

# Fordham Law Review

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Volume 80 | Issue 2

Article 5

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November 2011

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### Recommended Citation

Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 Fordham L. Rev. 537 (2011).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol80/iss2/5>

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# THE SUPREME COURT ASSUMES ERRANT PROSECUTORS WILL BE DISCIPLINED BY THEIR OFFICES OR THE BAR: THREE CASE STUDIES THAT PROVE THAT ASSUMPTION WRONG

*Joel B. Rudin\**

## INTRODUCTION

Section 1983<sup>1</sup> creates a civil damages remedy against “every state official for the violation of any person’s federal constitutional or statutory rights.”<sup>2</sup> Under § 1983, citizens are empowered to act as “private attorneys general” to enforce the Constitution against individual governmental actors or municipalities.<sup>3</sup> In *Imbler v. Pachtman*,<sup>4</sup> the Supreme Court limited the use of this remedy against public prosecutors, finding that, like judges, they are entitled to absolute immunity from liability under § 1983 for conduct “within the scope of [prosecutors’] duties in initiating and pursuing a criminal prosecution.”<sup>5</sup> Recognizing that its decision might “leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty,”<sup>6</sup> the Court reasoned that “the immunity of prosecutors from liability . . . under § 1983 does not leave the public powerless to deter misconduct or punish that which occurs”<sup>7</sup> because “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”<sup>8</sup>

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1. 42 U.S.C. § 1983 (2006).
2. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).
3. *See City of Canton v. Harris*, 489 U.S. 378 (1989) (bringing claim against municipality alleging that police officer’s failure to provide plaintiff necessary medical attention while in police custody violated her constitutional rights); *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978) (bringing suit against the City of New York and other governmental actors arguing that forced maternity leave violates constitutional rights).
4. 424 U.S. 409 (1976).
5. *Id.* at 410.
6. *Id.* at 427.
7. *Id.* at 428–29.
8. *Id.* at 429.

*Imbler* foreclosed a significant avenue for wronged criminal defendants to obtain redress, but it did not preclude all potential theories of civil liability against prosecutors and their offices under § 1983. Notwithstanding *Imbler*, a prosecutor may be sued for his or her conduct in an extra-judicial or “investigative” capacity.<sup>9</sup> Additionally, under *Monell v. Department of Social Services of New York*<sup>10</sup> and *City of Canton v. Harris*,<sup>11</sup> a municipality may be sued where the unlawful custom, policy, or practice of its prosecutor’s office causes constitutional injury to the plaintiff.<sup>12</sup> Such an “unlawful policy” may be proven by showing that a municipality is deliberately indifferent<sup>13</sup> to its constitutional obligations through its failure to train, supervise, or discipline its agents or employees.<sup>14</sup>

Both of these paths to prosecutorial accountability are under attack in the courts. With anecdotal evidence suggesting a recent upswing in multi-million dollar lawsuits filed against prosecutors’ offices,<sup>15</sup> the Supreme Court recently has granted certiorari in a number of cases brought against prosecutors individually or against the municipalities that employ them.<sup>16</sup> In its decision denying *Monell* liability in *Connick v. Thompson*<sup>17</sup> on March 29, 2011, the Court again relied on *Imbler*’s assumption that prosecutors will be deterred from committing misconduct due to their amenability to

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9. See *Burns v. Reed*, 500 U.S. 478, 494–96 (1991) (holding that prosecutor is entitled only to “qualified immunity” for providing assistance to police that contributes to a misleading arrest warrant application intended to bring a suspect before the court for criminal proceedings); see also *Kalina v. Fletcher*, 522 U.S. 118, 129–31 (1997) (holding that only qualified immunity protects prosecutor who acted like a complainant in personally attesting to the truth of a fact necessary to obtain an arrest warrant); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269–70 (1993) (holding that only qualified immunity protects prosecutor who obtained a false expert opinion during a matter’s investigative stage for later use at a criminal trial).

10. 436 U.S. 658, 694 (1978).

11. 489 U.S. 378, 398 (1989).

12. See, e.g., *Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992).

13. *Id.*

14. *Id.*; see also *Ramos v. City of New York*, 729 N.Y.S.2d 678, 695–96 (App. Div. 2001).

15. See, e.g., Anahad O’Connor, *\$18 Million to Man Wrongly Imprisoned*, N.Y. TIMES, Oct. 20, 2010, at A22 (reporting on *Newton v. City of New York*, No. 07 Civ. 6211, 2010 WL 4177383 (S.D.N.Y. Oct. 22, 2010); this verdict was subsequently vacated after trial); A. G. Sulzberger, *City to Pay Record \$9.9 Million over Man’s Imprisonment*, N.Y. TIMES, June 4, 2010, at A19 (reporting on *Gibbs v. City of New York*, 714 F. Supp. 2d 419 (E.D.N.Y. 2010)); Bruce Golding, *‘Wrong Man’ \$30 M. Suit*, N.Y. POST (Feb. 23, 2011), [http://www.nypost.com/p/news/local/manhattan/wrong\\_man\\_suit\\_JY7gsJ4EK1HyVSfYWC5V3J](http://www.nypost.com/p/news/local/manhattan/wrong_man_suit_JY7gsJ4EK1HyVSfYWC5V3J) (reporting on *Bermudez v. City of New York*, No. 11 Civ. 750 (S.D.N.Y. filed Feb. 3, 2011)).

16. See *Connick v. Thompson*, 131 S. Ct. 1350, 1360–63 (2011) (holding that municipal prosecutor’s office cannot be held liable under “failure to train” theory based on a “single incident” of a *Brady* violation); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (District Attorney has absolute immunity for policy concerning information-sharing with police); *McGhee v. Pottawattamie Cnty.*, 547 F.3d 922 (8th Cir. 2008), cert. granted, 129 S. Ct. 2002 (Apr. 20, 2009), dismissed, 130 S. Ct. 1047 (Jan. 4, 2010) (considering whether prosecutor is immune from liability for manufacturing evidence; this case settled before a decision was entered).

17. 131 S. Ct. 1350.

“professional discipline, including sanctions, suspension, and disbarment.”<sup>18</sup> This position has consistently been advocated by parties and their amici favoring the prosecutor’s side of the debate.<sup>19</sup>

This Article challenges that assumption based on information uncovered through the very types of *Monell* and individual liability lawsuits that prosecutors and municipalities seek to curtail. A number of commentators and scholars already have found that, contrary to *Imbler*, the discipline of prosecutors rarely occurs. They also have analyzed the existing mechanisms for internal and external prosecutorial oversight and found that, also contrary to *Imbler*, such mechanisms fail to provide an effective structure for prosecutorial accountability. The information in these articles generally is drawn from publicly available data, or from voluntary responses by prosecutors’ offices to surveys or interviews. This material is summarized below in Part I.

However, the principal purpose of this Article is to present further evidence that prosecutors are rarely disciplined, and that prosecutors’ offices lack effective policies or structures for accountability, based upon material that their offices have been compelled to disclose during the course of civil rights lawsuits brought by the author. These materials, presented below in the form of case studies, show that in at least three New York City District Attorneys’ Offices, *Brady* and related due process violations<sup>20</sup> committed by public prosecutors are tolerated by their respective offices, which almost never discipline or sanction offenders. Deposition testimony as well as documentary discovery revealed that these District Attorneys’ Offices have no codes of conduct,<sup>21</sup> no formal disciplinary rules or

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18. *Connick*, 131 S. Ct. at 1363.

19. See Petitioners’ Brief on the Merits at 13, 28, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571); Amicus Curiae Brief of the National District Attorneys Ass’n in Support of Petitioners at 10–11, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571); Brief of the National Ass’n of Assistant United States Attorneys & National District Attorneys Ass’n as Amici Curiae in Support Of Petitioners at 8–17, *Pottawattamie Cnty. v. McGhee*, 129 S. Ct. 2002 (2009) (No. 08-1065); Brief of Petitioners at 36, *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (No. 07-854).

20. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (holding that prosecutors have an absolute constitutional due process obligation to turn over to defense counsel material information favorable to the defense). The *Brady* rule includes material impeachment evidence. See *Giglio v. United States*, 405 U.S. 150, 153–54 (1972). Prosecutors also are obligated under the Due Process Clause to refrain from presenting false or misleading evidence, or making false or misleading arguments, to the jury. See *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991).

21. As this Article went to press, the District Attorneys Association of the State of New York released a new ethics handbook. See DIST. ATTORNEYS ASS’N OF THE STATE OF N.Y., “THE RIGHT THING”: ETHICAL GUIDELINES FOR PROSECUTORS (2011). This handbook contains strong, generally progressive statements about specific ethical obligations of prosecutors, including the obligation to disclose *Brady* material pursuant to constitutional and ethical rules. *Id.* It also includes a strong statement of potential consequences for prosecutors who act unethically, such as censure or written reprimand, termination, disbarment, and even criminal prosecution. *Id.* at 6–7. However, the booklet makes no reference to any obligation of District Attorneys to adopt any formal or regular disciplinary procedures, to actually impose such discipline, or to refrain from ratifying misbehavior by defending it in the courts. It remains to be seen whether the handbook’s exhortations will be

procedures, and no history of imposing sanctions or any other negative consequences on prosecutors who violate *Brady* or related due process rules intended to guarantee defendants the right to a fair trial. To the contrary, they regularly defend such conduct no matter how strong the evidence that a violation occurred. The evidence provided in these lawsuits shows that judicial disciplinary bodies virtually never punish prosecutors for violating ethics rules.<sup>22</sup>

Ironically, in one of the cases discussed below, a court's disciplinary body suggested to a complainant that if he was not satisfied with the confidential "admonition" given to a prosecutor who had knowingly relied on false testimony to wrongfully imprison him, he could consult with counsel regarding "civil remedies."<sup>23</sup> When official attorney disciplinary bodies propose civil lawsuits as an alternative to the ineffectual attorney grievance process, it is time to question the Supreme Court's assumption that such "discipline" is an effective deterrent to prosecutorial misconduct.

#### I. COMMENTATOR AND COMMITTEE STUDIES OF PROFESSIONAL ACCOUNTABILITY AND DISCIPLINE OF PROSECUTORS

Commentators and research committees have responded to the Supreme Court's assumptions about the susceptibility of prosecutors to professional discipline by studying whether, in fact, such discipline actually occurs. In reaching the consensus that "professional discipline of prosecutors is extremely rare,"<sup>24</sup> legal commentators and other researchers have, among other things, reviewed published decisions of state bar disciplinary authorities and conducted voluntary surveys of prosecutors' offices. These published studies uniformly conclude that prosecutors are "rarely, if ever," punished by professional disciplinary bodies, even when they engage in "egregious" misconduct.<sup>25</sup>

Richard A. Rosen, in 1987, surveyed all reported cases of attorney discipline in order to determine the proportion of those cases that involved the discipline of criminal prosecutors for violations of the *Brady* rule.<sup>26</sup> He also surveyed numerous state bar and prosecutorial oversight committees to

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contradicted, as in the past, by official toleration of flagrant or intentional violations of the acknowledged rules.

22. See *infra* Part II.

23. See *infra* note 223 and accompanying text.

24. Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 722 (2006).

25. Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do when Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 807 (2006); see also Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 296 (2007) (terming the discipline received by the prosecutor in the "Duke lacrosse" case the "Mike Nifong exception" because the case represents a rare example of prosecutorial discipline); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 276 n.7 (2004) (citing BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14.1 n.5 (2d ed. 2002)).

26. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 718–20 (1987).

find unpublished or otherwise unreported instances where such discipline was imposed.<sup>27</sup> He found only “nine cases . . . in which discipline was even considered,”<sup>28</sup> and only six where it was actually imposed.<sup>29</sup> Ten years later, Jeffrey Weeks updated Rosen’s study and found that, although there was no decrease in the amount of *Brady* violations committed, there were only seven additional instances where prosecutorial discipline was considered, and only four cases where it was actually imposed.<sup>30</sup>

In a similar study, Fred C. Zacharias reviewed every reported case of professional discipline for prosecutorial misconduct.<sup>31</sup> He found only twenty-seven instances<sup>32</sup> in which prosecutors were disciplined for unethical behavior occurring at or affecting the fairness of criminal trials, including, but not limited to, violations of the *Brady* rule.<sup>33</sup> Zacharias’s study compared this rate of discipline to that of all lawyers nationally and concluded that “prosecutors are disciplined rarely, both in the abstract and in comparison to private lawyers.”<sup>34</sup>

In connection with special investigative reports on the causes of wrongful convictions, committees of lawyers and other criminal justice professionals in New York and California examined whether prosecutors are disciplined by their own offices. The New York State Bar Association Task Force on Wrongful Convictions (Task Force) examined fifty-three cases of wrongful convictions that were overturned by “exoneration,” and conducted hearings at which both defense attorneys and prosecutors testified.<sup>35</sup> It concluded that thirty-one of the wrongful convictions were attributable to “governmental practices,” which were defined to include the use of false testimony, violation of *Brady*, improper evidence retention or transfer, and refusal to investigate alternative suspects to crimes. It reported that “research has not revealed any public disciplinary steps against prosecutors.”<sup>36</sup> The Task Force also surveyed District Attorneys’ Offices across New York State, twenty of which responded to a written questionnaire, to determine “whether sanctions [for prosecutorial misconduct] had ever been imposed,” and found that just one prosecutor

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27. *See id.* at 720.

28. *Id.*; *see also id.* at 700–03 (collecting as an “example” more than fifty reported cases of prosecutorial misconduct related to *Brady*).

