

Grievance Committee for the Tenth Judicial District
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Re: Grievance Complaint Regarding Attorney Michael Bushwack, State Bar No. 4551420

To the Grievance Committee,

The Nassau County Court found that prosecutor Michael Bushwack¹ committed prosecutorial misconduct that “usurped the power of the Grand Jury,” prejudicing Ryan Draper and justifying the dismissal of three serious charges.² Specifically, after a Grand Jury voted to dismiss certain charges in Draper’s case, Bushwack proceeded to question the clerk about the vote totals and provide an unsolicited re-charge of the grand jury.³ Thus, Bushwack “exercised improper influence” that “undermined the integrity of the Grand Jury.”⁴ The court subsequently dismissed the charges that were premised on this improper re-charge.⁵

Despite the findings of misconduct noted in this grievance, as of the writing of this grievance, the New York Attorney Detail Report lists “Disciplinary History: No record of public discipline” for Bushwack.⁶ Accordingly, the Grievance Committee should seek a suspension of Bushwack’s license.

¹ Michael John Bushwack, State Bar No. 4551420, United States Attorney’s Office—Eastern District, 610 Federal Plaza, Central Islip, New York 11722. Phone: (631) 715-7878. The Unified Court System website does not list an email for Bushwack. These writers do not have personal knowledge of any of the facts or circumstances of Bushwack or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

² Exhibit A, *People v Draper*, 32 Misc 3d 1238(A) at *2 (Sup Ct, Nassau County 2011), available at <https://tinyurl.com/wpt5kp8n>.

³ *See id.* at *3 (“There might be an appropriate explanation why the prosecutors took the action which they did. [O]n the state of this record, this Court can only conclude that it is more likely than not that [Bushwack was] dissatisfied with the recorded action of [the Grand Jury’s] morning session” (emphasis in original)).

⁴ *Id.*

⁵ *Id.*

⁶ *See* New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney Michael Bushwack, click on Name hyperlink].

1. The Grievance Committee has a Unique Duty to Protect the Public by Holding Prosecutors Accountable for Misconduct.

A. Prosecutorial Misconduct is Pervasive and Unchecked.

Our legal system holds prosecutors to the highest standards of all attorneys.⁷ When any attorney errs, it can cause harm, typically to an individual person. But a prosecutor's misconduct can not only destroy a person's life, and that of their family, but also derail the legal system's promises of fairness and equality for all. When state actors harness the punitive power of the state in a manner that violates the state's own rules, it sends the message that power—not justice—is the driving force behind legal actions. A single prosecutor's misconduct can damage “the reputation and public confidence placed” in all prosecutors and the justice system itself.⁸

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one.”⁹ Hal Lieberman, former Chief Counsel for the Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct “undermines the integrity of the entire system.”¹⁰

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.¹¹ Yet these appellate courts “did not routinely refer prosecutors for investigation by the state disciplinary committees,” and the disciplinary committees otherwise “almost never took serious action against prosecutors.”¹² Indeed, among these numerous cases in which judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.¹³ None of the other implicated prosecutors

⁷ *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) (“[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.”); *see also* ABA Criminal Justice Standards: Prosecution Function Standard 3-1.4(a) (“In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.”).

⁸ *Rain*, 162 AD3d at 1462.

⁹ *Berger v United States*, 295 US 78, 88 (1935) (emphasis added); *see also* *People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 519, 523 (2000) (“Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility—determining facts relevant to guilt or innocence.”); *People v Levan*, 295 NY 26, 36 (1945).

