638 (2001) (hereafter "Appellant Brief"); *see also* Brief for Respondent at 16-25 in *People v Campos*, 281 AD2d 638 (2001), available at 2000 WL 3448808 (hereafter "Respondent Brief").

⁴ Trial Transcript at 476:12-15 in *People v Campos*, 281 AD2d 638 (2001) (hereafter "Transcript"). Hale continued to claim that he did not know whether the polygraph examination, for which he helped formulate questions, had been administered (at 481). In other words, Hale told the court that he called a witness to testify in a murder case without knowing whether his office had administered a polygraph examination to the witness.

⁵ Transcript at 476-478.

witness. Hale not only failed to inform the defense about the existence of a polygraph examination, but when the court asked him directly, Hale initially told the court that he did not know anything about it, and then said he did not “recall,”⁶ before ultimately conceding in court that he had indeed helped formulate the questions. The court found Hale’s conduct to be “truly egregious” and defined it as “prosecutorial misconduct,” striking all of the witness’s testimony.⁷

The Grievance Committee should investigate the *Campos* case; the trial court’s finding of misconduct appears to us to constitute more than a sufficient basis for the Grievance Committee to discipline Hale. The appellate court found that the trial court’s remedy—striking the witness’s testimony—was sufficient and did not reverse Mr. Campos’s conviction. However, the fact that the trial court found that Hale committed prosecutorial misconduct by suppressing exculpatory evidence and misleading the court is nonetheless of extreme gravity and importance.

Campos is not the only case where the defense contended that Hale concealed exculpatory evidence and the Grievance Committee should investigate the facts in other cases as well. The defense made this same argument in the case of Garnell Thompson, which Hale prosecuted in 2003. Thompson argued on appeal that Hale failed to provide contact information for witnesses in a timely fashion, hampering the defense’s ability to investigate and present evidence of innocence.⁸ Though the Appellate Division found the suppressed information in *Thompson* not material under the *Brady* standard, this Committee should investigate whether Hale’s actions violated his broader ethical duties under the Rules of Professional Conduct.

Then last year, Hale’s 1993 prosecution of Emmanuel Cooper for murder unraveled due to an egregious *Brady* violation, and Cooper was freed after spending twenty-seven years in prison.⁹ In that case, as will be discussed in more detail below, the key eyewitness was under arrest for a serious crime when he made the statement incriminating Cooper, something he lied about at trial. The defense was never told.

After prosecuting and securing convictions against Campos, Thompson, Cooper and many other people, Hale was placed in charge of the CRU and tasked with taking a fresh look at old Brooklyn convictions. It is hard to imagine a more apparent conflict of interest. Given Hale’s long career as a *prosecutor in the same office* prior to entering the CRU, many, if not all, of the cases that would have been ripe for an independent CRU review were the same cases prosecuted by Hale himself or one of his colleagues.

⁶ Transcript at 442:11-22.

⁷ Transcript at 498: 23-25, 499:1-12; Transcript at 519.

⁸ Exhibit B, *People v Thompson*, 54 AD3d 975 (2d Dept 2008; *see also* Brief of Appellant at 5, 8, 11, available at 2007 WL 5416004 (hereafter “Thompson Brief”); Trial Transcript at 14:20-15:13 in *People v Thompson*, Sup Ct, Kings County, Oct. 18, 2005, indictment No. 3289/04 (hereafter “Thompson Tr Transcript”).

⁹ Jeff Winter, *Wrongfully convicted man was released after 27 years, but then the world went on lockdown*, CNN (May 22, 2021) <https://tinyurl.com/39krfd6w>; *People v Emmanuel Cooper*, Sup Ct, Kings County, Jan. 8, 2020, indictment No. 427/93.

Notwithstanding the finding of misconduct noted below, as of the writing of this grievance, the New York Attorney Detail Report lists “Disciplinary History: No record of public discipline” for Hale.¹⁰

We call upon the Grievance Committee to take the following actions:

1. The Committee should investigate and appropriately discipline Hale based on the trial court’s finding of misconduct in *People v. Campos*.
2. The Committee should move swiftly to investigate Hale’s conduct as a prosecutor in the cases of Cooper, Thompson, and any of Hale’s other cases in which the issue of misconduct was raised in the courts before trial, at trial, on appeal, in motions pursuant to CPL §440.10, or in lawsuits alleging government misconduct, as well as in any of Hale’s cases that were the subject of other ethical grievances mentioned in the media as potentially involving misconduct, or identified by any other source. 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.”¹¹
3. The Committee should investigate the CRU’s practices during Hale’s eight-year tenure to determine whether, under Hale’s supervision, the CRU properly and neutrally investigated the cases brought to its attention. The Committee should investigate whether Hale’s work leading the CRU was in compliance with the Rules of Professional Conduct, including (a) whether Hale’s CRU practice was competent and free of improper conflicts of interest under Rules 1.1 and 1.16 of the Rules of Professional Conduct,¹² (b) whether Hale complied with his obligation to report misconduct by his colleague prosecutors when he learned of it under the circumstances defined by Rule 8.3, and (c) whether Hale’s practice at the CRU was prejudicial to the administration of justice under Rule 8.4.

New York does not have a statute of limitations 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.”¹³ Thus, a prompt and thorough investigation of Hale’s conduct is essential to the administration of justice.

¹⁰ New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney Mark Hale, click on Name hyperlink].

¹¹ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

¹² See e.g. Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.16 Comment [1] (“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest . . .”).

¹³ ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

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.¹⁴ 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.¹⁵

As the U.S. 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.”¹⁶ 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.”¹⁷

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.¹⁸ Yet these appellate courts “did not routinely refer prosecutors for investigation by the state disciplinary committees,” and the disciplinary committees otherwise “almost never took serious action against prosecutors.”¹⁹ 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.²⁰ None of the other implicated prosecutors

¹⁴ *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.”).

¹⁵ *Rain*, 162 AD3d at 1462.

¹⁶ *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).

¹⁷ Joaquin Sapient & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (Apr. 3, 2013), <https://tinyurl.com/t2ryucec>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *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).