29. *Id.* at 720–31.

30. Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881 (1997).

31. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 743 (2001).

32. *Id.* at 751–54 tbls. VI & VII.

33. As opposed to “plainly illegal activity,” such as “bribery, extortion . . . and embezzlement,” or “allegedly abusive behavior towards tribunals, usually consisting of criticism of judges.” *Id.* at 744–47.

34. *Id.* at 755.

35. FINAL REPORT OF THE N.Y. STATE BAR ASS’N’S TASK FORCE ON WRONGFUL CONVICTIONS 19, 29–31 (2009), available at <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/FinalWrongfulConvictionsReport.pdf>.

36. *Id.* at 5, 17.

had been referred to an outside disciplinary committee by these offices, and only one prosecutor had been sanctioned internally.<sup>37</sup> The Task Force also took and credited testimony from the author concerning his law firm's findings as to internal discipline of prosecutors in New York City.<sup>38</sup> The Task Force concluded, "[T]here is little or no risk to the specific [prosecutor] involved resulting from a failure to follow the [Brady] rule."<sup>39</sup>

Meanwhile, in California, the Commission on the Fair Administration of Justice (Justice Commission) made similar findings. The Justice Commission analyzed 2,131 California cases where criminal defendants raised claims of prosecutorial misconduct in trials, appeals, or post-conviction litigation.<sup>40</sup> While courts had found prosecutorial misconduct in 444 of these cases, the Justice Commission focused on fifty-four cases that resulted in the reversal of the conviction and which also, pursuant to a specific provision of California Law, should have been reported to the state bar association for disciplinary investigation.<sup>41</sup> The Commission could not find a single instance where any such referral was made.<sup>42</sup> The Commission concluded, "[O]ur reliance upon the State Bar as the primary disciplinary authority is seriously hampered by underreporting."<sup>43</sup> Moreover, the Justice Commission cited no specific examples of internal discipline in those cases, or in any others.<sup>44</sup>

Finally, a study conducted by two journalists at the *Chicago Tribune* in 1999 also investigated whether prosecutors' offices disciplined their employees for prosecutorial misconduct. Their articles reported that out of 381 nationwide reversals in homicide cases (sixty-seven of which carried death sentences) since 1963 (the year *Brady* was decided) for "using false evidence or concealing evidence suggesting innocence,"<sup>45</sup> only "one [prosecutor] was fired, but [he] appealed and was reinstated with back pay,"<sup>46</sup> "another received an in-house suspension of 30 days," and a "third prosecutor's law license was suspended for 59 days, but because of other misconduct in the case."<sup>47</sup> None were disbarred or received any public sanction.<sup>48</sup>

Scholars have noted that prosecutors' offices generally lack sufficient internal mechanisms to oversee and discipline attorneys effectively. As part

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37. *Id.* at 30–31.

38. *Id.* at 31; *see also infra* Part II.

39. FINAL REPORT OF THE N.Y. STATE BAR ASS'N'S TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 29.

40. CAL. COMM. ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (Gerald Uelmen ed., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

41. *See id.*

42. *See id.*

43. *Id.*

44. *See id.* at 73–74.

45. Maurice Possley & Ken Armstrong, *Trial & Error: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at C1.

46. Maurice Possley & Ken Armstrong, *Trial & Error: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1.

47. *Id.*

48. *See id.*

of a Symposium at Cardozo Law School studying prosecutorial compliance with *Brady* and other discovery obligations,<sup>49</sup> several commentators identified design flaws in prosecutors' offices related to this lack of oversight.<sup>50</sup> Elsewhere, commentators also have faulted prosecutors' offices for failing to implement the type of rigorous organizational oversight models used in administrative agencies<sup>51</sup> and corporations.<sup>52</sup> Rather than being uniquely amenable to professional discipline, prosecutors' offices appear far less equipped than other large organizations, including police departments, to manage and discipline employees.

The above research on prosecutorial discipline and internal supervisory policies, while contradicting the *Imbler* assumption about prosecutorial discipline, is limited by the lack of access to the internal records of prosecuting offices and to insider accounts of how such offices operate, as well as to the often secret disciplinary practices of judicial or bar grievance committees. The next section presents such previously unavailable information as it relates to three large District Attorneys' Offices in New York: Bronx, Queens, and Kings (Brooklyn) Counties. New York City was compelled by court orders in several *Monell*-based lawsuits to provide document discovery and deposition testimony concerning these Offices' disciplinary procedures and practices. The information that has been disclosed further refutes the Supreme Court's assumptions in *Imbler*.

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49. See generally Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works*, 31 CARDOZO L. REV. 1943 (2010).

50. See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090–91 (2010) (explaining that prosecutors' offices should take a more "compliance-based" approach to misconduct because "[t]he existing framework for addressing prosecutorial misconduct is entirely backward-looking, and ineffective"). See generally *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037 (2010) (collecting reports from medical professionals, police department officials, corporate psychologists, and statisticians about alternative models for ensuring prosecutorial accountability); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2215–16 (2010) (proposing the creation of an external monitoring body to review dubious convictions).

51. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869–70 (2009) (addressing "design flaws" in the operation of prosecutors' offices, which contribute to "prosecutorial overreaching"). Barkow criticizes the vertical structure of prosecutors' offices, in which the same prosecutor investigating a case also prosecutes it. *Id.* She recommends that prosecutors' offices should follow the model of administrative agencies in separating officials handling investigations from those handling advocacy functions. *Id.*

52. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) ("The resulting dangers [of the lack of prosecutorial accountability] can be enormous."). Bibas suggests that prosecutors' offices would benefit from following a corporate model in five areas: office culture; managerial structure; internal policy-making; personnel actions, such as hiring, firing, promotion, and training; and the dissemination of information, performance evaluations, and incentives. Following a corporate structure would increase accountability of individual prosecutors, as well as of the local District or State Attorney. Bibas posits that a more formalized and predictable training and disciplinary model would tamp down prosecutors who "suffer from an excess of adversarial zeal and a notches-on-the-belt conviction mentality." *Id.* at 1000–11.



## II. CASE STUDIES: THE DISCIPLINARY POLICIES, PROCEDURES, AND HISTORY OF THREE NEW YORK CITY DISTRICT ATTORNEYS' OFFICES

### A. *The Bronx District Attorney's Office*

Alberto Ramos was a criminal defendant who was unjustly convicted of rape in 1985, freed upon the discovery of *Brady* violations in 1992, and recovered a \$5 million civil rights settlement in 2003. In furtherance of the civil rights suit, the author compelled the Bronx District Attorney's Office to disclose personnel records for prosecutors involved in seventy-two cases in which courts had found improper behavior by prosecutors from 1975 through 1996, and to submit to oral depositions about the Office's "disciplinary" practices. In subsequent companion lawsuits, which are ongoing, brought on behalf of two former criminal co-defendants victimized by *Brady* violations during an attempted murder trial in 1998, the author and his co-counsel<sup>53</sup> have obtained additional records through 2007, as well as the depositions of Robert T. Johnson, Bronx District Attorney since 1989, virtually all of his senior staff, and two line prosecutors. These discovery materials have revealed that this major urban prosecutor's office, employing nearly 400 prosecutors and hundreds of support staff,<sup>54</sup> has no published code or rules of behavior for prosecutors, no schedule of potential sanctions for misbehavior or objective standards governing when such sanctions will be imposed, no written or formal procedure for investigating or disciplining prosecutors, and no procedure for keeping a record of prosecutors who have been cited for or are known to have engaged in improper behavior. Officials could identify just one prosecutor since 1975 who, according to the Office's records, has been disciplined in any respect for misbehavior while prosecuting a criminal case. Officials claim that several prosecutors have been verbally chastised, or temporarily denied raises in compensation, but there is no apparent record of it.

#### 1. The *Ramos* Case

##### a. *The Criminal Prosecution*

Alberto Ramos was a twenty-one-year-old college student and part-time childcare worker when he was arrested on September 6, 1984, and charged with raping a five-year-old girl at a Bronx day care center. His arrest was the latest in a series of highly publicized day care center sexual abuse cases brought by then-District Attorney Mario Merola, a politically ambitious

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53. Co-counsel is New York attorney Julia Kuan, who won the cases of each of the former criminal defendants who are now plaintiffs in the lawsuits.

54. Erin Einhorn & Jonathan Lemire, *DAs Urge Council: Save Us!*, N.Y. DAILY NEWS, June 4, 2010, at 18 (explaining that the Bronx D.A.'s office is under pressure to fire forty-five prosecutors).

prosecutor.<sup>55</sup> In May 1985, Ramos's case became the first of the Merola prosecutions to come to trial.<sup>56</sup>

The prosecution's case was based upon the child's sworn testimony claiming that she had been raped in a classroom bathroom while the other children were napping.<sup>57</sup> For "corroboration," the People relied on a doctor's testimony that the child's mere ability to describe sexual intercourse indicated that she had experienced it, as well as the doctor's observation that the child had a vaginal irritation or rash.<sup>58</sup> In addition, the child's grandmother testified that when she picked up the girl on the day in question, the child was upset.<sup>59</sup> Other witnesses informed the jury that earlier that day, Ramos, exasperated by the children's rowdiness and his inability to control them, had inappropriately placed tape on the upper lip of several children, including the complainant, to quiet them.<sup>60</sup> In her summation, the prosecutor forcefully argued that the child could not "make up" her claim of having sexual intercourse and that her vaginal "bruises" corroborated her testimony.<sup>61</sup>

Ramos was convicted. He screamed in agony, "Kill me."<sup>62</sup> Several weeks later, the judge, expressing frustration that he could not sentence Ramos to life in prison, meted out the maximum sentence of eight and one-third to twenty-five years.<sup>63</sup> Ramos's direct appeal and his post-judgment motion to vacate his conviction were denied.<sup>64</sup> Because he continued to deny his guilt, Ramos was likely to serve at least two-thirds, if not the entirety, of his maximum sentence.<sup>65</sup> Meanwhile, the everyday reality of his punishment was brutal: as a convicted child rapist, he was subjected to constant physical, sexual, and verbal abuse.<sup>66</sup>

Seven years into Ramos's hellish incarceration, fate intervened. The alleged victim's mother had brought a civil lawsuit against the New York City-funded day care center and against Ramos. The City's private

55. See *Frontline: Innocence Lost: Other Well-Known Cases*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/other.html> (last visited Oct. 20, 2011) (describing Merola's prosecution of the "Bronx Five" day care center workers).

56. See *Ramos v. City of New York*, 729 N.Y.S.2d 678, 684 (App. Div. 2001).

57. STEPHEN GILLERS, *IN THE PINK ROOM* 2–3 (2006).

58. *Id.* at 3.

59. *Id.*

60. *Id.*

61. *Id.* at 3–4; see also Trial Transcript at 429, 431, *People v. Ramos*, No. 3280-84 (N.Y. Sup. Ct. Bronx Co. May 9–20, 1985) (on file with author).

62. GILLERS, *supra* note 57, at 4.

63. See *People v. Ramos*, 614 N.Y.S.2d 977, 980 (App. Div. 1994).

64. *People v. Ramos*, 124 A.D.2d 1077 (N.Y. App. Div. 1986), *appeal denied*, 69 N.Y.2d 832 (1987).

65. See, e.g., Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at a Parole Hearing*, 93 IOWA L. REV. 491, 522 (2008) ("[P]ractically all New York state inmates [know] that a failure to 'admit' guilt at [a parole] hearing would probably ring the death knell to [their] chances for parole."); see also *Edwards v. Goord*, 362 F. App'x 195, 198 (2d Cir. 2010) (challenging unsuccessfully New York State Department of Correctional Services' denial of "good time" credit based on inmate's refusal to admit guilt resulting in inmate having to serve his complete sentence).

66. See Amended Complaint at 12, *Ramos v. City of New York*, No. 21770-93 (N.Y. Sup. Ct. Bronx Co. filed Oct. 20, 1995) (on file with author).

insurance carrier, fearing a massive judgment, settled, but a defense investigator, believing Ramos to be innocent, obtained permission to share his investigative discoveries with Ramos and his mother.<sup>67</sup> They, in turn, hired the author's law firm. Based largely upon the investigator's records, Ramos moved for a new trial, and an evidentiary hearing was held.<sup>68</sup>

The court found in its decision that the trial prosecutor had assured defense counsel that she would obtain and disclose all relevant social service and day care center records, but had then failed to do so.<sup>69</sup> Before or during trial, Assistant District Attorney Diana Farrell did obtain numerous documents and interviewed teachers and administrators, but she did not disclose the following information that was in her actual or constructive possession<sup>70</sup>:

(1) The child initially denied repeatedly that anything had happened other than he "taped my mouth," before finally accusing Ramos;<sup>71</sup>

(2) Prior to the alleged rape, the child had described watching sexually explicit programs on television, would use dolls to simulate sex during show and tell in school, was described by her teachers as "sexually wiser" than the other children and street smart, and would expose herself;<sup>72</sup>

(3) The child used to masturbate on a regular basis in school,<sup>73</sup> thereby explaining her vaginal irritation; and

(4) As revealed by a sign-in, sign-out book, the child's grandmother had not picked her up at all on the day in question; in fact, she had been picked up by her aunt.<sup>74</sup>

In vacating Ramos's conviction, the court issued a scathing opinion crediting the defendant's witnesses over the sometimes contrary testimony of the trial prosecutor. While declining to find that the prosecutor's misconduct had been willful, the court termed it "cavalier and haphazard," and continued: "The greatest crime in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system."<sup>75</sup> The court released Ramos on his own recognizance, pending retrial.