¹⁰ Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (Apr. 3, 2013), <https://tinyurl.com/t2ryucec>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*; *see also* *In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005) (holding, following a Grievance Committee disciplinary proceeding, that a prosecutor's misconduct warranted a three-year suspension from the practice of law).

were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.¹⁴ As the *New York Times* Editorial Board wrote in 2018, “there’s no reliable system for holding prosecutors accountable for their misconduct, and they certainly can’t be entrusted with policing themselves.”¹⁵

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

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.¹⁶ In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the “checks” of “professional discipline” by state bar organizations.¹⁷

Unfortunately, the U.S. Supreme Court’s assumption—that professional disciplinary actions would “provide an antidote to prosecutorial misconduct”—has not been borne out.¹⁸ A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.¹⁹

In their 2016 article, “Prosecutorial Accountability 2.0,” ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors “were rarely disciplined for

¹⁴ See Sapient & Hernandez.

¹⁵ Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), <https://tinyurl.com/4ntvsv85>.

¹⁶ See e.g. *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have “absolute immunity” for the “conduct of a prosecution”); *Dann v Auburn Police Dept.*, 138 AD3d 1468, 1469 (4th Dept 2016) (“The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.” (internal quotation marks omitted)); see also *Ryan v. State*, 56 NY2d 561, 562 (1982) (holding that “the doctrine of prosecutorial immunity” precludes “recovery against the State” for “acts of prosecutorial misconduct”).

¹⁷ *Imbler*, 424 US at 429; see also *Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official’s claim to prosecutorial immunity in a professional ethics proceeding).

¹⁸ See Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz L Rev 219, 242–243 (2012).

¹⁹ Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) <https://tinyurl.com/rpxyadhb>; see also Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), <https://tinyurl.com/vjkr2eh>; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L J 59, 81 (2012) (citing “the small number of sanctions against prosecutors, relative to lawyers as a whole”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 NC L Rev 721, 725 (2001) (describing the “rarity of discipline” of prosecutors).

misconduct, and if so, not very seriously.”²⁰ Indeed, “neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors’ offices would clean up their own messes.”²¹ “It’s an insidious system,” said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.²² “Prosecutors engage in misconduct because they know they can get away with it.”²³

In 2018, the Appellate Division suspended New York prosecutor Mary Rain’s law license for two years for a variety of misconduct, including summation misconduct.²⁴ In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.²⁵ But even a short suspension like that received by Rain and Kurtzrock²⁶—indeed, public discipline of any kind—remains rare.

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

2. The Nassau County Court Found that Bushwack Usurped the Power of the Grand Jury.

The prosecutor has heightened duties of impartiality and fairness in front of a Grand Jury. “As legal advisor to the Grand Jury, the prosecutor performs dual functions: that of public officer and that of advocate. The prosecutor is thus ‘charged with the duty not only to secure indictments but also to see that justice is done.’”²⁷ Prosecutors have a “duty of fair dealing” in front of a Grand Jury; the law grants prosecutors “substantial control over the Grand Jury proceedings, requiring the exercise of completely impartial judgment and discretion.”²⁸

A prosecutor is supposed to be a “minister of justice,” responsible for guaranteeing “procedural justice and that guilt is decided upon the basis of sufficient evidence.”²⁹ These duties are especially

²⁰ Bruce Green & Ellen Yaroshfsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

²¹ *Id.* at 65 (citation omitted); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

²² Sapien & Hernandez.

²³ *Id.*

²⁴ *Rain*, 162 AD3d at 1462.

²⁵ *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

²⁶ In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court’s sanction was surprisingly light. See, e.g., Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State*, HuffPost (Sept. 20, 2017), <https://tinyurl.com/yhvm43k>; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), <https://tinyurl.com/fp9yfs8x>; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), <https://tinyurl.com/52ar9tjx>.

²⁷ *People v Huston*, 88 NY2d 400, 406 (1996) (internal citations omitted).