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.²¹

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.”²²

B. Prosecutors are Required to Provide Exculpatory Evidence to the Defense under the *Brady* Doctrine, State Discovery Laws, and Rule of Professional Conduct 3.8, Yet Often Fail to Comply with these Obligations.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.²³ A prosecutor’s duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.²⁴ Consequently, a conviction must be overturned when the suppressed evidence is “material,”²⁵ and where there is a “reasonable probability” that the undisclosed evidence would have changed the result.²⁶ New York places an even greater burden on prosecutors, as it uses a less stringent standard for *Brady* reversals than the U.S. Supreme Court.²⁷ In New York, if the defense requested the evidence and the prosecution still failed to provide it, the conviction must be reversed if there is a “reasonable

²¹ See Sapien & Hernandez.

²² Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), <https://tinyurl.com/4ntvsv85>.

²³ See generally *Brady v Maryland*, 373 US 83 (1963); *Giglio v United States*, 405 US 150 (1972).

²⁴ *Brady*, 373 US at 87.

²⁵ *United States v Bagley*, 473 US 667 (1984); *Kyles v Whitley*, 514 US 419, 433 (1995). The U.S. Supreme Court has not addressed, and courts and scholars disagree, whether the appellate-level “materiality” standard applies to a prosecutor’s pre-trial disclosure burden. See e.g. *Boyd v United States*, 908 A2d 39, 60 (D.C. 2006) (the “Supreme Court in *Strickler* contemplated the existence of a broad ‘duty of disclosure,’ but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. *The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.*”) (emphasis added). This appears to coincide with Justice Kennedy’s understanding, as summed up in a 2012 oral argument: “I think you misspoke when you [were asked] what is the test for when *Brady* material must be turned over. And you said whether or not there’s a reasonable probability . . . that the result would have been different. That’s the test for when there has been a *Brady* violation. You don’t determine your *Brady* obligation by the test for the *Brady* violation. You’re transposing two very different things.” Transcript of Oral Argument at 49, *Smith v Cain*, 565 US 73 (2012) (No. 10-8145), <https://tinyurl.com/dmmu7b44>; see also Janet C. Hoeffel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 NYU Rev L & Soc Change 467, 473 (2015) (“[B]y the very nature of appellate and post-conviction review, the Court has not had to decide the proper standard for the prosecution’s pretrial duty to disclose favorable evidence.”). The ethical rules governing a prosecutor’s pretrial disclosure obligations, however, do not include a materiality requirement.

²⁶ *Bagley*, 473 US 667.

²⁷ *People v Vilardi*, 76 NY2d 67 (1990).

possibility”—less than the “reasonable probability” required under *U.S. v. Bagley*—that the failure to disclose contributed to the verdict.²⁸

In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads, present evidence that the prosecution’s case is inaccurate, present evidence that the testimony of the prosecution’s witnesses is inaccurate or false, present evidence of the accused’s innocence to the jury, and ultimately, to protect the accused from a wrongful conviction. It is unsurprising, then, that suppression of *Brady* evidence has played a role in over forty-four percent of all known wrongful convictions and sixty-one percent of known wrongful convictions for murder.²⁹

A prosecutor has an affirmative duty to search for favorable and material evidence in their own records and those of related agencies, and to then turn these over to the defense.³⁰ Under federal law, a prosecutor who commits an intentional *Brady* violation could potentially be charged with a felony.³¹

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform legislation, New York’s discovery statutes required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.³² Other New York criminal procedure law sections obligated prosecutors to disclose types of evidence that commonly contain *Brady* information.³³ The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor’s discovery obligations.³⁴

A prosecutor’s obligation to provide helpful evidence to the defense is of such import that it is codified in its own subsection in the 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 ³⁵

Rule 3.8, which binds New York prosecutors, is broader than the *Brady* obligation in that a prosecutor must provide *all* evidence that tends to exculpate the accused, not just *materially*

²⁸ In the 1990 *Vilardi* case, the New York Court of Appeals emphasized the importance of “elemental fairness to the defendant and...concern that the prosecutor’s office discharge its ethical and professional obligations.” The Court maintained the New York rule that if the defense has requested the favorable evidence, the suppression of that evidence mandates reversal if there is just a “reasonable possibility” that the failure to disclose contributed to the verdict.

²⁹ National Registry of Exonerations, Government Misconduct and Convicting the Innocent at 81 (Sept. 1, 2020), <https://tinyurl.com/yha56e4b>.

³⁰ See *Kyles v Whitley*, 514 US 419, 432 (1995); *Strickler v Green*, 527 US 263, 280-281 (1999).

³¹ 18 USC § 242.

³² McKinney’s Cons Laws of NY, CPL 240.20(1)(h) (repealed); *Doorley v. Castro*, 160 AD3d 1381, 1383 (4th Dept 2018).

³³ McKinney’s Cons Laws of NY, CPL § 240.20 (repealed).

³⁴ CPL § 245.20(1)(k).

³⁵ Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). This Rule was previously codified in New York’s Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)).

exculpatory evidence.³⁶ As a consequence, more conduct will violate Rule 3.8 than in the constitutional rule. Similarly, the American Bar Association Standards extend beyond the *Brady* rule, requiring a prosecutor to “diligently seek to identify” and disclose all mitigating, exculpatory and impeachment evidence “regardless of whether the prosecutor believes it is likely to change the result of the proceeding.”³⁷

Despite the significance of the *Brady* rule in the criminal legal system, the New York State Justice Task Force has pointed to “[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence.”³⁸ 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.”³⁹

C. Prosecutors Have a Duty to Present Evidence Honestly.

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

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

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil

³⁶ NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 (2016) (“While *Brady* has been held to require a prosecutor to disclose only ‘material’ evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation.”); see also, ABA Comm on Ethics and Prof Responsibility Formal Op 09-454 (2009); *United States v Gatto*, 316 F Supp 3d 654, n 17 (2018); and *People v Waters*, 35 Misc 3d 855, 859-60 (Sup Ct, Bronx County 2012) (Rule 3.8(b) is “[i]ndependent of *Brady*”).

³⁷ ABA Criminal Justice Standards: Prosecution Function Standard 3-5.4(c).

³⁸ NY State Justice Task Force, *Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform* at 2 (2014), <https://tinyurl.com/asd2ht4d>.

³⁹ NY State Bar Assn, *Report of the Task Force on Criminal Discovery* at 52 (Jan. 30, 2015), <https://tinyurl.com/f78tjetx>.

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

⁴¹ See *People v Waters*, 35 Misc 3d 855, 861 (Sup Ct, Bronx County 2012) (violation of due process when prosecutor “although not soliciting false evidence, allows it to go uncorrected when it appears” (quoting *Napue v. Illinois*, 360 US 264, 269 (1959)); see also *Napue*, 360 US at 271 (finding a due process violation when prosecutor failed to correct witness’s false testimony that he had not received any promise in return for his testimony)).

