

(To be submitted)

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

In the Matter of the Application of
RICHARD A. BROWN, District Attorney
of Queens County,

Petitioner,

For a Judgment in the Name of Prohibition
under Article 78 of the Civil Practice Law
and Rules,

Appellate Division Docket No.
2010-09688

-against-

The Honorable JOEL L. BLUMENFELD,
Acting Justice, Supreme Court of the State
of New York; ELISAUL PEREZ, named as
Defendant in Queens County Indictment
Number 1202/2009,

Respondents.

AMICUS CURIAE BRIEF OF THE
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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APPELLATE DIVISION: SECOND DEPARTMENT

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AMICUS CURIAE BRIEF OF THE
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Preliminary Statement

This is an *amicus curiae* brief respectfully submitted on behalf of the New York State Association of Criminal Defense Lawyers. The New York State Association of Criminal Defense Lawyers (“NYSACDL”) is a non-profit membership organization of approximately 600 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist,

educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing. Our members represent criminal defendants around the state, in the City of New York, and in the County of Queens. We have many years' experience representing defendants before and during their arraignment in the Criminal Courts of the City of New York and elsewhere and have a keen interest in protecting and enforcing our clients' rights to counsel and against self-incrimination.

Point One

District Attorney Brown's Petition Attempts to Undermine Judicial Independence

Richard A. Brown, Queens District Attorney, has filed a petition, pursuant to Article 78 of the CPLR, to preclude the Honorable Joel L. Blumenfeld from rendering a judicial decision that calls into question conduct by the District Attorney and his office. Instead of filing an appeal following the issuance of the hearing court's decision, District Attorney Brown seeks to undermine judicial independence by obstructing the ability of a duly-appointed judicial officer from performing his duties. At the heart of this issue is the attempt by District Attorney Brown to keep Justice Blumenfeld from addressing whether the District

Attorney's conduct was inappropriate and/or violative of ethical norms.¹

Courts are duty-bound to protect the integrity of the judicial system and preserve the ethical standards of the legal profession, *In re Abrams*, 62 N.Y.2d 183, 197 (1984)(citations omitted), and it is well within the power of the judiciary to consider whether law enforcement has engaged in unethical conduct in an attempt to obtain an arrested person's statements. Judges routinely find that lawyers have violated ethical rules and have made such findings public. *See Muriel Siebert & Co., Inc. v. Intuit, Inc.* 8 N.Y.3d 506 (2007)(deciding whether attorney should be disqualified from representing client); *People v. Paperno*, 54 N.Y.2d 294, 300 (1981)(disciplinary rule proscriptions also apply to the prosecuting attorney); *Lyons v. Menoudakos & Menoudakos, P.C.*, 63 A.D.3d 801 (2d Dept. 2009)(evidence of a violation of a disciplinary rule is relevant to the question of tort liability); *People v. Cintron*, 173 A.D.2d 277 (1st Dept. 1991)(defense counsel properly prohibited from testifying on behalf of client); *People v. Kabir*, 13 Misc. 3d 920 (Sup. Ct. Bronx 2006)(adjudicating whether prosecutor violated DR 7-104); *People v. Miranda*, 24 Misc. 3d 1223A, 899 N.Y.S.2d 62 (Sup. Ct. Bronx 2009)(it is within a court's power to render legal

¹ Because we understand other *amici* will address the question of whether the District Attorney's policy violates ethical rules, we will not duplicate those efforts.

decisions based on existing precedent where questions of direct ethical violations are implicated). Despite Mr. Brown's desire to the contrary, prosecutors simply cannot be immune from such criticism when it is warranted.

The case of *Sedore v. Epstein*, 56 A.D.3d 60 (2d Dept. 2008) is particularly illustrative. There, this Court sustained an Article 78 proceeding against a District Attorney prohibiting the delegation of the prosecutorial power to a non-prosecutor. In so doing, the Court properly considered the ethical conduct of the District Attorney, stating that:

The duty of a prosecutor is thus somewhat different from that of an attorney retained by a party, as the canons of professional ethics recognize (*see* Code of Professional Responsibility EC 7-13). The attorney's obligation is to exercise professional judgment "solely for the benefit of the client and free of compromising influences and loyalties" (Code of Professional Responsibility EC 5-1), to represent the client zealously within the bounds of the law (*see* Code of Professional Responsibility Canon 7), and "to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules" (Code of Professional Responsibility DR 7-101[A][1] [22 NYCRR 1200.32(a)(1)]). In the case of the prosecutor, all of these obligations flow not to the complainant, but to the public, which is the client (*see People v Harris*, 154 Misc 2d 554, 558, 585 N.Y.S.2d 684 [N.Y. Crim. Ct.