²⁸ *Id.*

²⁹ Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

significant in a non-adversarial, one-sided Grand Jury proceeding, where there is no defense attorney, and “dismissal of the indictment is specifically compelled... when the integrity of the Grand Jury proceeding is impaired” and prejudice may result.³⁰

In *People v. Draper*,³¹ the prosecution asked the Grand Jury to evaluate evidence related to a car accident and return an Indictment on six counts—three of which were more serious, involving criminal negligence. This was an experienced Grand Jury that had already heard evidence and instructions in other cases. After receiving witness testimony and legal instructions in the *Draper* case, the Grand Jury only issued an Indictment on three charges, dismissing the three charges involving criminal negligence.³² The Nassau County Court later reviewed the evidence and determined that, in fact, there was insufficient evidence of criminal negligence and that those three charges were properly dismissed.

But when the Grand Jury came back with its initial decision dismissing three of the charges, it appears that rather than simply accepting the result, prosecutor Bushwack re-instructed the Grand Jury on the laws of criminal negligence and grand jury voting requirements.³³ The Grand Jury had, at one point, specifically requested further information on the definition of criminal negligence—but had seemingly not requested any information about grand jury voting requirements that Bushwack provided. After Bushwack’s unsolicited re-instruction, the Grand Jury voted to indict on all six charges.

In ruling on Draper’s motion to dismiss, the Nassau County Court found that Bushwack’s actions likely “exercised improper influence” on the grand jurors and dismissed those three charges on account of Bushwack’s “improper prosecutorial conduct and unfair dealing which usurped the power of the Grand Jury.”³⁴ The Court termed Bushwack’s actions “prosecutorial misconduct” that “undermined the integrity” of the grand jury and “prejudice[d]” Draper.³⁵ While allowing for the possibility of an alternative interpretation, the court noted that based on the record before it, it could “only conclude that it [was] more likely than not that [Bushwack was] dissatisfied with the recorded action of [the Grand Jury’s] morning session”—the vote to not indict.³⁶

3. The Grievance Committee Must Seek Discipline for the Serious Professional Misconduct That Occurred Here.

As noted by one Grievance Committee, “[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct.”³⁷ Professional misconduct occurs with a “violation of any of the Rules of Professional

³⁰ *Huston*, 88 NY2d at 401–02.

³¹ *Draper*, 32 Misc 3d 1238(A) at *2.

³² *Id.*

³³ *Id.* at *2-3.

³⁴ *Id.* at *2.

³⁵ *Id.*

³⁶ *See id.* at *3.

³⁷ Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, <https://tinyurl.com/39axvffr>.

Conduct.”³⁸ Grievance Committees are “committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession.”³⁹

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors “have a special duty to seek justice, not merely to convict.”⁴⁰

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, “Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all.”⁴¹

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a “minister of justice,” responsible to guarantee “procedural justice and that guilt is decided upon the basis of sufficient evidence.”⁴² Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor’s job goes well beyond achieving the maximum number of convictions.⁴³ The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.⁴⁴ Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

A. Bushwack Violated the Rules of Professional Conduct.

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.⁴⁵ As the Court of Appeals explained, “the privilege to practice law is not a personal or liberty interest, but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.”⁴⁶

On the record before the court, Bushwack’s conduct constitutes a violation of Rule of Professional Conduct 8.4. Under Rules 8.4(d) and 8.4(h), a lawyer shall not engage in conduct that is prejudicial to the administration of justice or engage in any other conduct that adversely reflects

³⁸ Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

³⁹ *How to File a Complaint*.

⁴⁰ *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

⁴¹ *Kurtzrock*, 192 AD3d 197, 219.

⁴² Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

⁴³ ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2 (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

⁴⁴ See Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

⁴⁵ See, e.g., *Matter of Capoccia*, 59 NY2d 549, 551 (1983).