⁴² See e.g. Daniel S. Medwed, *Prosecution Complex: America’s Race to Convict and its Impact on the Innocent*, 80-81 (2012); *Connick v Thompson*, 563 US 51, 65-66 (2011); see also Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 Geo J Legal Ethics 309, 316 (2001) (“The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.”)

accountability.⁴³ In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the “checks” of “professional discipline” by state bar organizations.⁴⁴

Unfortunately, the U.S. Supreme Court’s assumption—that professional disciplinary actions would “provide an antidote to prosecutorial misconduct”—has not been borne out.⁴⁵ A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only sixty-three prosecutors—less than two percent—were ever publicly disciplined.⁴⁶

In their 2016 article, “Prosecutorial Accountability 2.0,” ethics experts Professors Ellen Yaroshefsky and Bruce Green point out that prosecutors “were rarely disciplined for misconduct, and if so, not very seriously.”⁴⁷ Indeed, “neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly ... [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors’ offices would clean up their own messes.”⁴⁸ “It’s an insidious system,” said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.⁴⁹ “Prosecutors engage in misconduct because they know they can get away with it.”⁵⁰

In 2018, the Appellate Division suspended prosecutor Mary Rain’s law license for two years for a variety of misconduct, including summation misconduct.⁵¹ In December 2020, the Appellate

⁴³ See e.g. *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have “absolute immunity” for the “conduct of a prosecution”); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 2016) (“The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.” (internal quotation marks omitted)); see also *Ryan v. State*, 56 NY2d 561, 562 (1982) (holding that “the doctrine of prosecutorial immunity” precludes “recovery against the State” for “acts of prosecutorial misconduct”).

⁴⁴ *Imbler*, 424 US at 429; see also *Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official’s claim to prosecutorial immunity in a professional ethics proceeding).

⁴⁵ See Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz L Rev 219, 242–243 (2012).

⁴⁶ Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) <https://tinyurl.com/rpxyadhb>; see also Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), <https://tinyurl.com/vjkfr2eh>; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L J 59, 81 (2012) (citing “the small number of sanctions against prosecutors, relative to lawyers as a whole”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 NC L Rev 721, 725 (2001) (describing the “rarity of discipline” of prosecutors).

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

⁴⁸ *Id.* at 65 (citation omitted); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

⁴⁹ Sapien & Hernandez.

⁵⁰ *Id.*

⁵¹ *Rain*, 162 AD3d at 1462.

Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.⁵² But even a short suspension like that received by Rain and Kurtzrock⁵³—indeed, public discipline of any kind—remains rare.

Prosecutors, the officials tasked with holding the public accountable, are not being held accountable for their own misconduct. Absent strong public discipline, misconduct like that of Hale will continue unabated and undeterred.

2. The Trial Court Found that Hale Suppressed Exculpatory Evidence and Committed a *Brady* Violation “Absolutely Without Justification” in *People v. Campos*.

In 1998, Hale was found to have committed misconduct in the prosecution of Vladymir Campos.⁵⁴ Hale prosecuted Campos for the shooting death of a man named Felix “Pito” Gonzalez. The prosecution theory at trial was that Campos had killed Pito for money in a contract killing. Based on the appellate briefs, it seems that witnesses described a more chaotic-sounding scene, involving Campos asking to borrow Pito’s jacket, showing him a gun or pointing a gun, Pito grabbing the gun, and the gun discharging once (or Campos shooting it once).⁵⁵ Pito later died.

At trial, Hale called key witness Omar Williams to testify against Campos. In addition to describing the scene above wherein Campos shot Pito, Williams testified that the day before the murder, he had heard Campos discuss killing Pito in exchange for money.⁵⁶

During Williams’s testimony, Campos started yelling, accusing Williams of lying and seemingly telling Williams not to let Hale scare him.⁵⁷ Campos told the judge, “The D.A. is putting shit in his head. That ain’t right.”⁵⁸ When the testimony resumed—the judge asked the jurors and Williams to leave the courtroom after Campos’s outburst—Williams said that what he had just testified to regarding the contract killing was false.

Hale interrupted Williams during his testimony, something that Campos’s attorney later described as follows: “Mr. Hale was getting answers he didn’t like. He tried to stop the witness from speaking.”⁵⁹ When he continued, Williams told the jury that his incriminating statement had been coerced by a police detective:

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

⁵³ In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court’s sanction was surprisingly light. *See e.g.* Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State*, HuffPost (Sept. 20, 2017), <https://tinyurl.com/yhvm43k>; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), <https://tinyurl.com/fp9yfs8x>; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), <https://tinyurl.com/52ar9tjx>.

⁵⁴ Exhibit A, *People v Campos*, 281 AD2d 638, 639 (2d Dept 2001). The trial court struck the witness’s testimony from the record and the appellate court upheld Campos’ conviction.

⁵⁵ Appellant Brief at 10; *see also* Respondent Brief at 3-5.

⁵⁶ Appellant Brief at 14; *see also* Respondent Brief at 16-17.

⁵⁷ Transcript at 423-24.

⁵⁸ Transcript at 425; *see also* Respondent Brief at 6.

⁵⁹ Transcript at 489:23-24.

[The detective] told my mother to stay home; right? So, I went with him. So, my mother asked him before we left, my mother asked him do I need a lawyer to come in. He said, no he can come by himself. So, I went there and he had me in this room and ... asked me if I know Jeff Rock. I told him, yes. And then he asked me did he have something to do with the murder. I said I have no idea, I don't know. I don't know how it went down, whatever. Then, he told me that – he came and gave me a pen and piece of paper and told me that sign my name, the address, and then my telephone number and then sign it and leave it and then he said to write word for word what he's saying. And he said if I didn't do it, that he was going to lose me through the system, arrest me that night, put me through the system and he said one phone call, he'll lose me through the system. And I was scared so I did what he said ... And after I did that, he told me to go on up to the D.A.'s office to make a written statement on tape.⁶⁰

Williams further testified that he was afraid that Campos “could go to jail for a long time for something that ain't true.”⁶¹ Hale asked Williams, “Is it your statement, now, sir, that what you told to the police, what you told to the assistant district attorney under oath, wasn't true?” Williams responded to Hale: “Yes, sir. I've been telling you that for the longest but you still don't want to believe me. I took a lie detector and everything.”⁶²