The Bronx District Attorney appealed. In addition to attacking the evidentiary basis for the lower court's factual findings, the Office's brief, submitted in the name of the Bronx District Attorney Robert T. Johnson, contended that none of the undisclosed information consisted of *Brady*

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67. *See Ramos*, 614 N.Y.S.2d at 980.

68. *See id.*

69. *See id.* at 982.

70. Decision and Order at 3, *People v. Ramos*, No. 3280-84 (N.Y. Sup. Ct. Bronx Co. dated June 1, 1992) (on file with author).

71. *Ramos*, 614 N.Y.S.2d at 981.

72. *See id.* at 980-81.

73. *See id.*

74. *See id.*

75. *See People v. Ramos*, No. 3280-84, slip op. at 9, 1992 WL 12620540 (N.Y. Sup. Ct. Bronx Co. June 1, 1992), *aff'd*, 614 N.Y.S.2d 977.

material.<sup>76</sup> “By placing the dolls in close proximity she could have been simulating wrestling or some other activity,” the District Attorney argued.<sup>77</sup> What is more, the dolls were not “anatomically correct.”<sup>78</sup> The District Attorney speculated that the child had not really seen sexual acts on television because “[i]t is common knowledge that such movies do not contain hard-core pornographic footage”<sup>79</sup> The new information about masturbation was not material because the defense already had a document suggesting the child masturbated (although on the witness stand her teacher denied such knowledge). Finally, the District Attorney argued that the sign-in, sign-out log need not have been disclosed because it did not “touch upon defendant’s guilt or innocence.”<sup>80</sup> The Appellate Division affirmed the lower court’s ruling in an even more scathing opinion.<sup>81</sup> The District Attorney’s Office then agreed that it lacked any “reasonable cause” to continue the prosecution, and dismissed all charges.<sup>82</sup>

*b. The Attorney Grievance Process*

Shortly after the trial court issued its decision vacating Ramos’s conviction, Ramos’s prosecutor received notice from the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Judicial Department, of a secret sua sponte disciplinary inquiry.<sup>83</sup> The Departmental Disciplinary Committee is the New York State authority charged with the investigation and discipline of attorneys accused of professional misconduct.<sup>84</sup> It may initiate an investigation of an attorney upon a complaint or “on its own initiative.”<sup>85</sup> Upon such investigation, it has the authority to impose sanctions on an attorney ranging from the most serious punishment of disbarment to a private letter of “admonition.”<sup>86</sup> Under the New York State Judiciary Law, the conduct of such an investigation—including its very existence—is confidential unless the Disciplinary Committee finds that the attorney should be publicly reprimanded.<sup>87</sup>

After learning of the Disciplinary Committee’s investigation, Ramos’s prosecutor sat down with Counsel to the District Attorney Anthony Girese,

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76. Appellant’s Brief at 29, *People v. Ramos*, No. 3280-84 (N.Y. App. Div. Sept. 7, 1993) (on file with author).

77. *See id.* at 30.

78. *Id.*

79. *Id.* at 31.

80. *Id.* at 32.

81. *People v. Ramos*, 614 N.Y.S.2d 977 (App. Div. 1994).

82. *Ramos v. City of New York*, 729 N.Y.S.2d 678, 685 (App. Div. 2001).

83. *Id.* at 668–69, 750–51.

84. *See Departmental Disciplinary Committee*, N.Y. STATE SUPREME COURT APPELLATE DIV. FIRST DEP’T., <http://www.courts.state.ny.us/courts/ad1/Committees&Programs/DDC/index.shtml> (last visited Oct. 20, 2011).

85. N.Y. COMP. CODES R. & REGS. tit. 22, § 605.6(a) (1994).

86. *Id.* § 605.5(a).

87. N.Y. JUDICIARY LAW § 90(10) (McKinney 2002).

and together they prepared a letter defending her conduct.<sup>88</sup> The letter stated that there was “no misconduct” on her part, and asked that any inquiry be deferred until the appeal was decided.<sup>89</sup> The prosecutor also wrote her own letters to the Disciplinary Committee defending her conduct.<sup>90</sup> She also gave confidential sworn testimony, which she refused during the lawsuit to consent to unseal.<sup>91</sup> The Committee dismissed the disciplinary action.<sup>92</sup> At no time did the Committee afford Ramos or his counsel notice of the prosecutor’s contentions or any opportunity to provide any materials or arguments concerning whether she had committed ethics violations.

*c. The Civil Lawsuit*

While the Ramos post-judgment hearing was underway, the Second Circuit decided *Walker v. City of New York*.<sup>93</sup> *Walker* contained two principal legal holdings of relevance to Ramos. First, a District Attorney’s failure to adequately train or supervise his staff to comply with their obligations to disclose *Brady* material, and not to present false or perjured testimony, could give rise to *Monell* liability under § 1983.<sup>94</sup> The plaintiff would have to show that the District Attorney had been deliberately indifferent to an obvious need for greater training, supervision, or discipline, and that this policy of indifference was a substantial cause of the violation of the plaintiff’s federal constitutional rights.<sup>95</sup> Second, although a New York municipality is not subject to suit under § 1983 for a District Attorney’s “prosecutorial” decisions that he makes on behalf of the State, it may be sued for a District Attorney’s “managerial” or “administrative” functions that he performs as a policymaker on behalf of the City of New York, including constitutionally faulty training or supervision of his staff.<sup>96</sup>

Based upon *Walker*, and armed with the Appellate Division’s ringing denunciation of the District Attorney’s conduct at Ramos’ criminal trial,

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88. See Deposition of Diana Farrell at 683, *Ramos v. City of New York*, No. 21170-93 (N.Y. Sup. Ct. Bronx Co. deposed Oct. 7, 1997) (on file with author).

89. See *id.* at 689.

90. See Letter from Diana Farrell to Andral Bratton, Departmental Disciplinary Comm., Supreme Court of the State of N.Y., Appellate Div., First Dep’t (Mar. 15, 1995) (on file with author); Letter from Diana Farrell to Andral Bratton, Departmental Disciplinary Comm., Supreme Court of the State of N.Y., Appellate Div., First Dep’t (Nov. 29, 1994) (on file with author).

91. See Deposition of Diana Farrell, *supra* note 88, at 687.

92. See *id.*

93. 974 F.2d 293 (2d Cir. 1992).

94. See *id.* at 296, 300.

95. Although *Walker* suggested that a showing of inadequate *training* could be made without a history of prior complaints or findings of similar misconduct, that view was overruled by the Supreme Court in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). However, the Ramos lawsuit, and the others brought by the author, have been based on multiple prior incidents of misconduct, a history of failure to *discipline*, and evidence of ratification reflecting an unlawful policy.

96. *Walker*, 974 F.2d at 301.

Ramos elected to bring a § 1983 lawsuit in the State Supreme Court in Bronx County. Ramos claimed that the trial prosecutor's misconduct had resulted from the District Attorney's deliberate indifference to his staff's history of obtaining unlawful convictions by violating *Brady* and relying on false or misleading evidence and argument, exhibited by his failure to properly train, supervise, and discipline prosecutors to avoid or to deter such violations, and by his ratification of such misconduct when it occurred.<sup>97</sup>

To substantiate this claim, Ramos sought disclosure of the personnel and disciplinary records of the prosecutors who had been involved in seventy-two reported cases in which courts had found violations of *Brady* obligations (eighteen cases), or other violations of the duty not to present false, misleading, or inflammatory evidence or summation argument (fifty-four cases). The majority of the decisions had been handed down between the mid-1970s and District Attorney Merola's death in 1987, but a significant number had occurred from 1989 through 1996, during the Administration of District Attorney Johnson. The City resisted such document disclosure, and moved for dismissal or summary judgment regarding Ramos' § 1983 claim. While the lower court denied this motion, it limited disclosure of records to those relating to just ten of the seventy-two court decisions.<sup>98</sup> Both sides appealed. Ramos fully prevailed.<sup>99</sup>

In its decision, the Appellate Division, noting the "catastrophic" result when prosecutors wrongfully convict a defendant by withholding materially favorable information,<sup>100</sup> upheld Ramos' civil rights claim, while granting all of the document discovery Ramos sought. Agreeing with the Second Circuit's analysis in *Walker*, the court held that under state law, a District Attorney is a local policymaker with respect to training and supervising staff concerning its *Brady* obligations.<sup>101</sup> The court further held that under the facts in Ramos's case, the City could be liable for both the District Attorney's consistent failure to discipline prosecutors who caused unconstitutional convictions—by withholding *Brady* material or by knowingly relying on false or misleading evidence or argument—and for the District Attorney's ratification of such misconduct in Ramos's own case, through his "strident opposition" to Ramos's motion and failure to discipline Ramos's trial prosecutor.<sup>102</sup> The court directed the City to name the prosecutors involved in *all seventy-two* misconduct cases and to provide

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97. See Amended Complaint, *supra* note 66, at 24–36. The complaint also named as defendants the Human Resources Administration (HRA) and the New York City Police Department, under different theories of liability. *Id.*

98. Decision and Order, *Ramos v. City of New York*, No. 21770-93, 1999 WL 34804917 (N.Y. Sup. Ct. Bronx Co. dated Oct. 27, 1999) (on file with author).

99. *Ramos v. City of New York*, 729 N.Y.S.2d 678 (App. Div. 2001).

100. See *id.* at 681.

101. See *id.* at 693.

102. See *id.* at 694–95.

their personnel records, including their salary cards and evaluations, and any evidence of discipline.<sup>103</sup>

The records, finally disclosed a year later without any confidentiality order, revealed that from 1975 through 1996, during the administration of three District Attorneys, there was just *one* incidence of any prosecutor being disciplined. This prosecutor was one of fourteen prosecutors who had been involved in more than one of the trials in which misconduct had been found.<sup>104</sup> A second prosecutor had conducted five of the trials, while a third had conducted four,<sup>105</sup> yet neither of these latter two prosecutors, according to the records, had ever been disciplined.<sup>106</sup> Indeed, the District Attorney's Office conceded that payroll and other records "do not indicate the existence of any disciplinary measures taken against any of th[e] ADAs."<sup>107</sup> A more detailed review of the three prosecutors just mentioned is revealing.

The prosecutor who received "discipline" did so in connection with a robbery conviction he obtained after trial in February 1977.<sup>108</sup> The criminal defendant promptly appealed that conviction and alleged an extraordinary number of prosecutorial improprieties.<sup>109</sup> In a decision dated April 13, 1978, the Appellate Division resoundingly agreed. It denounced the prosecutor for "overzealous," "improper conduct . . . throughout the trial, despite repeated admonitions by the court,"<sup>110</sup> including disparaging the "so-called presumption of innocence" and "reasonable doubt" and continually "disregard[ing] and overriding . . . the court's rulings and instructions."<sup>111</sup> In reversing the conviction, the court cited the Code of Professional Responsibility and implied that the prosecutor had violated it.<sup>112</sup> The prosecutor's salary record showed that when the trial occurred, he was earning \$21,500.<sup>113</sup> Notwithstanding the Office's notice of his misconduct presented by the defendant's appeal, he received salary increases over the next year of \$4,500—or 21 percent.<sup>114</sup> After the court handed down its decision, the prosecutor suffered a deduction of four weeks

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103. *See id.* The court's directive was contained in its initial, published decision and in an unpublished supplemental order on file with the author. Plaintiff's Second Supplemental Demand for Discovery & Inspection, *Ramos v. City of New York*, No. 21770-93 (N.Y. Sup. Ct. Bronx Co. Mar. 17, 1998) (on file with author); *see also* Order, *Ramos v. City of New York*, No. 21770-93 (N.Y. App. Div. dated Dec. 27, 2001) (on file with author).

104. Personnel records disclosed in discovery, *Ramos v. City of New York*, No. 21770-93 (N.Y. Sup. Ct. Bronx Co. filed Apr. 1, 1996) (on file with author).

105. *Id.*

106. *Id.*

107. Letter from Stuart P. Levy, Assistant Dist. Attorney, Office of the Dist. Attorney, Bronx Cnty., to Hon. Betty Owen Stinson, Supreme Court of the State of N.Y., Bronx Cnty. (July 24, 2002) (on file with author).

108. *See* *People v. Bussey*, 403 N.Y.S.2d 739, 739 (App. Div. 1978).

109. *See id.*

110. *Id.*

111. *Id.* at 741–42.

112. *Id.* at 742.

113. Personnel records disclosed in discovery, *supra* note 104.

114. *Id.*

of pay, or approximately \$2,150.<sup>115</sup> However, he then received a bonus of \$250 on June 30, 1978, and a \$2,500 salary increase on July 1, 1978, more than making up for his lost income.<sup>116</sup>

Between 1978 and 1981, the same prosecutor was derided by three more appellate opinions in two cases (although neither conviction was reversed),<sup>117</sup> but continued to receive raises in compensation. Dissenting judges in two of the decisions suggested that such “egregious” conduct be referred for professional discipline,<sup>118</sup> noting that the same trial assistant had been denounced in prior decisions for “outrageous and abusive conduct”<sup>119</sup> and “improper and tasteless” behavior.<sup>120</sup> On November 24, 1981, Associate Judge Bernard Meyer of the New York Court of Appeals reminded the District Attorney of his “continuing obligation with respect to his trial assistants . . . to instruct them clearly and firmly against using such tactics.”<sup>121</sup> Yet, during the four-year period beginning July 1, 1978, the prosecutor received “merit” and other raises totaling \$13,500, until he was earning \$42,000 by July 1, 1982.<sup>122</sup>

On November 22, 1982, District Attorney Merola wrote to a member of the Appellate Division’s Departmental Disciplinary Committee, asking it to reconsider its initial finding in connection with a disciplinary inquiry concerning the conduct of the prosecutor.<sup>123</sup> Merola assured the Committee that he already had authorized disciplinary measures which took into account all of the prosecutor’s misconduct and that, in light of his subsequent performance, these early trials in his career were an “aberration.”<sup>124</sup> It appears the Committee did reconsider, as there is no evidence that the prosecutor was sanctioned.