1992)]; *see also Berger v United States*, 295 U.S. [75], 88 [(1935)]; *People v Zimmer*, 51 N.Y.2d [390], 393 [(1980)]; ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Commentary, Standard 3-1.3 [3d ed. 1993]). In light of this, the conflict inherent in permitting the prosecutor to be paid by the complainant is readily apparent (*see People v Garfield*, 152 Misc 2d 51, 574 N.Y.S.2d 501 [(N.Y. Just. Ct. 1991)]; *People v Benoit*, 152 Misc 2d 115, 575 N.Y.S.2d 750 [(N.Y. Crim. Ct. 1991)]; *People v Calderone*, 151 Misc 2d 530, 573 N.Y.S.2d 1005 [(N.Y. Crim. Ct. 1991)]).

Sedore, 56 A.D.3d. at 67. Thus, prosecutors' ethical obligations clearly exceed those of other lawyers; it was a District Attorney's ethical violation which provided part of the basis for granting the writ in the *Sedore* case.

It is also particularly noteworthy that the judiciary has the power to consider ethical rules in assessing the particular issues in a given case. Lawyers on both sides of a criminal case are (or certainly should be) keenly aware that judges can examine their conduct for its legality including whether any violations of the Rules of Professional Conduct (or the Disciplinary Rules, as they were previously known) have occurred. Unethical conduct on the part of *any* attorney that deprives criminal defendants of their constitutional rights is well within the realm of judicial review.

District Attorney Brown seemingly fails to recognize the distinction between a grievance committee review – which examines the ethical nature of attorney conduct for the purpose of disciplinary action – and a court’s judicial power to consider unethical conduct as a part of safeguarding a defendant’s constitutional rights. Such use of ethical rules to ascertain whether a prosecutor has acted appropriately is not unique to the state system, and is equally reflected in the federal judicial system. For example, in this Circuit, federal courts may exclude evidence obtained in violation of ethical rules prohibiting communication with represented parties. *See SEC v. Lines*, 669 F. Supp. 2d 460, 465 (S.D.N.Y. 2009).

As Justice Felix Frankfurter memorably wrote, “There can be no free society without law administered through an independent judiciary.” *United States v. United Mine Workers*, 330 U.S. 258, 307 (1947) *quoted in New York v. De Lury*, 23 N.Y.2d 175, 188 (1968). Curtailing a court’s ability to act independently by not allowing it to review the conduct of the prosecutor would significantly impinge upon that crucial judicial independence.

In sum, using an Article 78 proceeding to attack a judge’s power to rightfully consider evidence in a case is improper *ab initio*, as it undermines the independence of the judiciary. In any event, it is simply not the appropriate

mechanism for seeking review of a judicial decision to suppress (or not to suppress) a post-arrest statement to law enforcement because “[p]rohibition is generally not available to collaterally review an arguable error of law committed in a pending criminal action.” *Jacobs v. Altman*, 69 N.Y.2d 733, 735 (1987); *see also Matter of Patel v. Breslin*, 45 A.D.3d 1240 (3d Dept. 2007)(dismissing Article 78 seeking to prohibit judge from enforcing order which disqualified the client’s attorney from representing her in a criminal action due to a conflict of interest because there was adequate remedy at law by direct appeal); *Moore v. Mallon*, 188 A.D.2d 651 (2d Dept. 1992)(dismissing petition challenging ruling concerning admissibility of certain evidence because prohibition is not generally available to review an alleged error of law in a pending criminal action).

Criminal Procedure Law § 450.20(8) provides the People with a statutory right to appeal from a hearing court’s decision on a motion to suppress evidence. District Attorney Brown’s petition seeks to prevent a judge from even considering whether his own policy is ethical. If Brown can prevent a judge from considering whether he has violated ethics rules, surely any lawyer could seek such a writ of prohibition. If other lawyers’ ethics are properly consider by the courts, Brown’s argument that prosecutors are exempt is simply wrong.

No man in this country is so high that he is above the law. No officer

of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, 106 U.S. 196, 220 (1882); *Karedes v. Colella*, 187 Misc. 2d 656, 660 n.3 (Sup. Ct. Broome County 2001)(quoting Theodore Roosevelt: “No man is above the law and no man is below it.”)