Williams had therefore disavowed his previous claim that supported the prosecution's theory—that it was a contract killing. Williams further testified that after he took *and failed* the polygraph examination, another prosecutor told him, “[Y]ou have to stick with this thing [the false statement].”⁶³

But leading up to the trial, Hale never disclosed to the defense or the court that Williams had changed his story or that he had taken a polygraph.⁶⁴

Hale conceded to the court that he had “explained the ramifications of [Williams] changing his story” to Williams, thereby acknowledging that he had personal knowledge of the recantation and had even confronted the witness about it himself.⁶⁵ Hale later acknowledged that Williams had also recanted to a different prosecutor before Hale took over the case.⁶⁶ Hale excused his failure to disclose the recantations explaining that he believed Williams recanted out of fear of retaliation, not because his original statement was untrue.⁶⁷

The trial judge asked Hale about the polygraph examination.

⁶⁰ Transcript at 434-5.

⁶¹ Transcript at 435.

⁶² Transcript at 436: 24-25; 437:1-6; see also Appellant Brief at 14-16, 31, Respondent Brief at 16-21.

⁶³ Appellant Brief at 16; *see also* Respondent Brief at 20, Transcript 437:12-17.

⁶⁴ Appellant Brief at 16; *see generally* Respondent Brief (stating delayed disclosure occurred), Transcript at 439.

⁶⁵ *Id.*; *see also* Respondent Brief at 20-21, Transcript at 440.

⁶⁶ *Id.* at 17; *see also* Respondent Brief at 22-23.

⁶⁷ *Id.* at 16; *see also* Transcript at 490-91.

THE COURT: I see. And do you have any knowledge of this purported lie detector test?

MR. HALE: No, Judge. I don't recall. I don't have anything in my file about that. The Court knows that I wasn't on this case right from the get-go. I don't see anything in my files that purports to do that. And I'm not saying that he is a hundred percent wrong; at this time I simply do not know. Certainly, I wish I could tell you one way or the other, but I can't, Judge.⁶⁸

But just two days later, still during the *Campos* trial, Hale admitted to the court that five months prior to the trial, in May 1998, Hale spoke to the witness and the witness's attorney about the recantation and "did ask whether [the witness] would take a polygraph examination."⁶⁹ Hale told the court that he had personally spoken with the polygraph examiner⁷⁰ to help formulate questions for the polygraph exam.⁷¹

Hale told the court that the polygraph examination was part of the District Attorney's process to decide whether to seek a death sentence or life imprisonment.⁷² Campos's attorney, after reviewing some just-provided polygraph documents, told the court that the documents established a broader purpose for the polygraph examination than the purpose Hale had described:

[T]he examiner's primary purpose of this examination was to determine the truthfulness of subject's statements regarding the incident and whether or not you were involved in the shooting of Pito. That was their primary purpose. A moment ago we heard the primary purpose of giving the polygraph test was to determine whether he was being truthful or not with regards to the contract killing. Apparently, that wasn't their only interest.⁷³

Based on these parts of the trial transcript, it seems that Hale's position to the court was that he did not know whether the polygraph examination was administered. That claim would signify that a key witness recanted an important claim in a potential death penalty homicide case, Hale helped prepare a polygraph examination for the witness, then Hale called that witness to testify at trial without knowing whether the polygraph examination had been administered by his own office.

The trial court found that Williams's recantations and the polygraph examination constituted *Brady* material and addressed the discrepancy between Hale's initial failure to recall the polygraph

⁶⁸ Transcript at 442:11-22; *see also* Appellant Brief at 17 (emphasis removed); Respondent Brief at 8, 21.

⁶⁹ Transcript at 476:12-15.

⁷⁰ *Id*; *see also* Respondent Brief at 24. Hale continued to claim that he did not know whether the polygraph examination, for which he helped formulate questions, had been administered (Transcript at 481).

⁷¹ Transcript at 476-478; *see also* Appellant Brief at 17-18, 34; Respondent Brief at 24-25.

⁷² Transcript at 473:24-25; 474:2-5; *see also* Appellant Brief at 17-18, 34; Respondent Brief at 24-25. The Campos appellate brief argues that the polygraph date was May 22, not May 15, as described by Hale.

⁷³ Transcript at 492-95.

examination with his two-days-later recollection of having helped formulate the polygraph questions.

I'm finding, first, that the items are *Brady*, and I am finding that the People were absolutely without justification, in any way, shape or form, in their failure to affirmatively disclose it ... [With] regret, Mr. Hale, I have to agree with [defense counsel's] characterization here that your representations two days ago that you didn't know anything about this, in light of what you just said on the record, is a little *disingenuous*, and *I find prosecutorial misconduct*.⁷⁴

For context, due process requires that the prosecutor apprise the defense of favorable evidence, which even at the time of the *Campos* trial included impeachment materials,⁷⁵ such as recantations and polygraph examination results.⁷⁶ These obligations arise from considerations of “elemental fairness to the defendant and as a matter of professional responsibility.”⁷⁷ That Hale did not credit Williams's recantations—and said he believed them to be the product of a threat—is irrelevant; it is not up to a prosecutor to pick which witness statements he believes and disclose only those statements.⁷⁸ Indeed, Campos's attorney pointed out that Hale's suppression of inconsistent statements by a witness, based on which statements Hale chose to believe, was the equivalent of Hale “becoming the jury in this case.”⁷⁹

Hale's apparent misrepresentations to the court—that he had no knowledge of a polygraph examination, did not “recall” anything about a polygraph examination, and had no notes of such an examination in his file—are particularly troubling. Hale later told the trial court that his conversations with the witness and the witness's attorney about the recantation—and the polygraph examination itself—occurred months before trial. This information was presumably important; according to Hale, it was part of the District Attorney's process to decide whether to seek death or life imprisonment.⁸⁰

On June 22, 1998, the District Attorney's Office publicly announced its decision to seek life imprisonment rather than execution.⁸¹ Roughly five months after the polygraph examination—

⁷⁴ Transcript at 498:23-25, 499:1-12; *see also* Appellant Brief at 20; Respondent Brief at 26-29 (emphasis added).

⁷⁵ *See Brady v Maryland*, 373 US 83 (1963); *United States v Bagley*, 473 US 667, 676 (1984); *People v Cwikla*, 46 NY2d 434, 441 (1979).