Significantly, in the prosecutor’s next evaluation after the court decisions in 1980 and 1981 that so vehemently condemned his performances, his bureau chief scored his overall quality of performance as a “4” out of a possible “5.”<sup>125</sup> While the supervisor noted the Assistant District Attorney’s “involvement with the App[ellate] Div[ision] Disciplinary Committee,” he did so not as a reflection of the quality of the prosecutor’s trial performance, but rather as an explanation for his drop off in “productivity.”<sup>126</sup> Indeed, praised for being “cooperative and

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115. *Id.*

116. *Id.*

117. *People v. Galloway*, 54 N.Y.2d 396 (1981), *aff’d* 430 N.Y.S.2d 93 (App. Div. 1980); *People v. Wheeler*, 438 N.Y.S.2d 467 (App. Div. 1981).

118. *Galloway*, 54 N.Y.2d at 414 n.4 (Meyer, J., dissenting).

119. *Id.* at 415 (Meyer, J., dissenting) (quoting *People v. Bussey*, 403 N.Y.S.2d 739, 742 (App. Div. 1978)) (internal quotation marks omitted).

120. *Id.* (quoting *Wheeler*, 438 N.Y.S.2d at 467) (internal quotation marks omitted).

121. *Galloway*, 54 N.Y.2d at 415.

122. Personnel records disclosed in discovery, *supra* note 104.

123. Letter from Mario Merola, Dist. Attorney, Office of the Dist. Attorney, Bronx Cnty., to Martin London, Supreme Court, Appellate Div., Departmental Disciplinary Comm. (Nov. 22, 1982) (on file with author).

124. *Id.*

125. Personnel records disclosed in discovery, *supra* note 104.

126. *Id.*



conscientious,” the only additional criticism the prosecutor received was for “lateness . . . which he has been counseled about *repeatedly*.”<sup>127</sup> The following year, the same supervisor had nothing but superlatives for this Assistant District Attorney.<sup>128</sup> Recommending him for promotion to “senior trial status,” the Bureau Chief gushed: “Tremendous ability to plead def[endan]ts with the weakest proof.”<sup>129</sup> He continued as a Bronx Assistant District Attorney until his retirement in 1997.<sup>130</sup>

The prosecutor responsible for five of the misconduct decisions was found in an appellate decision in October 1982 to have engaged in “persistent misconduct [during summation, which] deprived the defendant of his right to a fair trial,” resulting in the reversal of a manslaughter conviction.<sup>131</sup> Three years later, the same court reversed another manslaughter conviction obtained by the same prosecutor six months after the prior decision.<sup>132</sup> The court was irate that the prosecutor had “blatantly violated defendant’s rights”<sup>133</sup> even after being chastised in the prior opinion, and termed the prosecutor’s conduct “willful and deliberate.”<sup>134</sup> The following year, reversing a third manslaughter conviction obtained by the same prosecutor, the same court commented:

[W]hen the misconduct is so pervasive, so egregious and results in violations of fundamental due process rights, and the prosecutor’s disregard of the court’s rulings and warnings is as deliberate and reprehensible as that of this prosecutor, who has twice before provoked reversals by this court, a reversal is the only responsible remedy we can invoke as guardians of the rights of the People.<sup>135</sup>

The prosecutor left the Office’s employ in 1984, after six years. There was nothing in his personnel file to indicate that he did not leave voluntarily or was disciplined in any way. Meanwhile, on July 1, 1983—*after* the trial in which he had “blatantly violated” the defendant’s rights in conduct that the court found to have been “willful and deliberate”—he received a salary adjustment and “merit” bonus totaling \$4,500, which amounted to more than 10 percent of his previous salary.<sup>136</sup>

As for the prosecutor cited in four decisions, three involved summation and other trial-related misconduct—resulting in two reversals and one finding of harmless error—and one involved an apparent *Brady* violation which was remanded for an evidentiary hearing.<sup>137</sup> Within five weeks of

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127. *Id.*

128. *See id.*

129. *Id.*

130. *See id.*

131. *See* *People v. Perez*, 455 N.Y.S.2d 89, 91 (App. Div. 1982).

132. *See* *People v. Rosa*, 489 N.Y.S.2d 722, 728 (App. Div. 1985).

133. *Id.* at 726.

134. *Id.* at 728.

135. *People v. Sandy*, 499 N.Y.S.2d 75, 77 (App. Div. 1986) (citations omitted).

136. Personnel records disclosed in discovery, *supra* note 104.

137. *See* *People v. Qualls*, 70 N.Y.2d 863 (1987) (remanding for evidentiary hearing concerning apparent *Brady* violation); *People v. Jorge*, 566 N.Y.S.2d 649, 650 (App. Div. 1991) (reversing murder conviction because prosecutor misstated the testimony and cited the Bible while exhorting the jury to “do your duty”); *People v. Taylor*, 556 N.Y.S.2d 307 (App.

the first reversal, he received “merit” increases and bonuses totaling \$11,500, or more than 15 percent of his previous salary.<sup>138</sup> Following the other court decisions, including the reversal in 1991, he received yearly “merit” increases ranging from \$1,000 to \$4,000.<sup>139</sup> His evaluations were not provided.

Ramos’s trial prosecutor also received no sanction for her misbehavior. During her deposition, she testified that “everything [she] did in connection with the Ramos prosecution was consistent with [her] training.”<sup>140</sup> She testified that she believed she was required to disclose only evidence that was “blatantly *Brady*” because it “tended to exonerate the defendant” or was “crucial” or, as to impeachment evidence, only if she determined after investigation that it was “truthful.”<sup>141</sup> She revealed that shortly after the hearing court’s decision was handed down, she met with District Attorney Johnson, Chief Assistant Barry Kluger, and Counsel Girese, and received their complete support, including their agreement to appeal the decision.<sup>142</sup> Before the appeal was denied, and believing that the negative publicity about the case had stalled her career, she voluntarily left the Office and solicited and obtained an appointment to the “18-B” panel, a court-certified panel of private attorneys assigned to represent indigent criminal defendants.<sup>143</sup>

Numerous other court decisions about which discovery was provided involved findings of deliberate, intentional, or flagrant misbehavior. In one case, the appellate court upheld the defendant’s claim that “he was deprived of due process by the prosecutor’s knowing use of perjured testimony,” and faulted the prosecutor’s failure to comport with the district attorney’s “responsibility and duty to correct what he knows to be false and elicit the truth.”<sup>144</sup> Another prosecutor, in *People v. Lantigua*,<sup>145</sup> was found to have knowingly withheld crucial *Brady* material which proved the falsity of her summation to the jury. The appellate court wrote: “It hardly advances the interest of justice for a prosecutor to use testimony she knows to be false to discredit the evidence given by defense witnesses during her summation.”<sup>146</sup> The appellate court found yet another prosecutor’s “decision to accuse the defendant (and squarely implicat[e] his counsel) of fabricating his defense” during summation to be “indefensible.”<sup>147</sup> Other

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Div. 1990) (declining to reverse for prosecutor’s Biblical quotations); *People v. Hamilton*, 502 N.Y.S.2d 747, 748 (App. Div. 1986) (reversing robbery conviction “because the fundamental fairness of the trial was severely impaired by repetitive improper prosecutorial trial tactics”).

138. Personnel records disclosed in discovery, *supra* note 104.

139. *Id.*

140. Deposition of Diana Farrell, *supra* note 88, at 844.

141. *Id.* at 303, 318–19, 762, 767, 769.

142. *Id.* at 667.

143. *Id.*

144. *People v. Olmo*, 545 N.Y.S.2d 285, 286–87 (App. Div. 1989) (quoting *People v. Savvides*, 1 N.Y.2d 554, 557 (1956)).

145. 643 N.Y.S.2d 963 (App. Div. 1996).

146. *Id.* at 969.

147. *People v. Negron*, 556 N.Y.S.2d 41, 43 (App. Div. 1990).

appellate decisions found flagrant or intentional summation misconduct as well as *Brady* violations requiring reversal.<sup>148</sup> All of the prosecutors in these cases continued to receive increases in compensation; none, according to the records provided, were disciplined.

Two more depositions of note were conducted. Mitchell Borger, the Assistant District Attorney who handled the beginning stages of the Ramos prosecution, including the submission of testimony to the grand jury, testified that he was unaware of any disciplinary policy or procedure while he was at the Office or that any prosecutor had ever been disciplined.<sup>149</sup> The Executive Assistant District Attorney under District Attorney Johnson, Eric Warner, who had been Farrell's bureau chief at the time of the Ramos trial and was involved in training at the time of his deposition in 2000, testified to his understanding that *Brady* only applied where the defendant had made a specific request for the material.<sup>150</sup> He did not recall that there was any *Brady* training at all under District Attorney Merola or that he had received such training himself; he could not find any evidence of *Brady* training materials before 1995 (six years into Johnson's tenure);<sup>151</sup> and he was unaware of any Assistant District Attorney at the Office having ever been disciplined for violating *Brady*.<sup>152</sup>

Ramos's case was concluded before any of this evidence could be presented to a jury. In 2003, Ramos accepted a settlement of \$5 million.<sup>153</sup>

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148. See *People v. Banfield*, 599 N.Y.S.2d 227 (App. Div. 1993) (reversing conviction where prosecutor promised witness "favorable disposition" of witness's case, but did not disclose that to defendants); *People v. Byfield*, 194 A.D.2d 331 (N.Y. App. Div. 1993) (companion case to *Banfield*); *People v. Mudd*, 585 N.Y.S.2d 364, 366 (App. Div. 1992) (finding summation statements "entirely outside the bounds of rhetorical comment"); *People v. McReynolds*, 572 N.Y.S.2d 8, 8 (App. Div. 1991) (finding that prosecutor "so overstepped the bounds of permissible comment that [the defendant] was denied a fair trial"); *People v. Bagarozzy*, 522 N.Y.S.2d 848, 854–55 (App. Div. 1987) (deciding that inflammatory summation and evidence distracted jury from real issues in the case); *People v. Bailey*, 503 N.Y.S.2d 16, 18 (App. Div. 1986) (finding that inflammatory summation and vouching was "calculated to produce a wrongful conviction"); *People v. Hamilton*, 502 N.Y.S.2d 747, 750 (App. Div. 1986) (noting that "central theme" of summation was "wholly improper"); *People v. Ortiz*, 497 N.Y.S.2d 678, 680 (App. Div. 1986) (reversing conviction based on prosecutor's "obdurate pattern of inflammatory remarks throughout the . . . summation"); *People v. Pressley*, 462 N.Y.S.2d 864, 866–67 (App. Div. 1983) (reversing conviction for prosecutor's "repeated[ ] attack[s]" on defendant and improper "persistent references" to defendant's refusal to incriminate himself by cooperating with law enforcement); see also *Rosario Violation May Be Raised on CPA §440.10 Motion*, N.Y. L.J., Sept. 8, 1989, at 21 (summarizing decision in *People v. Okafor*, noting that court found *Rosario* and *Brady* violations and reversed conviction where prosecutor withheld potentially exculpatory witness statements in a child sex abuse case).

149. Deposition of Mitchell Borger at 184–92, *Ramos v. City of New York*, No. 21170-93 (N.Y. Sup. Ct. Bronx Co. deposed Mar. 11, 1998) (on file with author).

150. Deposition of Eric Warner at 52, *Ramos v. City of New York*, No. 21170-93 (N.Y. Sup. Ct. Bronx Co. deposed June 15, 2000) (on file with author). But see *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (*Brady* material must be turned over to defense even without specific request).

151. Deposition of Eric Warner, *supra* note 150, at 18–20.

152. *Id.* at 82–83.

153. Andrea Elliott, *City Gives \$5 Million to Man Wrongly Imprisoned in Child's Rape*, N.Y. TIMES, Dec. 16, 2003, at B3.