⁴⁶ *Matter of Seiffert*, 65 NY2d 278, 280 (1985) (quotation marks omitted); see also *Matter of Scudieri*, 174 AD3d 168, 173 (2019).

on the lawyer's fitness as a lawyer.⁴⁷ Bushwack prejudiced the administration of justice when his actions impaired the Grand Jury, potentially prejudicing Draper, as the court found in its decision. By re-charging the grand jury after the latter returned a no true bill, the court found that Bushwack engaged in "unfair dealing" that "usurped" the grand jury's power.⁴⁸ This action was also not befitting of a prosecutor.⁴⁹

B. Based on the Court's Finding, Bushwack's License Should be Suspended.

New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."⁵⁰ The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."⁵¹

"The purpose of a sanction in a disciplinary proceeding is not to punish but to protect the public, to deter similar conduct, and to preserve the reputation of the Bar."⁵² Prosecutorial misconduct that violates the U.S. and New York constitutions has a devastating impact on due process. It is a long-standing, largely unaddressed problem in the court system that is rarely discovered and even more rarely corrected.

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."⁵³ Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."⁵⁴ Similarly, extensive prosecutorial experience weighs towards a more serious sanction.⁵⁵

⁴⁷ See Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4.

⁴⁸ *Draper*, 32 Misc. 3d 1238(A) at *2.

⁴⁹ The *Draper* court noted that there may be a mitigating or alternative explanation of Bushwack's motive that exists outside the record. *Id.* at *3 ("There might be an appropriate explanation why the prosecutors took the action which they did. [O]n the state of this record, this Court can only conclude that it is more likely than not that [Bushwack was] dissatisfied with the recorded action of [the Grand Jury's] morning session" (emphasis in original)). If the Grievance Committee learns of persuasive, credible, sworn evidence in that regard, the Committee should nonetheless examine whether a violation of Rule 8.4 occurred, as the administration of justice was undoubtedly prejudiced via the charging—and dismissal—of three serious charges that lacked sufficient evidence.

⁵⁰ ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

⁵¹ *Id.*

⁵² *Matter of Malone*, 105 A.D.2d 455, 460 (3d Dep't 1984).

⁵³ *Kurtzrock*, 192 AD3d at 219; see also *Rain*, 162 AD3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

⁵⁴ *Kurtzrock*, 192 AD3d at 219.

⁵⁵ *Id.*

While not a long-term veteran prosecutor, Bushwack was not a novice, having been a prosecutor for three years at the time of this misconduct.⁵⁶ The *Draper* court found that Bushwack committed serious misconduct; based on the *Draper* court's finding, the Grievance Committee should seek the suspension of Bushwack's license. The *Draper* opinion notes that a less damning explanation for Bushwack's actions may exist outside the record. In the event that the Committee learns of persuasive, credible, sworn evidence that reveals an innocent, or less nefarious, motive for Bushwack's actions, such evidence may provide a reason to not seek the suspension of Bushwack's license. In any event, the Committee should consider seriously the effect of Bushwack's actions in the *Draper* case and make clear that prosecutorial misconduct is not tolerated.

Conclusion

The court found that Bushwack usurped the power of a grand jury, seemingly because he was not happy with the grand jury's initial vote. The court dismissed three serious charges on the basis of what it termed Bushwack's "prosecutorial misconduct." To these writers' knowledge, Bushwack remains unsanctioned publicly or privately for this serious misconduct—and now prosecutes people in the federal system.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."⁵⁷ To that end, "the grievance process exists to protect the public By bringing a complaint to a committee's attention, the public helps the legal profession achieve its goal."⁵⁸ The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Bushwack. As the comment to Rule 8.3 of the New York Rules of Professional Conduct reminds us, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."⁵⁹ Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should obtain a list of all cases that this prosecutor worked on and contact the attorneys, witnesses, and accused persons (while protecting the accused's rights to privacy and counsel) in those cases. The Committee should also identify all of Bushwack's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

⁵⁶ See New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney Michael Bushwack, click on Name hyperlink].

⁵⁷ NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, <https://tinyurl.com/47scv4pb>.