⁷⁶ *See People v Baxley*, 84 NY2d 208 (1994) (testifying witness's recantations constitute *Brady*); *People v Scott*, 88 NY2d 888 (1996) (polygraph test results constituted *Brady* material despite inadmissibility of polygraphist's conclusions); *People v Rutter*, 202 AD2d 123 (1st Dept 1994) (witness's exculpatory statements during polygraph examination constituted *Brady* and *Rosario* material).

⁷⁷ *People v Simmons*, 36 NY2d 126, 131 (1975).

⁷⁸ *Baxley*, 84 NY2d at 213-214 (“[N]ondisclosure cannot be excused merely because the trial prosecutor genuinely disbelieved [the witness's] recantation. The ‘good faith’ of a prosecutor is not a valid excuse for nondisclosure.”); *People v Andre W.*, 44 NY2d 17 (1978).

⁷⁹ Transcript at 492-495.

⁸⁰ Transcript at 473:24-25; 474:2-5.

⁸¹ This decision was notable enough to be reported in the newspaper. “DA’ll ask for a life sentence.” *Daily News*, June 22, 1998.

four months after the Kings County District Attorney’s (KCDAO) announced its decision to seek life imprisonment—the Campos murder trial began.

Ultimately, the *Campos* trial court denied the defense motion for a mistrial but ordered the jury to disregard the witness’s entire testimony, finding that Hale’s *Brady* violations were “truly egregious” prosecutorial misconduct.⁸²

Campos was convicted. On appeal, Hale’s colleagues from the District Attorney’s Office described in their appellate brief that the prosecution “delayed disclosure [of] the *Brady* material,”⁸³ but argued that it was not prejudicial to Campos and the sanction was sufficient. The Appellate Division affirmed the conviction in 2001, finding that the trial court’s remedy of striking the witness’s testimony was sufficient to cure the suppression of exculpatory evidence.⁸⁴ Importantly, the appellate court did not disturb the trial court’s ruling that a *Brady* violation had occurred.

3. The Grievance Committee Should Investigate Whether Hale Committed Misconduct in *People v. Cooper* and *People v. Thompson*.

Two other cases prosecuted by Hale warrant serious investigation by the Grievance Committee. In both *People v. Cooper* and *People v. Thompson*, the defense argued that the prosecution withheld favorable evidence from the defense. The Grievance Committee should investigate whether Hale’s actions in these cases constituted professional misconduct.

A. People v. Cooper

In 1993, five years before the *Campos* prosecution, Hale prosecuted Emmanuel Cooper for homicide.⁸⁵ Cooper was convicted and spent twenty-seven years in prison before his exoneration in 2020.⁸⁶ After evidence surfaced of a significant *Brady* violation during the trial, the KCDAO agreed to the vacatur of the conviction⁸⁷ and ultimately moved to dismiss the indictment.⁸⁸

The *Brady* evidence concerned an alleged eyewitness, Rico Sanchez, whose trial testimony implicated Cooper in the homicide.⁸⁹ This evidence was important to the State’s case against Cooper, as the other witnesses’ identifications of Cooper were tentative or otherwise questionable.⁹⁰ At trial, Sanchez testified that at the time when he gave a statement to the police incriminating Cooper, he had come to the police station voluntarily to assist with the

⁸² Transcript at 519; Appellant Brief at 21; *see also* Respondent Brief at 26.

⁸³ Respondent Brief at 27, 29.

⁸⁴ *Campos*, 281 AD2d at 638-39.

⁸⁵ Slevin Affirmation at ¶ 35.

⁸⁶ Cooper Complaint at 1.

⁸⁷ Cooper Mem of Law at 20.

⁸⁸ Cooper Complaint at 2.

⁸⁹ Cooper Mem of Law at 8.

⁹⁰ Cooper Complaint at 7-10.

investigation—and that he was not handcuffed or placed in a holding cell.⁹¹ When the defense attorney attempted to question Sanchez further about why he was at the police station, Hale objected, preventing this line of questioning.⁹² Hale told the court that Sanchez was not under arrest on the day in question.⁹³

This was false—Sanchez was actually under arrest that day.⁹⁴ In fact, he was accused of firing a shotgun from his vehicle at two people in a nearby car.⁹⁵ This was a very serious charge⁹⁶ that cast significant doubt on the credibility of Sanchez’s statement to the police.⁹⁷ The defense was not informed of Sanchez’s arrest, and Hale explicitly told the court that Sanchez was not under arrest that day; furthermore, the defense was prevented from cross-examining Sanchez on the subject.⁹⁸ Hale then compounded the problem by emphasizing Sanchez’s false testimony in his summation. Summarizing Sanchez’s identification of Cooper, Hale told the jury, “[h]e said that when he wasn’t under arrest. He said that when he had no pending cases In other words, [Sanchez] said it when he didn’t need any kind of deal.”⁹⁹

In its 2020 Affirmation in Response to Motion to Vacate Judgment, it seems that the KCDAO did not include an affirmation or any statement from Hale, sworn or otherwise, about the circumstances that led to the *Brady* violation. Instead, the KCDAO wrote that it had reviewed Cooper’s file and located a rap sheet for Sanchez that did not include the shooting arrest and that no other document in the file “provides any reason to believe that either at or before the time of defendant’s trial” Hale knew of Sanchez’s arrest.¹⁰⁰

The KCDAO conceded that if this information had been disclosed, “there is a reasonable probability that the outcome of the trial would have been different.”¹⁰¹ In other words, without this *Brady* violation, Emmanuel Cooper may not have been imprisoned for twenty-seven years.

Additionally, Cooper’s civil rights lawsuit alleges that the government suppressed other exculpatory reports that were apparently released by the State after Cooper’s conviction was vacated.¹⁰²

⁹¹ Cooper Mem of Law at 9-11, 24-25.

⁹² Slevin Affirmation at 24.

⁹³ *Id.* at 25.

⁹⁴ Cooper Mem of Law at 26.

⁹⁵ Slevin Affirmation at 10.

⁹⁶ According to the KCDA, Sanchez was charged with Reckless Endangerment, Criminal Mischief, and Criminal Possession of a Weapon. The charges were later dismissed for insufficient evidence. *See* Slevin Affirmation at 11-12.