At the time, this was the largest settlement of any wrongful conviction case in New York State.<sup>154</sup> Defending the conduct of the District Attorney's Office to the *New York Times*, District Attorney Johnson and Chief Assistant Kluger contended that prosecutors were dealt with "on an individual basis," apparently informally, that often a prosecutor cited for misconduct was no longer employed by the Office when the appellate decision criticizing his conduct was handed down, and that "[n]ot one of [the seventy-two cases] involves a finding of deliberate or intentional . . . concealment of evidence. . . . They were technical rulings or a slip of the tongue."<sup>155</sup>

## 2. *The Maldonado and Poventud Cases*

Despite the Ramos settlement and increased public attention to the problem of wrongful convictions, attitudes at the top of the Bronx District Attorney's Office do not appear to have changed. This is revealed by depositions and document discovery in two additional companion lawsuits in which the author is co-counsel. The lawsuits arise from a joint criminal prosecution in 1997–98 of two defendants, Robert Maldonado and Marcos Poventud, for the attempted murder and attempted robbery of a livery cab driver. The cab driver, who was shot in the head and barely survived, was the only witness identifying either defendant at trial and linking them to the crime. With the defense challenging the cab driver's ability to make accurate identifications, the police suppressed the fact that this eyewitness initially had identified as one of the perpetrators a man who was in prison when the crime occurred (the *Brady* material). After this information later surfaced, Maldonado, who had spent four years in prison, was acquitted at a retrial, while Poventud succeeded in overturning his conviction after nine years in prison on collateral attack. Maldonado's civil lawsuit is pending in the State Supreme Court in the Bronx; Poventud's is pending in the United States District Court for the Southern District of New York.<sup>156</sup>

In their separate lawsuits, both Maldonado and Poventud alleged that the police suppressed the *Brady* material from prosecutors as well as the defense, or alternatively that prosecutors learned about the *Brady* material but colluded with the police in suppressing it from the defense. The latter theory was part of the plaintiffs' *Monell* claim, similar to the claim in the *Ramos* case, contending that the Bronx District Attorney's deliberate indifference to a history of *Brady* and related due process violations committed by his subordinates had been a substantial cause of the

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154. *Id.*

155. Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, N.Y. TIMES, Mar. 21, 2004, at 25.

156. See *Poventud v. City of New York*, 07 Civ. 3998 (S.D.N.Y. filed May 22, 2007); *Maldonado v. City of New York*, No. 17568-2004 (N.Y. Sup. Ct. Bronx Co. filed June 14, 2004).

misconduct that caused the plaintiffs' wrongful convictions.<sup>157</sup> Discovery in the two cases was consolidated.

During pretrial discovery, the plaintiffs, as in the *Ramos* case, obtained disclosure of prosecutors' personnel and "disciplinary" records in connection with cases where courts had found misconduct.<sup>158</sup> Plaintiffs' demand was limited to cases that were decided under District Attorney Johnson, from 1989 through 2006.<sup>159</sup> Not a single document was produced evidencing any disciplinary action against any of the prosecutors.<sup>160</sup>

Depositions were taken of the Office's executive staff, including Odalys Alonso, the Chief Assistant District Attorney, who has responsibility for the overall management of the Office, including hiring, firing, and discipline; the Counsel to the District Attorney since 1989, Anthony Girese, who deals with legal issues and has been the Office's liaison with the Departmental Disciplinary Committee; the Chief of Appeals since 1994, Joseph Ferdenzi; and District Attorney Johnson.

Testifying as a representative witness under Federal Rule of Civil Procedure 30(b)(6) on the issue of discipline at the Office,<sup>161</sup> Alonso acknowledged that neither the Office's standard employment agreement, nor its employee manual, nor any other document, contains any provisions concerning internal disciplining of prosecutors for misconduct in connection with the handling of criminal cases.<sup>162</sup> The Office has no written policy or procedure setting forth specific rules of behavior, defining infractions of such rules—including whether punishment may be inflicted for negligence, recklessness, or deliberate indifference to defendants' constitutional rights as opposed to willful, deliberate violations—or providing notice of the types of discipline that may be imposed for infractions.<sup>163</sup> The "system" for discipline is that the District Attorney is told when court decisions or defense motions or appeals alleging improper behavior are received by the Office, and then he determines whether to conduct an investigation or to impose some form of discipline.<sup>164</sup> There is

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157. See Amended Complaint, *Poventud v. City of New York*, 07 Civ. 3998 (S.D.N.Y. filed Oct. 28, 2010) (on file with author); Amended Complaint, *Maldonado v. City of New York*, No. 17568-2004 (N.Y. Sup. Ct. Bronx Co. filed Nov. 8, 2006) (on file with author).

158. See Plaintiff's First Set of Interrogatories & Request for Document Production, *Poventud v. City of New York*, No. 07 CV 3998 (S.D.N.Y. filed Oct. 12, 2007) (on file with author); Plaintiff's First Set of Interrogatories and Request for Document Production, *Maldonado v. City of New York*, No. 17568-2004 (N.Y. Sup. Ct. Bronx Co. filed June 14, 2004) (on file with author).

159. See Plaintiff's First Set of Interrogatories & Request for Document Production, *Poventud v. City of New York*, *supra* note 158; Plaintiff's First Set of Interrogatories & Request for Document Production, *Maldonado v. City of New York*, *supra* note 158.

160. Personnel records disclosed in discovery, *Poventud v. City of New York*, No. 07 CV 3998 (S.D.N.Y. filed May 22, 2007); Letter from Gerard J. Marino, Assistant Corp. Counsel, City of New York Law Dep't, to Anthony Cecutti, Romano & Kuan, LLC (Nov. 26, 2007) (on file with author).

161. Deposition of Odalys Alonso at 2, *Poventud v. City of New York*, 07 Civ. 3998 (S.D.N.Y. deposed Nov. 29, 2010) (on file with author).

162. *Id.* at 39–42.

163. *Id.* at 66–70.

164. *Id.* at 44–45.

no standard for determining when discipline will be imposed, other than the subjective judgment of the District Attorney.

Alonso, who has been a supervisor or a member of the executive staff during Johnson's entire twenty-two-year tenure in office, recalled only a single instance of formal discipline, occurring in January 2002.<sup>165</sup> Girese, in his deposition, could recall no instance.<sup>166</sup> Neither could District Attorney Johnson.<sup>167</sup> In the incident recalled by Alonso, Johnson himself happened to walk into a courtroom where one of his Assistant District Attorneys was delivering a summation and was offended that it contained gratuitously inflammatory content.<sup>168</sup> Alonso testified that Johnson immediately instructed that Assistant District Attorney's supervisor to discipline the Assistant District Attorney, which she purportedly did through an oral admonishment and by withholding any raise or bonus at the prosecutor's next salary review.<sup>169</sup> However, no records were produced evidencing that such sanctions were imposed.<sup>170</sup> On appeal, the Office fully defended the Assistant District Attorney's conduct as appropriate<sup>171</sup> despite the supposed finding by the District Attorney himself that the prosecutor had behaved so inappropriately that he deserved to be sanctioned. This was the single prosecutor during Johnson's twenty-two years in office that anyone could recall was formally "disciplined" for violating a rule of behavior in the prosecution of a criminal case.

Alonso did testify, however, that she was told by her predecessor, Chief Assistant District Attorney Kluger, that under Johnson's policy, whenever the Appellate Division reversed convictions for summation misconduct, he would orally chastise the Assistant District Attorney if he or she was still in the Office.<sup>172</sup> In most of these cases, the Office was at the same time arguing on appeal that there had been no misconduct. Johnson was unaware of any record of Assistant District Attorneys who have been orally chastised, and could not recall any specific instance where it occurred.<sup>173</sup> Johnson said that prior misconduct would be a factor in a subsequent disciplinary decision, but acknowledged that no records are kept of such misconduct or admonitions for it.<sup>174</sup> Records are kept, however, of individual prosecutors' successes in obtaining convictions at trial and by

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165. *Id.* at 59–60. Odalys Alonso recalled that at some point in the past Assistant District Attorneys in the office were informed that another Assistant District Attorney was disciplined, but she did not recall any details about it, and the prosecutor did not receive any negative evaluation. *Id.* at 64.

166. Deposition of Anthony Girese at 119–20, *Poventud v. City of New York*, 07 Civ. 3998 (S.D.N.Y. deposed Mar. 24, 2011) (on file with author).

167. Deposition of Robert Johnson at 60–66, *Poventud v. City of New York*, 07 Civ. 3998 (S.D.N.Y. filed May 22, 2007) (on file with author).

168. Deposition of Odalys Alonso, *supra* note 161, at 124–25.

169. *Id.* at 131–33.

170. *Id.* at 140, 145–47 (stating that the prosecutor received a merit bonus and raise); *see also* Personnel records disclosed in discovery, *supra* note 160 (on file with author).

171. *Id.* at 154–57.

172. *See* Deposition of Odalys Alonso, *supra* note 161, at 81–82, 289–90.

173. *See* Deposition of Robert Johnson, *supra* note 167, at 64–66.

174. *See id.* at 58–59, 65–67.

guilty plea.<sup>175</sup> Johnson testified that he has never had to consider any discipline for *Brady* violations because there have been no “intentional” violations, to his knowledge, during his twenty-two-year tenure.<sup>176</sup> In fact, during the Johnson era, there have been numerous court decisions finding flagrant or intentional *Brady* violations or misconduct during summations.<sup>177</sup> Moreover, there have been “dozens” more decisions finding improper behavior but declining to reverse under the harmless error doctrine.<sup>178</sup>

Johnson acknowledged that his Office has no policy concerning referrals of prosecutors to the outside Departmental Disciplinary Committee for apparent ethical violations.<sup>179</sup> He also did not believe that the Office had ever made such a referral during his tenure.<sup>180</sup> Counsel to the District Attorney Girese testified that it has been his role, since Johnson took office in 1989, to respond to inquiries from the Disciplinary Committee about alleged prosecutorial misconduct in his Office. He was unaware, however, of any instance in which any prosecutor was sanctioned in relation to the handling of a criminal matter.<sup>181</sup>

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175. *See id.* at 71–72. Johnson denied that he gives this factor any weight in promotions. *Id.*

176. *See id.* at 43.

177. *See, e.g.,* *People v. Garcia*, 848 N.Y.S.2d 137, 140 (App. Div. 2007) (finding prosecutor committed “flagrant violation” when he withheld material impeachment evidence, and criticizing the People’s defense of this conduct as “disingenuous” and “disquieting”); *People v. Mickel*, 710 N.Y.S.2d 70, 71 (App. Div. 2000) (reversing conviction where prosecutor failed to disclose “significant” *Brady* material); *People v. Olivero*, 710 N.Y.S.2d 29, 31 (App. Div. 2000) (finding prosecutor’s comments in summation “manifestly unfair”); *People v. Lantigua*, 643 N.Y.S.2d 963, 969 (App. Div. 1996) (finding that prosecutor intentionally withheld *Brady* material and made knowingly false argument in summation); *People v. Williams*, 622 N.Y.S.2d 275, 275 (App. Div. 1995) (“The basis for the reversal of this case lies in the prosecutor’s repeated disregard of the rulings of the trial court . . . in asking improper questions of witnesses so that the constitutional right of the defendant to a fair trial was violated.”); *People v. Banfield*, 599 N.Y.S.2d 227, 227 (App. Div. 1993) (reversing conviction where prosecutor promised witness “favorable disposition” of witness’s case, but did not disclose that to defendants); *People v. Byfield*, 194 A.D.2d 331, 332 (N.Y. App. Div. 1993) (companion case to *Banfield*); *People v. Hernandez*, 585 N.Y.S.2d 436, 436 (App. Div. 1992) (affirming conviction, but stating that it “deplore[d] [prosecutor’s] excesses [in summation] in the strongest possible terms and ask[ed] that prosecutors be trained and admonished to refrain from such unnecessary conduct”); *People v. Butler*, 585 N.Y.S.2d 751, 753 (App. Div. 1992) (prosecutor’s “overzealous[ ]” conduct and “numerous unwarranted remarks” during cross-examination and summation “deprived defendant of a fair trial”); *People v. Mudd*, 585 N.Y.S.2d 364, 366 (App. Div. 1992) (finding summation comments “directly contradictory to the evidence, prejudicial and entirely outside the bounds of acceptable rhetorical comment”); *People v. McReynolds*, 572 N.Y.S.2d 8, 8 (App. Div. 1991) (noting that prosecutor “impugn[ed] the defense counsel’s integrity”); *People v. Negron*, 556 N.Y.S.2d 41, 43 (App. Div. 1990) (finding summation comments “particularly offensive” and conduct “grossly improper”).

178. Deposition of Anthony Girese, *supra* note 166, at 129.

179. *See* Deposition of Robert Johnson, *supra* note 167, at 72–73.

180. *Id.*

181. Deposition of Anthony Girese, *supra* note 166, at 165–66.

*B. The Queens District Attorney's Office: The Su Case*

## 1. Criminal Proceedings

Shih Wei Su was eighteen years old when he was convicted of attempted murder at trial in Queens in 1992. The underlying incident involved the shooting of two victims at a pool hall in what the prosecution contended was a youth gang-related incident.<sup>182</sup> The principal prosecution witness was Jeffrey Tom, a member of the Green Dragons,<sup>183</sup> which was a rival of the gang with which Su was allegedly affiliated, the White Tigers.<sup>184</sup> Neither Tom nor the two victims who were with him at the time of the shooting implicated Su in their initial statements to police,<sup>185</sup> but they all changed their story at about the same time and implicated him in one way or another.<sup>186</sup> Tom was the most damaging witness, claiming that he knew Su and heard him give an order to shoot.<sup>187</sup> Although Tom had his own robbery-by-extortion case, he denied, under questioning by the prosecutor, that the lenient plea bargain he had received (a youthful offender adjudication and sentence of probation) had resulted from any deal with the District Attorney's Office.<sup>188</sup> The prosecution in her summation argued that Tom's testimony was truthful.<sup>189</sup> Su was convicted and received the maximum sentence of sixteen and two-thirds to fifty years in prison.<sup>190</sup>

Su repeatedly challenged his conviction, both on direct appeal and collateral attack,<sup>191</sup> claiming that Tom must have received some sort of promise or benefit in exchange for his testimony.<sup>192</sup> However, the District Attorney argued successfully that either Su or his attorneys were remiss for not making Tom's sealed plea and sentencing minutes part of the record.<sup>193</sup> In 1999, over the District Attorney's objection, a judge finally ordered Tom's plea and sentencing minutes unsealed, reasoning that the District Attorney "has no legitimate interest in shielding possible perjury."<sup>194</sup> The minutes proved that a prosecutor had made an explicit, on-the-record deal with Tom to grant him leniency in exchange for his trial testimony against Su.<sup>195</sup> Tom's flat denials, elicited by a different prosecutor at Su's trial,

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182. *Su v. Filion*, 335 F.3d 119, 122 (2d Cir. 2003).