⁵⁸ *Id.*

⁵⁹ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed a wide range of egregious discovery violations, leading to his resignation and the Appellate Division’s December 2020 ruling suspending his law license for two years.⁶⁰ In imposing this sanction, the Appellate Division highlighted as a mitigating factor that “there was no showing that [Kurtzrock] engaged in any similar conduct in any other cases.”⁶¹

But at the time of the December 2020 Appellate Division ruling, there was in fact already significant evidence of similar misconduct by Kurtzrock in other cases, which would have been easily identified if a systematic investigation had been undertaken.⁶² To start, after Kurtzrock’s *Brady* violation was revealed during the 2017 *Booker* trial, defense counsel for a different murder case in which Kurtzrock had obtained a conviction, *People v. Lawrence*, then pending on appeal, requested a reexamination of the discovery in that case. The District Attorney’s Office agreed, and the investigation revealed that Kurtzrock had failed to disclose more than 40 items of *Brady* and/or *Rosario* evidence in *Lawrence* as well, including a payment to a witness and exculpatory witness statements. Consequently, the judge dismissed the indictment in 2018, and Shawn Lawrence, who had served six years of incarceration of his 75-years-to-life sentence, was released.⁶³ The judge concluded that the suppression constituted “more than exceptionally serious misconduct.”⁶⁴

A systematic investigation of Kurtzrock ensued that uncovered even more suppressed evidence. Following the Appellate Division’s December 2020 ruling, the Suffolk County District Attorney’s Office (“SCDAO”) worked with the New York Law School Post-Conviction Innocence Clinic to conduct a comprehensive review of Kurtzrock’s trial cases and other cases where Kurtzrock’s actions raised discovery issues.⁶⁵ The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by “practices similar to those criticized by the Appellate

⁶⁰ *Kurtzrock*, 192 AD3d 197.

⁶¹ *Id.* at 220.

⁶² Letter to Second Department (unfiled), Nina Morrison of the Innocence Project and Paul Shechtman of Bracewell LLP, January 20, 2021; see also Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, <https://tinyurl.com/52ar9tjx>.

⁶³ Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, <https://tinyurl.com/52ar9tjx>.

⁶⁴ County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, <https://tinyurl.com/2a7ba9cd> (hereafter “Kurtzrock report”) at 11 (discussing case of *People v. Shawn Lawrence*) (internal quotation marks omitted).

⁶⁵ The SCDAO “attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO, both as a homicide prosecutor and while serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases... that Kurtzrock did not try himself but in which Kurtzrock’s actions prior to trial were identified as raising *Brady/Giglio* and/or *Rosario* compliance concerns.” *Id.* at 4.

Division in the [2017] *Booker* case,”⁶⁶ which the report characterized as a “potential systemic issue.”⁶⁷

As a result of the investigation, the SCDAO provided new evidence to defendants in **100 percent of Kurtzrock’s homicide cases and 76 percent of all trial cases reviewed.**⁶⁸ These disclosures have already spurred applications to review convictions.⁶⁹ The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,⁷⁰ an important step given that, in explaining the lenient two-year suspension for Kurtzrock’s misconduct in *Booker*, the Appellate Division cited the ostensible lack of evidence of misconduct by him in other cases.

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 that “[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover”⁷¹ and the need for the Grievance Committee to systematically investigate this prosecutor’s work.

2. The Committee should promptly investigate whether any supervising attorney at the Nassau County District Attorney’s Office is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.⁷²
3. The Grievance Committee should investigate whether the Nassau County District Attorney’s Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole,

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.*

⁷⁰ *Id.* at 7.

⁷¹ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁷² Rules of Professional Conduct (22 NYCRR 1200.0) rule 5.1 (d) reads: A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

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

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.⁷³

4. The Committee should identify any prosecutors trained and/or supervised by Bushwack and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to systematically investigate all cases identified in #1-4 above and advise the court if this investigation casts doubt on the integrity of any convictions. To be clear, we do not mean a closed-door, cloaked process inside a District Attorney's Office, but rather a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.



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⁷³ District Attorney offices qualify as “law firms” under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). “Firm’ or ‘law firm’ includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.”