⁹⁷ In January 2018, Rico Sanchez apparently signed an affidavit recanting his testimony from Cooper’s trial, stating that he was pressured by the police to identify Cooper. *See* Complaint at 15.

⁹⁸ Cooper Mem of Law at 24-25.

⁹⁹ *Id.* at 25-26.

¹⁰⁰ Slevin Affirmation at 12-13.

¹⁰¹ *Id.* at 24.

¹⁰² Cooper Complaint at 21.

The Grievance Committee must investigate the circumstances of this case and determine whether Hale committed prosecutorial misconduct by failing to disclose exculpatory evidence. To these writers' knowledge, Hale has not submitted a sworn statement about how the *Brady* violation occurred. According to a recent media report, after dismissing the charges against Cooper, Supreme Court Judge Ruth Shillingford called for an independent investigation into the circumstances that led to his wrongful conviction, saying, "There has got to be an evaluation of what happened in every case. How did it get to that point? And that cannot be done by the District Attorney's Office."¹⁰³

Additionally, the Grievance Committee should investigate whether Hale's conduct, if proven to be unintentional, violated the requirements that attorneys perform competently, with proper care and with adequate preparation.

B. People v. Thompson

In 2005, seven years after the *Campos* trial, Hale prosecuted Garnell Thompson in another homicide case.¹⁰⁴ Thompson was charged with the murder of his former girlfriend.¹⁰⁵ At some point prior to the trial, Hale provided DD-5s—police reports made by detectives—to the defense, but redacted the names and contact information of the witnesses.¹⁰⁶ In reviewing the appellate brief and partial transcript, it appears that one report indicated that the victim owed money to various people and had "beef" with two individuals, neither of whom was Thompson.¹⁰⁷ A second report concerned a police informant, who told the police that someone had admitted to being paid \$300 to lead the killer to the victim.¹⁰⁸ A third report indicated that the victim had stolen between \$5,000 and \$10,000 from someone who was going to pay \$10,000 to have her killed.¹⁰⁹

Prior to trial, Thompson's attorney requested the *unredacted* reports, contending the redactions were hampering the defense investigation into these witnesses.¹¹⁰ The defense argued that these reports revealed the possibility that someone other than Thompson had committed the crime and that they were exculpatory. Either just before or during the trial, Hale provided the unredacted reports, at which point the defense contended it was too late for the defense investigator to locate the witnesses.¹¹¹

¹⁰³ Ethan Corey and Elizabeth Weill-Greenberg, *He Says He Was Wrongfully Convicted. His Trial Prosecutor Led The Unit That Rejected His Petition*, NY Focus (Sept. 23, 2021), <https://tinyurl.com/5253ecsy>.

¹⁰⁴ See *Thompson*, 54 AD3d at 976.

¹⁰⁵ Thompson Brief at 2.

¹⁰⁶ See Thompson Brief at 3, 11, 12; Hearing Transcript at 1, 2:10-16, 3-9, in *People v Thompson*, Sup Ct, Kings County, Oct. 6, 2005, indictment No. 3289/04 (hereafter "Thompson Hr Transcript"); Thompson Tr Transcript at 14:6-13, 22:6-11.

¹⁰⁷ Thompson Hr Transcript at 2:23-3-5, see also Thompson Brief at 4.

¹⁰⁸ Thompson Hr Transcript at 6:17-7:22; Thompson Brief at 4.

¹⁰⁹ Thompson Hr Transcript at 8:7-13; Thompson Brief at 5.

¹¹⁰ Thompson Brief at 5, 8, 11; Thompson Tr Transcript at 14:20-15:13.

¹¹¹ Thompson Brief at 8, 11; Thompson Tr Transcript at 14:20-15:13.

The trial court denied the remedies suggested by the defense and Thompson was convicted. On appeal, the Appellate Division referred to the reports as “*Brady* material” but denied Thompson relief because it found that the suppressed evidence was ultimately not material to the conviction.¹¹² Unlike the Grievance Committee, however, it was not the Appellate Division’s task to analyze Hale’s conduct through the lens of the professional rules. Under Rule 3.8, materiality is not an element in a prosecutor’s pre-trial disclosure duty, which requires that all favorable evidence be disclosed, whether material or not.¹¹³

The Grievance Committee should investigate whether Hale delayed disclosure of this evidence and whether that constituted professional misconduct.

4. 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.”¹¹⁴ Professional misconduct occurs with a “violation of any of the Rules of Professional Conduct.”¹¹⁵ Grievance Committees are “committed to ... recommending discipline for lawyers who do not meet the high ethical standards of the profession.”¹¹⁶

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 U.S. Supreme Court has stated unequivocally that prosecutors “have a special duty to seek justice, not merely to convict.”¹¹⁷

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.”¹¹⁸

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

¹¹² *Thompson*, 54 AD3d at 976.

¹¹³ NY City Bar Assn Comm on Prof Ethics Formal Op 2016-3 (2016) (“While *Brady* has been held to require a prosecutor to disclose only ‘material’ evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation.”); *see also*, ABA Comm on Ethics and Prof Responsibility Formal Op 09-454 (2009); *United States v. Gatto*, 316 F.Supp.3d 654, n 17 (2018); *People v Waters*, 35 Misc 3d 855, 859-60 (Sup Ct, Bronx County 2012) (Rule 3.8(b) is “[i]ndependent of *Brady*”). This Rule was previously codified in substantially similar form in New York’s Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)).

¹¹⁴ Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, <https://tinyurl.com/39axvffr>.

¹¹⁵ Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

¹¹⁶ *How to File a Complaint*.

¹¹⁷ *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

¹¹⁸ *Kurtzrock*, 192 AD3d 197, 219.

that guilt is decided upon the basis of sufficient evidence.”¹¹⁹ 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.¹²⁰ The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.¹²¹ 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. Hale’s Misconduct in *Campos* Likely Violated the Code of Professional Responsibility. The Committee Should Also Investigate Hale’s Conduct in *Cooper, Thompson*, and as head of the Conviction Review Unit.

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.¹²² As the Court of Appeals explains, “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.”¹²³

Disclosing Exculpatory Evidence

The Code of Professional Responsibility (“Code”) was the applicable professional set of rules in 1993, 1998 and 2005, when Hale prosecuted Cooper, Campos, and Thompson. Rule DR 7-103(b) required 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.”¹²⁴ In addition, two other rules similarly required prosecutorial disclosure, and prohibited knowing concealment, of evidence.¹²⁵

As interpreted by the New York City Bar Association and the American Bar Association, Rule 3.8, the contemporary successor to DR 7-103(b), requires that a prosecutor provide *all* evidence

¹¹⁹ Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

¹²⁰ 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.”).