183. *See id.* at 121–22.

184. *See id.* at 122.

185. *See* Complaint at 4, *Su v. City of New York*, No. 06 Civ. 687 (E.D.N.Y. filed Feb. 16, 2006) (on file with author).

186. *Id.*

187. *Su*, 335 F.3d at 122.

188. *Id.* at 123–24.

189. *Id.* at 124–25.

190. Complaint, *supra* note 185, at 8.

191. *People v. Su*, 624 N.Y.S.2d 904 (App. Div. 1995), *leave to appeal denied*, 85 N.Y.2d 980 (1995); *People v. Su*, 699 N.Y.S.2d 291 (App. Div. 1999), *leave to appeal denied*, 94 N.Y.2d 925 (2000); *People v. Su*, 721 N.Y.S.2d 841 (App. Div. 2001).

192. Complaint, *supra* note 185, at 8 (reciting grounds for Su's post-trial motions).

193. *Id.* at 8–9 (describing People's opposition).

194. Motion: Unsealing at 2, *People v. Su*, No. 658-91 (N.Y. Sup. Ct. Queens Co. dated Jan. 21, 1999) (on file with author).

195. *Su v. Filion*, 335 F.3d 119, 123 (2d Cir. 2003).



had been false.<sup>196</sup> But the New York courts still would not grant Su any relief, accepting the District Attorney's additional procedural argument that Su's *Brady* violation claim should not be considered on the merits.<sup>197</sup>

Finally, on July 11, 2003, the Second Circuit granted Su's federal habeas corpus petition and directed that he be retried within sixty days or released.<sup>198</sup> The court excoriated the prosecutor for "knowingly elicit[ing] false testimony"<sup>199</sup> from a witness whose credibility was "central to the deliberations of any reasonable jury,"<sup>200</sup> for failing to correct such false testimony, and for "bolster[ing]" Tom's lies during her closing argument.<sup>201</sup> In vacating the conviction, it reasoned that a conviction obtained through "testimony the prosecutor knows to be false is repugnant to the Constitution."<sup>202</sup> As the Bronx District Attorney's Office had done in the *Poventud* case, the Queens District Attorney tried to get Su to accept a "time-served" plea bargain, but Su refused. After postponing the trial on several occasions, District Attorney Richard Brown's Office, on November 5, 2003, moved to dismiss all charges.<sup>203</sup>

## 2. The Attorney Grievance Process

On September 12, 2003, even while he was facing the prospect of retrial, Su filed a formal pro se complaint against the prosecutor with the Grievance Committee of the New York State Appellate Division, Second Judicial Department.<sup>204</sup> He asked for an investigation and sanction of the prosecutor for knowingly eliciting and failing to correct false testimony, and attached a copy of the Second Circuit's decision.<sup>205</sup> Su later submitted a supplemental letter, informing the Committee that his case had been dismissed for insufficient evidence, and that the prosecutor had been responsible for his wrongful imprisonment from ages seventeen through thirty.<sup>206</sup> He said he could not afford an attorney and that "while [the prosecutor] certainly will have her powerful attorneys and friends on her

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196. *See id.* at 121.

197. *See id.*

198. *See id.* at 130.

199. *Id.* at 128.

200. *Id.* at 129.

201. *Id.* at 127.

202. *Id.* at 126.

203. *See* Proceedings at 2, *People v. Su*, No. 0658-91 (N.Y. Sup Ct. Queens Co. dated Nov. 5, 2003) (on file with author).

204. Letter from Shih Wei Su to Second Dep't Grievance Comm. (Sept. 12, 2003) (on file with author).

205. *Id.*

206. Letter from Shih Wei Su to Melissa D. Broder, Assistant Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists. (Nov. 6, 2003) (on file with author); *see also* Jim Dwyer, *Prosecutor Misconduct, at a Cost of \$3.5 Million*, N.Y. TIMES, Oct. 22, 2008, at A27 (reporting on Su's correspondence with the Grievance Committee).

side, I firmly believe . . . this committee will not allow [the prosecutor] to manipulate the justice [sic] again.”<sup>207</sup> Su was wrong.

On December 12, 2003, the prosecutor submitted a remarkable letter prepared by her attorney, but which she endorsed with her signature.<sup>208</sup> It pleaded with the Committee for sympathy, pointing out that she was married and had two young children. The Su case “was considered old and probably in a position to be dismissed for failure to prosecute . . . [and] was thought to be a loser and was dumped in her lap,” the letter contended.<sup>209</sup> “[P]erhaps without being adept as a result of her inexperience,” the letter asserted, the prosecutor had inadvertently elicited false answers from her witness and had not known how to correct them.<sup>210</sup> While acknowledging that the prosecutor’s conduct had been “naive, inexperienced and, possibly, stupid,” the letter shifted blame to the District Attorney’s Office for not ensuring that she knew about the deal made by another prosecutor with her witness, contending, “[P]rosecutorial misconduct need not be the doing of the last assigned assistant, though he/she unwittingly kept it in motion and caused it to occur.”<sup>211</sup>

Su refuted the prosecutor’s arguments by letter dated January 22, 2004.<sup>212</sup> He contended that she had not just been a passive, hapless victim of a rogue witness, but had refused to correct Tom’s testimony when Su’s trial counsel had complained that it could not be true, and that she then “*capitalized*” on the false testimony in her summation by “vouch[ing] for Tom’s truthfulness, honesty, and lack of evasiveness.”<sup>213</sup> Su pointed out that the Second Circuit’s decision had found her misconduct to have been deliberate. Further, Su contended, the prosecutor could not blame her knowing elicitation of and failure to correct false testimony on inexperience when basic attorney disciplinary rules prohibit deceitful behavior and reliance on false or misleading evidence, and prosecutors are required by such rules to make timely disclosure of exculpatory evidence. “The Grievance Committee and the Appellate Division regularly sanction attorneys for mere negligence in handling client funds and other client matters,” Su wrote.<sup>214</sup> Observing that the prosecutor had “cost me 13 years of my life,” Su continued, “[e]ven intentional misconduct in such matters

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207. Letter from Shih Wei Su to Melissa D. Broder, Assistant Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists. (Nov. 6, 2003) (on file with author).

208. Letter from Jerome Karp to Melissa D. Broder, Assistant Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists. (Dec. 12, 2003) (on file with author); Dwyer, *supra* note 206, at A27. This letter was quoted in Mr. Dwyer’s article, was the subject of questioning during the prosecutor’s deposition in Su’s civil rights case, and was introduced as an exhibit.

209. Letter from Jerome Karp to Melissa D. Broder, *supra* note 208.

210. *Id.*

211. *Id.*

212. Letter from Shih Wei Su to Melissa D. Broder, Assistant Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists. (Jan. 22, 2004) (on file with author).

213. *Id.*

214. *Id.*

pales in importance compared to the damage done by a public prosecutor who knowingly withholds exculpatory evidence or misleads the court or the defense.”<sup>215</sup> He asked for permission to participate in the proceedings regarding the prosecutor.

Su did not hear at all from the Committee, until he received a seven-line letter from Chief Counsel Diana Maxfield Kearsse over a year later. It informed Su that, on December 14, 2004, “all the facts pertaining to your complaint were presented to the Grievance Committee,” and it had taken “appropriate action”: “the attorney has been issued an *Admonition* and a permanent record has been made.”<sup>216</sup> An “admonition” is the lightest sanction that may be imposed in New York, and does not result in any public record.<sup>217</sup>

On February 28, Su wrote Ms. Kearsse, asking what “investigation,” if any, had been conducted.<sup>218</sup> “Was [the prosecutor]’s unbelievable defense that she was unaware of her obligation to correct testimony she knew to be false challenged in any way? . . . What was the Committee’s reasoning in concluding that knowing misconduct by an *experienced* prosecutor (*four years* in the Office!) resulting in a wrongful conviction and 13 years imprisonment merited only an Admonition?”<sup>219</sup> Su requested the opportunity to present his case to the full Committee.<sup>220</sup>

Assistant Counsel Melissa D. Broder responded on March 22, 2005. There is no procedure to appeal a sanction, she wrote. Su was “free to consult with counsel regarding any civil remedies which may be available to you regarding the above-named attorney.”<sup>221</sup> Su still did not give up. On March 30, he again wrote Chief Counsel Kearsse:

Even jaywalking can get prison time. So can stealing a loaf of bread. How is it possible that an experienced prosecutor who knowingly broke every bar association code, every Constitutional law, and more only gets an admonition?

I am not a lawyer . . . but I guarantee you that any person, no matter how “naive, inexperience[d], or possibly stupid,” will know that false evidence is not allowed in the court.

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215. *Id.*

216. Letter from Diana Maxfield Kearsse, Chief Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists., to Shih Wei Su (Feb. 3, 2005) (on file with author).

217. See Appellate Div. Second Judicial Dep’t, *Attorney Matters: How to Make a Complaint About a Lawyer*, [http://www.courts.state.ny.us/courts/ad2/attorney\\_matters\\_ComplaintAboutALawyer.shtml](http://www.courts.state.ny.us/courts/ad2/attorney_matters_ComplaintAboutALawyer.shtml) (last visited Oct. 20, 2011), (“An Admonition is issued in those cases in which the committee finds that the lawyer committed clear professional misconduct that was not sufficiently serious to warrant the commencement of a formal disciplinary proceeding.”).

218. Letter from Shih Wei Su to Diana Maxfield Kearsse, Chief Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists. (Feb. 28, 2005) (on file with author).

219. *Id.*

220. *Id.*

221. Letter from Melissa D. Broder, Assistant Counsel, N.Y. State Grievance Comm. for the Second & Eleventh Judicial Dists., to Shih Wei Su (Mar. 22, 2005) (on file with author).

With all due respect, the message that this committee is sending out is loud and clear: Don't worry about using false evidence; you will only get an admonition if you are stupid enough to admit it.<sup>222</sup>

On April 26, 2005, Broder curtly reminded Su that "this matter is closed" and that he could consult with counsel regarding "civil remedies . . . . This should conclude our correspondences regarding this matter."<sup>223</sup>

### 3. The Civil Lawsuit

On February 16, 2006, Su took up the Grievance Committee's suggestion. He filed suit against the City of New York in the United States District Court for the Eastern District of New York, seeking monetary damages pursuant to § 1983 for his wrongful conviction.<sup>224</sup> His lawsuit, modeled after the *Ramos* and *Walker* cases, contended that the prosecutor's misconduct had resulted from the deliberate indifference of the Queens District Attorney to his obligation to properly train, supervise, and discipline his staff regarding their *Brady* and related due process obligations.<sup>225</sup> Su attached to his complaint an exhibit listing twenty-eight cases, decided between 1985 and 2004, involving wrongful withholding of evidence by Queens prosecutors, and fifty-nine cases in which such prosecutors during the same time frame relied on false, misleading, or inflammatory evidence or argument.<sup>226</sup>

During discovery proceedings, the court directed the City to provide personnel and disciplinary records (if any) for prosecutors involved in seventy-three appellate reversals for such misconduct, during the thirteen-year period from 1985 through 1998, including twenty-five cases involving the withholding of material evidence. When disclosed, the records did not reveal a single instance through 2000 in which any prosecutor had been disciplined by way of dismissal, suspension, demotion, transfer, reduction in or withholding of compensation, negative written evaluation, or referral to the court's Grievance Committee, for any of the seventy-three cases.<sup>227</sup> Discovery materials showed that, as in the Bronx, the Queens District Attorney's Office had (and has) no published or formal code of conduct for prosecutors, or any formal disciplinary policies or procedures. The informal "procedure" was for the Chief of Appeals, whenever a motion or brief was received that caused him to be "concerned" about possible misconduct, to bring the matter to the attention of the Chief Assistant

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222. Letter from Shih Wei Su to Diana Maxfield Kears, Chief Counsel, NYS Grievance Comm. for the Second & Eleventh Judicial Dists. (Mar. 30, 2005) (on file with author).

223. Letter from Melissa D. Broder, Assistant Counsel, NYS Grievance Comm. for the Second & Eleventh Judicial Dists., to Shih Wei Su (Apr. 26, 2005) (on file with author).

224. Complaint, *supra* note 185, at 1.

225. *See id.* at 12–15.

226. *See id.* at Ex. B.

227. Personnel records disclosed in discovery, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. filed Feb. 16, 2006) (on file with author). As with the Bronx District Attorney's Office, names of the line prosecutors apparently involved in misconduct have been omitted, as they are unnecessary for the purposes of this Article.

District Attorney or District Attorney Richard Brown.<sup>228</sup> Trial bureau supervisors might also report concerns up the chain of command.<sup>229</sup> Also, the District Attorney would receive copies of appellate decisions.<sup>230</sup> If the District Attorney concluded that a verbal reprimand was in order, he would handwrite a note to the Chief Assistant District Attorney, John Ryan, to “speak to” the Assistant District Attorney involved.<sup>231</sup> However, only three such notes were produced,<sup>232</sup> neither Castellano nor Testagrossa knew of any Assistant District Attorney who actually had been “spoken to,”<sup>233</sup> and there was no such evidence in any prosecutor’s personnel file<sup>234</sup>—with one exception.