Point Two

District Attorney Brown’s Pretextual Rationale for his Policy Is Without Merit

District Attorney Brown has insisted that his policy is designed to “help” the accused by freeing the innocent. But the many years of experience in court by NYSACDL’s members teaches us that this argument is baseless. For one, this District Attorney’s Office has a long history of prosecutorial misconduct; with several cases resulting in reversed convictions followed by large civil judgments. *See People v. Baba-Ali*, 179 A.D.2d 725 (2d Dept. 1992); *People v. Clausell*, 182 A.D.2d 132 (2d Dept. 1992); *People v. Robinson*, 190 A.D.2d 697 (2d Dept. 1993); *Turner v. Schriver*, 327 F. Supp. 2d 174 (E.D.N.Y 2004); *Shih Wei Su v. Fillion*, 335 F.3d 119 (2d Cir. 2003); *People v. Gallagher*, 18 Misc. 3d 1135A, 859 N.Y.S.2d 897 (Sup. Ct. Queens 2008). *See also* Dwyer, *Prosecutor Misconduct*,

at a Cost of \$3.5 Million, New York Times, Oct. 21, 2008 available at http://www.nytimes.com/2008/10/22/nyregion/22about.html?_r=1&scp=1&sq=shih-wei%20su&st=cse (last visited November 18, 2010).

Second, District Attorney Brown fails to show that the small number of cases dismissed through his policies would not have received a similar result with counsel afforded to the defendant. When defendants speak to their attorneys, exculpatory information may be secured and that information may serve to release the accused which can happen as early as at arraignment during defense counsel's bail application when facts are brought to light that cast doubt on the viability of a particular criminal prosecution. In such cases, judges sometimes release the accused without bail, upon their own recognizance. Likewise, by the next court date – often the date for grand jury action or release (commonly referred to as the “180.80 day”) – prosecutors who have had the opportunity to investigate the matter, including details provided by defense counsel, routinely dismiss cases. Thus, to claim that prosecutors have some unique or exclusive role in securing the release of those accused of crimes is but another example of District Attorney Brown's distorted view of power that fails to properly account for the roles of other parties held in the criminal justice system.

Point Three

District Attorney Brown's Policy Is An Institutional Violation of Criminal Procedure Law § 140.20 and the Fourth Amendment

District Attorney Brown has effectively instituted a policy of delaying arraignments so as to avoid the reach of the Sixth Amendment. There is no doubt that once an accusatory instrument is filed, the right to counsel attaches. *See e.g., People v. Carmona*, 82 N.Y.2d 603, 620 (1993). While Brown has his assistants prepare criminal complaints and run criminal history records so that all the papers are *ready* to be filed, it is only then that the defendant is diverted to be interrogated. Therefore, this policy can be viewed as nothing more than a thinly-veiled, calculated and deliberate attempt to delay the filing of accusatory instruments in violation of CPL § 140.20 and to use then exploit that time to convince soon-to-be defendants that they should give up their right to counsel and self-incrimination before their imminent arraignment.

Criminal Procedure Law § 140.20 (1) provides, in relevant part: "Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought

before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.”

As the Supreme Court recently pointed out in *Corley v. United States*, 129 S. Ct. 1558 (2009), the requirement of a prompt presentation to a magistrate dates back to common law. While the federal courts first used their supervisory power to enforce this rule, since 1946 it has been embodied in the Federal Rules of Criminal Procedure, which state that any person making an arrest within the United States “must take the defendant without unnecessary delay before a magistrate judge[.]” *See* Fed. R. Crim. P. 5(a)(1)(A). Indeed, the Fourth Amendment so requires as does the common law in New York State. *Green v. Kennedy*, 48 N.Y. 653 (1871).

CPL § 140.20 “is designed to protect against unlawful confinement and assure that persons accused are advised of their rights and given notice of the crime or crimes charged.” *People v. Ramos*, 99 N.Y.2d 27, 36 (2007). While a violation of that Section may not necessarily entitle a defendant to suppression, *see id.* at 36, n.8, a policy that violates CPL § 140.20 does deprive the accused of a prompt probable cause hearing required by the Fourth Amendment and any delay in arraignment may be considered in assessing the voluntariness of a defendant’s confession. *Ramos*, 99 N.Y.2d at 35.

NYSACDL members have provided anecdotal evidence that Brown’s

assistants fail to heed the telephone calls of retained counsel directing them not to interview their arrested clients. The NYSACDL believes that Brown's policy includes interrogating accused people who have a lawyer even when the lawyer promptly notifies his Office that they represent the soon-to-be defendants. We understand that prosecutors could make a calculation that the significant litigation advantage gained by these interrogations is worthwhile, even if the product of such an interrogation is later found inadmissible on the People's direct case. By obtaining a defendant's videotaped statement, even if that statement is later suppressed, the prosecutors can use it to cross-examine a defendant at trial and can use it to discredit claims he may make at trial. This is yet another reason Brown's policy is wrong and why judges should retain the power to examine whether it is ethical.

Conclusion

For these reasons, the New York State Association of Criminal Defense Lawyers urges the Court to deny the petition.

Dated: November 24, 2010
White Plains, New York

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