¹²¹ See Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

¹²² See e.g. *Matter of Capoccia*, 59 NY2d 549, 551 (1983).

¹²³ *Matter of Seiffert*, 65 NY2d 278, 280 (1985) (quotation marks omitted); see also *Matter of Scudieri*, 174 AD3d 168, 173 (2019).

¹²⁴ Code of Professional Responsibility DR 7-103(b) (22 NYCRR 1200.34 (repealed)). This rule was in effect when the discussed misconduct occurred. However, Rule 3.8(b) of the Rules of Professional Conduct replaced it in 2009.

¹²⁵ Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 1200.33 (repealed)); Code of Professional Responsibility DR 7-109(a) (22 NYCRR 1200.40 (repealed)). These two rule were replaced in 2009 by Rules of Professional Conduct (22 NYCRR 1200.0) 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 AD3d at 1460-61 (suppression of exculpatory evidence violated Rule 3.4(a)(1)).

that tends to exculpate the accused, not just *materially* exculpatory evidence.¹²⁶ *In the Matter of Glenn Kurtzrock*, the Appellate Division separately analyzed the prosecutor’s discovery duties under *Brady* and Rule 3.8.¹²⁷ In finding a Rule 3.8(b) violation in *Kurtzrock*, the Appellate Division neither undertook a materiality analysis nor listed materiality as an element of the rule.¹²⁸ Thus, the Appellate Division implicitly recognized that a violation of Rule 3.8, the modern successor to DR 7-103(b), does not depend on whether the evidence was material.¹²⁹

In *Campos*, the trial court determined that Hale withheld *Brady* evidence—the witness’s prior recantations and polygraph examination—in violation of these rules. This appears to be a clear-cut violation of the ethical rule that prohibits the withholding of favorable evidence.

Notably, a prosecutor’s “deliberate pattern of avoidance, or willful blindness” to the existence of such evidence—including failure to conduct a *Brady* analysis of evidence, or delegation of this duty to law enforcement—constitutes knowledge under Rule 3.8(b), the successor rule to Rule DR 7-103(b).¹³⁰ Thus, for example, in *Campos*, if Hale claimed that he forgot about the polygraph examination he was intimately involved in just months earlier—or the recantation he heard from the witness—any deliberate pattern of forgetfulness would still constitute an ethical violation.

The Grievance Committee should also investigate Hale’s handling of exculpatory evidence in *Cooper* and *Thompson*.

In *Cooper*, the Grievance Committee should seek to determine whether Hale knew of the exculpatory evidence, including the fact that the key witness lied about being under arrest at the time of his statement to police, as well as the other exculpatory reports cited in *Cooper*’s federal civil rights lawsuit. As noted above, to our knowledge, Hale never submitted a sworn affirmation stating when he learned of the exculpatory information; this should be a primary step taken by the Grievance Committee.

If Hale submitted credible sworn testimony and supporting evidence that he did not know of the exculpatory evidence in *Cooper*, the Grievance Committee should investigate whether any failure to learn of exculpatory evidence constitutes a deliberate pattern of avoidance, which itself constitutes knowledge under Rule 3.8(b), the successor to Rule DR 7-103(b).¹³¹

¹²⁶ See *supra* n 115.

¹²⁷ See generally *Kurtzrock*, 192 AD3d 197.

¹²⁸ *Id.*

¹²⁹ Courts in other jurisdictions have also recognized that Rule 3.8(b) violations do not depend on materiality. *In re Kline*, 113 A3d 202, 213 (DC 2015) (holding the D.C. professional rule, modeled after ABA Rule 3.8, “requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirement”); *In re Disciplinary Action Against Feland*, 2012 ND 174, 14 (ND 2016) (no materiality requirement under professional conduct disclosure rule); *Matter of Larsen*, 2016 UT 26, 41 (Utah 2016).

¹³⁰ *Kurtzrock*, 192 AD3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

¹³¹ *Kurtzrock*, 192 AD3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

In *Thompson*, the appellate court found that the unredacted reports at issue were not material to the verdict, but since materiality is not an element of an ethical violation, the Grievance committee should investigate whether Hale complied with his broader ethical duties beyond the *Brady* rule.

Candor to the Court

Under the ethical rules at the time of the *Campos* trial, attorneys were not supposed to knowingly make false statements to the court or to use evidence they knew to be false.¹³² Rule DR 1-102 prohibited attorneys from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹³³

The *Campos* trial court found that Hale’s response about the polygraph—that he did not know about it, and then that he could not “recall” it despite helping to formulate the questions—was “a little disingenuous” and constituted “prosecutorial misconduct.”

Prejudicing the Administration of Justice and Lack of Fitness to Practice Law

Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflects on their fitness to practice law.¹³⁴ A prosecutor’s violation of Rule DR 7-103(b) also violates Rule DR 1-102.¹³⁵ Moreover, an attorney’s misrepresentation during legal proceedings prejudices the administration of justice and reflects adversely on the attorney’s fitness, in violation of Rule DR 1-102.¹³⁶

Hale’s misconduct in *Campos* prejudiced the administration of justice, leading the court to strike the entire testimony of a witness from the record.

In *Cooper*, the Committee should investigate whether Hale’s actions prejudiced the administration of justice, in light of Cooper’s wrongful conviction and imprisonment for twenty-seven years.

¹³² Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.3 of the Rules of Professional Conduct replaced it in 2009.

¹³³ Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. *See also In re Muscatello*, 87 AD3d 156, 158-59 (2d Dept 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

¹³⁴ Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). These rules were in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.

¹³⁵ *Id.* This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009. *Kurtzrock*, 192 AD3d 197 (finding disclosure violation prejudiced the administration of justice and reflected adversely on the prosecutor in violation of Rules 8.4(d), (h)); *Rain*, 162 AD3d at 1461 (same).

¹³⁶ *In re Muscatello*, 87 AD3d at 158-59 (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rules 8.4(d), (h), the modern equivalents of DR 1-102).

Competent Practice of Law

If Hale proves to the Committee by sworn statements and extrinsic evidence that his actions in *Cooper* were unintentional and unknowing, the Committee must investigate whether his conduct violates the ethical requirement of the competent practice of law. Under Rules EC 6-1 and DR 6-101, an attorney has a duty to act competently, with proper care and with adequate preparation. Such an investigation must be thorough; Emmanuel Cooper spent twenty-seven years in prison following a wrongful conviction.