Assistant District Attorney Claude Stuart was caught apparently lying to a state court judge about whether an exculpatory witness was available to come to court to testify, and his alleged misconduct was reported in the news media.<sup>235</sup> The Disciplinary Committee ultimately suspended him from practice and he was fired by the District Attorney’s Office.<sup>236</sup> This fiasco might never have occurred had the Office disciplined Stuart when he previously was exposed for alleged misconduct. In 1995, Stuart had obtained a conviction in *People v. Walters*<sup>237</sup> by arguing in summation that the defendant had committed a shooting with a gun recovered from him which Stuart *knew* had not been used in the crime.<sup>238</sup> The appellate court reversed the conviction, finding Stuart’s conduct “an abrogation of his responsibility as a prosecutor,” “egregious,” and “improper.”<sup>239</sup> The District Attorney’s Chief of Appeals, John Castellano, testified in his deposition that he told the Chief Assistant District Attorney, John Ryan, that Stuart’s conduct had been “not tolerable” and “inexcusable.”<sup>240</sup> However, Castellano was unaware if Stuart had been disciplined for that misconduct, and there was no discovery suggesting that he had been.<sup>241</sup>

The deposition of Su’s prosecutor provided an interesting insight into the Office’s attitude regarding *Brady* compliance. While she acknowledged that her failure to disclose the truth about Jeffrey Tom’s relationship with the Office had been inexcusable, she revealed that it had been consistent with her *training* to erect a “Chinese wall” in order to avoid obtaining

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228. Deposition of John Castellano at 22–23, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed May 29, 2008) (on file with author).

229. Deposition of Charles Testagrossa at 19, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed June 11, 2008) (on file with author).

230. *Id.* at 27.

231. Deposition of John Castellano, *supra* note 228, at 257–58.

232. Personnel records disclosed in discovery, *supra* note 227.

233. *See* Deposition of Charles Testagrossa, *supra* note 229, at 19; Deposition of John Castellano, *supra* note 228, at 257–58.

234. Personnel records disclosed in discovery, *supra* note 227.

235. Stacy Albin, *Queens: Murder Conviction Questioned*, N.Y. TIMES, Nov. 14, 2002, at B12.

236. *In re Stuart*, 803 N.Y.S.2d 577 (App. Div. 2005).

237. 674 N.Y.S.2d 114 (App. Div. 1998).

238. *See id.* at 116.

239. *Id.*

240. Deposition of John Castellano, *supra* note 228, at 263.

241. *Id.* at 263–64; *see also* Personnel records disclosed in discovery, *supra* note 227.

knowledge of deals other prosecutors in the Office had made with cooperating witnesses.<sup>242</sup> This policy was inconsistent with Ethical Consideration 7-13 of the New York State Code of Professional Responsibility, which prohibited prosecutors from consciously avoiding knowledge they are required to disclose to their adversaries.<sup>243</sup>

The Chinese wall policy was exposed and condemned in *People v. Steadman*,<sup>244</sup> even before Su's case was tried. In *Steadman*, the New York Court of Appeals blasted the Queens District Attorney's unlawful policy, promulgated at an executive level, to erect just such a Chinese wall between trial prosecutors utilizing a cooperating witness and the prosecutor making a deal with the witness.<sup>245</sup> The Office's Chief of Trials, Daniel McCarthy, had made the deal with a witness's attorney, knowing that the witness would later invoke attorney-client privilege to shield himself from cross-examination when he falsely denied knowledge of promised benefits.<sup>246</sup> The trial prosecutors had kept themselves ignorant of the discussions, and had done nothing to correct the witness's false or misleading denial of knowledge of any promises.<sup>247</sup> After the witness's attorney, as an act of conscience, had disclosed the scheme to the defense and it had been denounced in a scathing opinion by the trial judge (issued before Su's trial),<sup>248</sup> the Office defended it on appeal as lawful, and promoted one of the two line prosecutors to a supervisory position.<sup>249</sup> This prosecutor was not even chastised for his behavior in the case.<sup>250</sup> Meanwhile, Chief of Trials McCarthy was hired by Bronx District Attorney Johnson to become his Director of Trial Training.<sup>251</sup> In his deposition, Johnson denied having ever been aware of *Steadman*, before or after hiring McCarthy,<sup>252</sup> even though McCarthy's misconduct had been denounced in written opinions by the trial judge, the Appellate Division, and the Court of Appeals. The Queens District Attorney conducted no internal investigation.<sup>253</sup>

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242. Deposition of Su's Prosecutor at 39-41, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed June 19, 2008) (on file with author).

243. See New York Lawyer's Code of Professional Responsibility EC 7-13, available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf> ("[A] prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused."). Though this ethics code has been superseded, it was the relevant language at the time of Su's prosecution.

244. 82 N.Y.2d 1 (1993).

245. See *id.* at 7-8.

246. See *id.*

247. *Id.*

248. Opinion and Order at 6-7, *People v. Steadman*, No. 3331-88 (N.Y. Sup. Ct. Queens Co. dated Apr. 20, 1990) (on file with author).

249. See Deposition of Jack Warsawsky at 12, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed July 15, 2008) (on file with author) (testifying as to the promotion).

250. See *id.* at 135-36.

251. Deposition of Daniel McCarthy at 9, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed Aug. 11, 2008) (on file with author).

252. Deposition of Robert Johnson, *supra* note 167, at 76-78.

253. Deposition of John Castellano, *supra* note 228, at 204.

Su's prosecutor's behavior in failing to disclose the truth about the Jeffrey Tom deal should have been known internally for years, but the Office was indifferent to it. Prosecutors assigned to oppose Su's direct appeal and collateral attacks on his conviction acknowledged that they had an ongoing *Brady* obligation to investigate whether Su's *Brady* allegations were correct, but they never did so. When one such Assistant District Attorney attempted to question Su's trial prosecutor, the latter refused to cooperate, and no one in the Appeals Bureau brought this remarkable and intolerable stonewalling to the attention of executives in the Office.<sup>254</sup> After Su filed his federal habeas petition, Chief of Appeals Castellano questioned Su's prosecutor, who claimed not to recall why she had not corrected Tom's false testimony, and Castellano conducted no further investigation into her behavior before preparing opposition papers.<sup>255</sup> In 2003, shortly after she had left the Office, Su's prosecutor learned from a news report that the Second Circuit had vacated Su's conviction, and telephoned John Ryan, the District Attorney's long-time Chief Assistant, to complain. Ryan responded: "[Y]ou are just going to have a bad day, that's all."<sup>256</sup> Another high-level prosecutor in the Office told her, "Don't worry, you're a good attorney. Everything will work out."<sup>257</sup>

In another case resulting in federal habeas relief and strong condemnation of the prosecutor's conduct, there was no internal discipline but instead the prosecutor was *promoted*. In *Jenkins v. Artuz*,<sup>258</sup> a federal judge, granting habeas relief, found that the prosecutor had "engaged in a pattern of misconduct that was designed to conceal the existence of [a witness's] cooperation agreement during [Jenkins's] trial,"<sup>259</sup> and that this misconduct was "improper and, when considered cumulatively, severe."<sup>260</sup> Refusing to admit error, the District Attorney's Office appealed. The Second Circuit affirmed the District Court's issuance of the writ, holding that the prosecutor "misled the jury," both in her questioning of the cooperating witness and during her summation,<sup>261</sup> and that "no doubt . . . [this] behavior violated Jenkins's due process rights."<sup>262</sup> Deposition testimony and other discovery revealed that the Queens District Attorney did not even informally admonish the prosecutor.<sup>263</sup> She received a promotion not long after Jenkins was convicted and currently is a Deputy Chief in one of the Queens District Attorney's Office's trial bureaus.<sup>264</sup> Numerous additional

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254. Deposition of Ranjana Piplani at 24–26, *Su v. City of New York*, 06 Civ. 687 (E.D.N.Y. deposed May 22, 2008) (on file with author).

255. Deposition of John Castellano, *supra* note 228, at 73–77, 87.

256. Deposition of Su's Prosecutor, *supra* note 242, at 19.

257. *Id.* at 18.

258. 294 F.3d 284 (2d Cir. 2002).

259. *Id.* at 290 (quoting *Jenkins v. Artuz*, No. 98-CV-277, slip op. at 27 (S.D.N.Y. May 16, 2001)).

260. *Id.*

261. *Id.* at 294.

262. *Id.*

263. See Deposition of Therese Lendino at 11, *Su v. City of New York*, No. 06 Civ. 687 (E.D.N.Y. deposed Aug. 6, 2008) (on file with author).

264. See *id.*

decisions used strong language in condemning what the courts sometimes concluded was intentional misconduct,<sup>265</sup> but records reflected no internal sanctions.

While no records were kept of complaints, findings of misconduct, or alleged reprimands, the contrary was true when it came to success in obtaining convictions. Charles Testagrossa, Executive Assistant District Attorney in charge of the Major Crimes Division in 2008 and an executive at the office for nearly twenty years, testified at his deposition that Assistant District Attorneys and their supervisors, under previous and the present District Attorneys, kept track of their trial win-loss records.<sup>266</sup> He said he perceived that their victory percentage affected their promotions and compensation.<sup>267</sup>

As discovery in the Su case neared completion, the City strenuously opposed the plaintiff's efforts to depose the District Attorney, Richard Brown, and his chief assistant, John Ryan, concerning their *Brady* disclosure and disciplinary policies. After the court directed Ryan to submit to a deposition and held open the possibility that Brown could be deposed as well, the parties reached a \$3.5 million settlement.

### C. Brooklyn District Attorney's Office: The Zahrey Case

#### 1. Criminal Proceedings

Zaher Zahrey was an undercover narcotics detective for the New York City Police Department's Brooklyn North narcotics division with an excellent performance record when he fell under investigation by the NYPD's Internal Affairs Bureau (IAB) in 1994.<sup>268</sup> IAB had been reconstituted to more vigorously combat police corruption after highly-

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265. See, e.g., *People v. Ni*, 742 N.Y.S.2d 61, 62 (App. Div. 2002) (“[I]nstances of prosecutorial misconduct were flagrant.”); *People v. Mackey*, 670 N.Y.S.2d 879, 880 (App. Div. 1998) (“[P]rosecutor deliberately withheld information which was likely to be elicited on cross-examination.”); *People v. Elder*, 615 N.Y.S.2d 915, 916 (App. Div. 1998) (finding that prosecutor's improper summation comments were “flagrant”); *People v. Scott*, 629 N.Y.S.2d 267, 268 (App. Div. 1995) (finding “flagrant” and “pervasive” prosecutorial misconduct); *People v. Robinson*, 594 N.Y.S.2d 801, 802–03 (App. Div. 1993) (noting that prosecutor's improper trial tactics and summation comments were “continued” and “persistent”); *People v. Gomez*, 548 N.Y.S.2d 568, 570 (App. Div. 1989) (reversing conviction for prosecutor's “frequen[t]” and “outrageous” “misconduct” during trial); *People v. Perez*, 511 N.Y.S.2d 687, 690 (App. Div. 1987) (finding that prosecutor made a “deliberate attempt to mislead the jury”). In other cases, the appellate courts criticized prosecutors' conduct as reckless or negligent. See, e.g., *People v. Banch*, 80 N.Y.2d 610, 621 (1992) (criticizing “the People's seeming lack of care in discharging their discovery obligation”).

266. See Deposition of Charles Testagrossa, *supra* note 229, at 44–45.

267. See *id.* at 46.

268. Fifth Amended Complaint at 11, 14, *Zahrey v. City of New York*, No. 98 Civ. 4546 (S.D.N.Y. filed Feb. 23, 2004) (on file with author). See generally *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000).



publicized hearings had exposed the department's lethargy in that regard.<sup>269</sup> Zahrey was suspected because he had continued playing playground "pick-up" basketball games with several individuals whom the police believed had been involved in criminal activity, including a local basketball legend and childhood friend, William Rivera.<sup>270</sup> When Rivera was murdered, Zahrey came forward to try to assist Rivera's family in finding out the status of the homicide investigation, only to walk into a hornet's nest of IAB detectives who were on the case because the murder weapon had been an off-duty police officer's gun.<sup>271</sup>

An intensive, two-year investigation yielded just one witness—a crack-addicted career criminal named Sidney Quick—who claimed knowledge that Zahrey had committed crimes.<sup>272</sup> At the direction of the Brooklyn District Attorney's Office, IAB Detective-Sergeant Robert Boyce repeatedly interviewed Quick, obtaining bizarrely inconsistent accusations that Zahrey had provided Rivera's alleged hold-up crew with confidential Police Department information on drug spots that could be robbed.<sup>273</sup> When these interviews led nowhere, Boyce later traveled to Sing-Sing State Prison, where Quick was by then serving a six-to-life sentence for robbery.<sup>274</sup> Remarkably, Boyce tape-recorded the entire, two-hour interview in which he promised Quick "a very sweet deal" in exchange for his cooperation against Zahrey, and suggested a story to Quick, which was demonstrably false, implicating Zahrey in the attempted robbery and murder of a drug dealer.<sup>275</sup> Brooklyn prosecutors who heard the tape tried for nearly two years to develop corroboration for Quick's accusations, a necessary prerequisite for prosecution under New York State law, but when they were unable to do so, they convinced federal authorities (who were not legally required to obtain corroboration) to take over the case and to prosecute—without initially disclosing the Quick tape and other exculpatory and impeaching information.<sup>276</sup> Zahrey was held for nearly nine months without bail, pending the conclusion of federal trial proceedings.<sup>277</sup> After a six-week trial, at which the author represented him, he was fully acquitted in June 1997.<sup>278</sup>

## 2. Civil Proceedings

In 1998, Zahrey brought a lawsuit against various individual prosecutors and detectives for investigative misconduct, and against the City of New

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269. Craig Horowitz, *A Cop's Tale*, N.Y. MAG., July 16, 2001, at 32 (explaining that the Internal Affairs bureau was "beefed-up" shortly before the *Zahrey* prosecution "in the wake of the Mollen Commission report").