Hale's Practice as Head of the Conviction Review Unit

The Committee should investigate the CRU's practices during Hale's eight-year tenure to determine whether, under Hale's supervision, the CRU properly and neutrally investigated the Brooklyn cases brought to its attention.

The Committee should investigate whether Hale's work leading the CRU was in compliance with the Rules of Professional Conduct, including, but not limited to, (a) whether Hale's CRU practice was competent under Rules 1.1 and 1.16 of the Rules of Professional Conduct,¹³⁷ (b) whether Hale complied with his obligation to report misconduct by his colleague prosecutors when he learned of it, under the circumstances defined by Rule 8.3, and (c) whether Hale's practice at the CRU was prejudicial to the administration of justice under Rule 8.4.

B. For Misconduct, Hale Must be Disciplined.

New York follows the American Bar Association in not having a statute of limitations for attorney discipline.¹³⁸ The American Bar Association's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."¹³⁹

In considering discipline, the Appellate Division has considered regarded the role of a prosecutor as a "substantial factor in aggravation."¹⁴⁰ 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."¹⁴¹ Similarly, extensive prosecutorial experience weighs towards a more serious sanction.¹⁴²

Prosecutorial misconduct has real-world, grave consequences. *Brady* violations lead to wrongful convictions and erode constitutional protections. Under Hale, the CRU's own report

¹³⁷ See e.g. Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.16 Comment [1] ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest . . .").

¹³⁸ ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

¹³⁹ *Id.*

¹⁴⁰ *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.").

¹⁴¹ *Kurtzrock*, 192 AD3d at 219.

¹⁴² *Id.*

found that *Brady* violations contributed to ten of the twenty-five wrongful convictions that the report surveyed.¹⁴³ The suppression of *Brady* evidence is one of the most serious transgressions a prosecutor can commit—especially in a homicide case, where the defendant typically faces a life sentence (followed by death in prison) or state execution.

Hale’s prosecution of Emmanuel Cooper ended in a wrongful conviction and a twenty-seven-year-prison sentence. In a recent CNN article profiling Cooper, he revealed that he struggles with the grave psychological impacts of his long incarceration to this day.¹⁴⁴

At the time of the *Campos* trial, five years after the *Cooper* trial, Hale had been a member of the New York bar for twelve years—not a new attorney unfamiliar with his ethical responsibilities. The *Brady* material in *Campos* was revealed by happenstance, when the witness blurted it out on the stand. It was only after the witness testified that he was given a polygraph examination that Hale provided any information about said polygraph examination—but even still, he initially said he knew nothing about it.

As the former head of the CRU, Hale routinely appeared in court on high-profile cases.¹⁴⁵ He spoke to journalists about those cases and was quoted regularly in the media.¹⁴⁶ A failure to hold someone of Hale’s stature and public exposure accountable for a court finding of misconduct would send the strongest of messages—to prosecutors, other attorneys, and the public—that prosecutors are beyond accountability.

Based on the *Campos* trial court’s finding that Hale withheld exculpatory evidence as well as Hale’s apparent misrepresentation to the court about the polygraph examination, the Grievance Committee should seek decisive and appropriate public discipline.

¹⁴³ Kings County District Attorney Office, 426 Years: An Examination of 25 Wrongful Convictions in Brooklyn at 2, New York (July 9, 2020), <https://tinyurl.com/4273ec6e>.

¹⁴⁴ Jeff Winter, *Wrongfully convicted man was released after 27 years, but then the world went on lockdown*, CNN (May 22, 2021), <https://tinyurl.com/39krfd6w>.

¹⁴⁵ See e.g. Alan Feuer, *Wrongful Convictions Are Set Right, but Few Fingers Get Pointed*, NY Times (Aug. 8, 2017), <https://tinyurl.com/2eszd8pa>; Colleen Wright, *Another Exoneration in Brooklyn Brings Total Since Last Year to 14*, NY Times (Aug. 4, 2015), <https://tinyurl.com/2v48mp5u>.

¹⁴⁶ See e.g. Matthew McKnight, *No Justice, No Peace*, The New Yorker (Jan. 6, 2015), <https://tinyurl.com/eej725rd>; Noah Remnick, *Brooklyn Man Is Exonerated After 25 Years in Prison for Murder*, NY Times (Mar. 10, 2016), <https://tinyurl.com/423ash7z>.

Conclusion

Brady violations often have a devastating impact on the accused, as well as the legal profession as a whole. The trial court in *Campos* found that Hale had committed egregious misconduct but still denied the defense request for a mistrial and Campos went on to be convicted. As Campos's attorney asked the trial court:

What is the punishment for failure to give *Brady, Rosario* material, and prosecutorial misconduct that you found? There has to be something. You say, don't ever do that, that's bad, Mr. Hale. Go back and tell your office that no, no, no, no, don't do that again? There has to be some kind of remedy. Mr. Campos can't just sit here and be convicted and sentenced to life without parole without them paying some price, too, for doing what it is they're not supposed to do and failing to do that which they're supposed to do....¹⁴⁷

We write to the Grievance Committee because, to our knowledge, no such accountability has occurred in this case. Prosecutors are attorneys, and as "officers of the court, all attorneys are obligated to maintain the highest ethical standards."¹⁴⁸ 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."¹⁴⁹

The judicial finding of misconduct in *Campos* alone constitutes a far more than sufficient basis to meet the "fair preponderance of the evidence" standard for the Grievance Committee to discipline Hale, but we also call upon the Committee to go further and investigate the other matters identified above as well. The investigation should be public at every stage possible.

Thank you for your careful consideration of this matter.



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¹⁴⁷ Transcript at 507-508.

¹⁴⁸ NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, <https://tinyurl.com/47scv4pb>.

¹⁴⁹ *Id.*



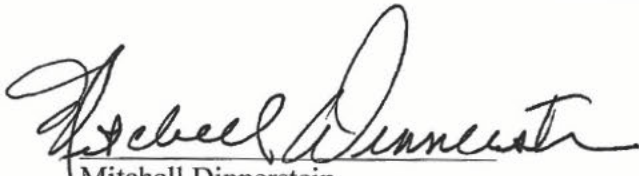
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