270. Fifth Amended Complaint, *supra* note 268, at 11–13.

271. *See id.* at 12.

272. *See id.* at 14–16.

273. *See id.*

274. *See id.* at 16.

275. *See id.* at 18–24.

276. *See id.* at 37–39.

277. *See id.* at 47, 50–51.

278. *See id.* at 52.

York.<sup>279</sup> One of his claims was that the indifference of Brooklyn District Attorney Charles J. Hynes to violations of the Office's *Brady* and related due process obligations had caused the Office's line prosecutors investigating the matter to withhold exculpatory information from the United States Attorney's Office, while simultaneously urging that Office to initiate Zahrey's prosecution.<sup>280</sup> The *Brady* claim was ultimately dismissed,<sup>281</sup> but before settling,<sup>282</sup> Zahrey succeeded in obtaining considerable discovery showing that the Brooklyn District Attorney's Office, like its counterparts in Queens and the Bronx, has no formal disciplinary rules and procedures, and no history of disciplining prosecutors found to have engaged in misconduct, including the withholding of *Brady* material.

In a deposition held on October 18, 2005, Dino G. Amoroso, former Counsel to the District Attorney, and then Executive Assistant District Attorney, testified that he was responsible for implementing Hynes' policies to ensure compliance with ethical standards and was knowledgeable about any specific investigations of prosecutors for alleged misconduct since Hynes' tenure began in 1990.<sup>283</sup> The Office had no employee manual or other published rules or procedures concerning standards of behavior, potential sanctions for violating them, or procedures for investigating and imposing discipline, including with regard to *Brady* obligations.<sup>284</sup> The Office would distribute memoranda on discovery and *Brady* obligations, but had no follow-up procedure to make sure individual prosecutors read them, and no *Brady* "policy."<sup>285</sup> Prosecutors were told informally that "conscious" ethical violations, including under *Brady*, would have the "highest consequence," including dismissal from the Office—as opposed to inadvertent mistakes during the "hurly-burly of trials."<sup>286</sup> Consistent with that approach, while it was conceivable that a

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279. Zahrey v. City of New York, No. 98 Civ. 4546 (S.D.N.Y. filed June 26, 1998).

280. Fifth Amended Complaint, *supra* note 268, at 65–66.

281. Zahrey v. City of New York, No. 98 Civ. 4546, 2009 WL 54495, at \*26 (S.D.N.Y. Jan. 7, 2009) (reasoning that Zahrey had not been prejudiced by any *Brady* violations since he was acquitted at trial, but holding that Brooklyn prosecutors were subject to personal liability for their involvement in manufacturing and using evidence they knew had been manufactured to cause federal criminal proceedings to be initiated and continued against Zahrey).

282. Zahrey settled in 2009 with the City and five individual defendants, including two supervisory prosecutors. These two prosecutors, Charles Guria, the Chief of the Brooklyn District Attorney's Civil Rights Bureau, and Theresa Corrigan, now the Chief of the Gang Unit of the Nassau County District Attorney's office and formerly a supervisor in Brooklyn, agreed to a judgment without admitting liability, pursuant to Federal Rule of Civil Procedure 68, under which they were jointly and severally liable for \$750,001 plus reasonable attorneys' fees for their alleged investigative misconduct. The judgment was paid by New York City.

283. Deposition of Dino G. Amoroso at 16–17, Zahrey v. City of New York, 98 Civ. 4546 (S.D.N.Y. deposed Oct. 18, 2005) (on file with author).

284. *Id.* at 91–92.

285. Deposition of Dennis Hawkins at 10–11, Zahrey v. City of New York, 98 Civ. 4546 (S.D.N.Y. deposed Mar. 13, 2000) (on file with author).

286. Deposition of Dino G. Amoroso, *supra* note 283, at 90, 181–82.

prosecutor might deserve sanction for merely violating *Brady* “negligently,” ordinarily only intentional misconduct would be punished.<sup>287</sup>

Amoroso testified that when a complaint or court decision was received identifying a possible ethical issue, it would be brought to the attention of the District Attorney, who would decide whether an investigation should be conducted or whether any other action was necessary.<sup>288</sup> Amoroso was fully informed about all such investigations that were conducted from 1990 to 2005. While he initially claimed that several disciplinary inquiries were conducted, he then acknowledged that none of them were for the purpose of determining whether a prosecutor had engaged in ethical lapses during the handling of criminal prosecutions. Rather, the investigations either were into personal misconduct by Assistant District Attorneys having nothing to do with their handling of individual cases, or concerned whether to retry defendants whose convictions had been reversed or vacated.<sup>289</sup> He did not know of a single instance in which any prosecutor had been so much as admonished for misconduct related to his or her handling of a criminal investigation or prosecution.<sup>290</sup>

During this fifteen-year period, however, there were numerous court decisions finding serious misbehavior by Brooklyn prosecutors, including in the *Brady* context. These cases included instances where Assistant District Attorneys withheld exculpatory witness statements or impeachment material, or made false and/or misleading presentations of the evidence at trial.<sup>291</sup> Numerous additional instances of misconduct through the present day were identified in the complaint in *Collins v. City of New York*, a lawsuit the author recently filed based upon findings by a federal judge of pervasive *Brady* violations, witness coercion, and other misconduct by the Chief of District Attorney Hynes’ Rackets Division, Michael F. Vecchione.<sup>292</sup> In the highly publicized Jabbar Collins murder case,

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287. *Id.* at 102–05.

288. *Id.* at 92–94.

289. *Id.* at 96–102, 105, 107, 110, 126–28, 133, 145–48.

290. *Id.* at 101–02, 105, 107, 128, 146–48.

291. *See, e.g.*, *Leka v. Portuondo*, 257 F.3d 89, 106 (2d Cir. 2001) (prosecutor suppressed evidence that would have had a “seismic impact” on the case); *People v. Calabria*, 94 N.Y.2d 519 (2000) (prosecutor repeatedly defied court’s ruling and made false or misleading argument to the jury); *People v. Cotton*, 662 N.Y.S.2d 135, 136 (App. Div. 2000) (prosecutor’s summation betrayed his “duty not only to seek convictions but also to see that justice is done” and his “duty of fair dealing to the accused and candor to the courts”) (citation omitted) (internal quotation marks omitted); *People v. LaSalle*, 663 N.Y.S.2d 79, 80 (App. Div. 1997) (prosecutor withheld impeachment evidence that “clearly” should have been disclosed); *People v. Roberts*, 611 N.Y.S.2d 214, 215 (App. Div. 1994) (“There is no doubt that the People violated the principles of *Brady*.”); *People v. Khadaidi*, 608 N.Y.S.2d 471, 472–73 (App. Div. 1994) (prosecution withheld interview notes with complainant containing prior inconsistent statements); *People v. Jackson*, 603 N.Y.S.2d 558, 559 (App. Div. 1993) (prosecution withheld several pieces of exculpatory and impeachment evidence in arson case); *People v. Inswood*, 580 N.Y.S.2d 39, 40 (App. Div. 1992) (prosecutor failed to turn over *Brady* material that revealed existence of potentially exculpatory witnesses).

292. *See generally* Complaint, *Collins v. City of New York*, No. 11 Civ. 766 (E.D.N.Y. filed Feb. 16, 2011); John Eligon, *In Suit, Freed Man Accuses Prosecutors of Misconduct*, N.Y. TIMES, Feb. 17, 2011, at A26.

Hynes's office agreed to federal habeas corpus relief for Collins,<sup>293</sup> his immediate release after fifteen years in prison, and the dismissal of the indictment without retrial,<sup>294</sup> rather than have Vecchione, the Office's chief "anti-corruption" prosecutor,<sup>295</sup> and other prosecutors in the Office, testify at a habeas hearing ordered by Federal District Judge Dora Irizarry.<sup>296</sup> The Office admitted that it had failed to disclose a secret recantation by its chief witness,<sup>297</sup> a recantation that Vecchione, in a previous sworn affidavit, had categorically denied ever occurred.<sup>298</sup> In testimony that the federal court found "credible," a second key witness testified that he was a drug addict at the time he was questioned by Vecchione, and that Vecchione threatened him with physical harm and secretly incarcerated him for a week without following required material witness procedures.<sup>299</sup> The court characterized the prosecution's failure to disclose this information, along with additional evidence refuting the testimony of the third and final significant prosecution trial witness, as "shameful."<sup>300</sup> Immediately after Judge Irizarry made her denunciation of Vecchione's behavior and the conduct of the Office, Hynes ratified that behavior. He told the news media that he would conduct no investigation, praised Vecchione as "a very, very principled lawyer,"<sup>301</sup> and pronounced him "not guilty of any misconduct."<sup>302</sup> Collins's lawsuit contends that Vecchione's behavior did not simply result from Hynes's indifference to coercion of witnesses and *Brady* violations but that such misconduct, at least in high-profile cases that the Office was anxious to win, was the *policy* of the Office.<sup>303</sup>

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293. See Sean Gardiner, *Attorney Drops Attempt at Retry*, WALL ST. J., June 10, 2010, at A25; Tom Robbins, *Presumed Guilty: A Jailhouse Lawyer Says a Top Brooklyn Prosecutor Rigged His Murder Conviction*, VILLAGE VOICE, June 2, 2010, at 8; A. G. Sulzberger, *Murder Conviction Voided over Prosecutors' Conduct*, N.Y. TIMES, May 26, 2010, at A21; A. G. Sulzberger, *Witness Issue Prompts a Hearing on Possible Misconduct by Prosecutors to Be Postponed*, N.Y. TIMES, May 27, 2010, at A27.

294. See A. G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES, June 9, 2010, at A18; see also Mark Fass, *Judge Orders Inmate's Release, Blasts D.A.'s Lack of Remorse*, N.Y. L.J., June 9, 2010, at 1.

295. KINGS COUNTY DISTRICT ATTORNEY'S OFFICE: BUREAUS, UNITS & DIVISIONS, <http://www.brooklynda.org/kcda-bur-units-divisions/kcda-bur-unit-div.htm> (last visited Oct. 20, 2011) (listing Michael Vecchione as Chief of the Rackets Division, which "investigate[s] and prosecute[s] serious and complex crimes in the areas of organized crime, criminal misconduct by public officials and police officers, gang-related activity, major frauds, arson, narcotics and tax revenue crimes").

296. Sulzberger, *supra* note 294, at A18.

297. Supplemental Affidavit in Opposition [to] Amended Petition for Writ of Habeas Corpus of Kevin Richardson at ¶ 6, Collins v. Ercole, 08-CV-1359 (E.D.N.Y. filed May 7, 2010) (on file with author).

298. Affirmation of Michael F. Vecchione at ¶ 15, People v. Collins, No. 2884-94 (N.Y. Sup. Ct. Kings Co. dated Nov. 3, 2006) (on file with author).

299. Transcript of Civil Cause for Hearing Before the Honorable Dora L. Irizarry, United States Dist. Judge at 120, Collins v. Ercole, 08-CV-1359 (E.D.N.Y. dated June 8, 2010) (on file with author).

300. *Id.* at 133.

301. Sulzberger, *supra* note 294, at A18.

302. Sean Gardiner, *A Solitary Jailhouse Lawyer Argues His Way Out of Prison*, WALL ST. J., Dec. 24, 2010, at A1.

303. Complaint, *supra* note 292, at ¶¶ 437–523.

## CONCLUSION

Contrary to the Supreme Court's assumption in *Imbler* and in subsequent decisions, experience shows that prosecutors are not disciplined—either internally by their Offices or externally by court or bar disciplinary committees—for violating their *Brady* or other due process obligations during criminal proceedings. Three major District Attorneys' Offices in “progressive” New York City lack any formal disciplinary rules or procedures, despite being large organizations employing hundreds of prosecutors and support staff.<sup>304</sup> Their informal “policy” is to confine consideration of discipline to cases in which courts have found “intentional” or willful misbehavior, even though courts often do not reach the issue of willfulness as it may be irrelevant to whether there was a violation of the defendant's due process rights requiring reversal of the conviction. In the relatively few *Brady* or other cases in which the court has found willfulness, the District Attorneys avoid discipline by rejecting the court's conclusion, or just passively failing to follow up with any investigation or consideration of discipline.<sup>305</sup>

In future cases, when analyzing policy considerations relating to individual and municipal liability by prosecutors or their employers for violations of the constitutional rights of criminal suspects or defendants, the Supreme Court should abandon the false assumption that prosecutors, theoretically subject to professional codes, really are disciplined or have reason to fear being disciplined by their offices or by outside disciplinary bodies. Otherwise, the Court will continue to premise significant civil rights decisions on a fiction that has plagued constitutional jurisprudence for thirty-five years.

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304. *See supra* notes 149, 151–52, 155, 162–64, 228–231 and accompanying text.

305. *See supra* notes 123–30, 136, 138–39, 181, 227, 249–53 and accompanying text.