Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
335 Adams Street, Suite 2400
Brooklyn, New York 11201
ad2-grv2@nycourts.gov

Re: Grievance Complaint Regarding Attorney Nicholas Fengos, State Bar No. 2200087

To the Grievance Committee,

Andre Hatchett spent 24 years and 350 days in prison on the basis of a wrongful conviction.[1] While imprisoned, Hatchett lost his younger son, parents, two close aunts, and younger brother.[2] During that time, Nicholas Fengos, the prosecutor who secured Hatchett's conviction, seems to have continued on in his legal career.[3]

We write to complain about Fengos's grave professional misconduct in Hatchett's case. The Kings County District Attorney's Office's Conviction Review Unit ("CRU") investigated Hatchett's conviction and successfully recommended that the court vacate it. In its review, the CRU unearthed egregious misconduct committed by Fengos. The primary misconduct was Fengos' failure to tell the defense that the only trial eyewitness had previously—and incorrectly—identified a different person—not Hatchett—as the perpetrator of the crime. Though a report documenting this information was in Fengos' file, the CRU suggested that it was not disclosed out of carelessness rather than malice—regardless, Fengos's failure contributed to the wrongful conviction and long incarceration of Hatchett.

The Grievance Committee should also investigate Fengos's conduct in the prosecution of Hatchett generally, including what the CRU termed his "likely" failure to provide documentation of the witness's drug use on the day of the homicide, the general carelessness of Fengos' preparation, Fengos's apparent failure to correct false testimony, and Fengos's decision to prosecute Hatchett despite implausible and inconsistent statements by the same eyewitness.[4]

---

[1] *See* Exhibit A, NY St Cts Elec Filing (NYSCEF) Doc No. 1, complaint at 4, in *Hatchett v The State of New York*, Ct Cl, NY County, claim No. 128658 (Oct. 7, 2016). These writers do not have personal knowledge of any of the facts or circumstances of Fengos or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[2] *Id*. at 12.

[3] Nicholas James Fengos, State Bar No. 2200087. According to Fengos's Attorney Registration information, his address is: New York State DOCCS, 314 West 40th Street, New York, New York 10018. Phone: (212) 239-6084. The website lists no email for him. Fengos is identified as the prosecutor who handled the case by publicly available transcripts from the trial and media reports. *See, e.g.*, Allie Conti, *How a Broken System Kept an Innocent Man Behind Bars for 25 Years*, Vice (Mar. 11, 2016), https://tinyurl.com/2394ccuj.

[4] *See generally* Exhibit B, Hearing Transcript in *People v Hatchett*, indictment No. 3771-1991 (Sup Ct, Kings County 2016) (hereafter "Hearing Transcript"); Exhibit C, Kings County District Attorney, Press Release, Brooklyn D.A. Moves to Vacate the Wrongful Conviction of Andre Hatchett Who Was Convicted of Murdering Acquaintance in 1991 in Bed-Stuy Park (Mar. 10, 2016), https://tinyurl.com/8f2h9ew7 (hereafter "Press Release"); Exhibit D, Kings County District Attorney, 426

The court's reversed Hatchett's conviction and in 2017, Hatchett settled his wrongful conviction lawsuit for $12 million.[5] Despite the CRU's findings 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 Fengos.[6] He remains a licensed New York attorney; the State Bar website lists him as working for the New York Department of Corrections and Community Supervision (DOCCS).[7]

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.[8] 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.[9]

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."[10] Hal Lieberman, former Chief Counsel for the

---

Years Report: An Examination of 25 Wrongful Convictions in Brooklyn, New York (July 9, 2020), https://tinyurl.com/552ejuem (hereafter "426 Years Report").

[5] National Registry of Exonerations, Andre Hatchett, https://tinyurl.com/39hk6rk4.

[6] New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Nicholas Fengos, click on Name hyperlink].

[7] *Id*. However, a cursory online search suggests that Fengos may be working at Hereford Insurance Company in Long Island City, New York. *See* Alumni US, Nicholas James Fengos profile, https://tinyurl.com/49fnat45; Lawyers.com, Nicholas James Fengos, https://tinyurl.com/3xe64vpb.

[8] *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.").

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

[10] *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).

Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[11]

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.[12] 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."[13] 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.[14] None of the other implicated prosecutors were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[15] 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."[16]

B. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and multiple prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[17] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[18] Because they are representatives of the state, not lawyers for an individual, prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[19]

---

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

[12] *Id.*

[13] *Id.*

[14] *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).

[15] *See* Sapien & Hernandez.

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

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

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

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

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

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[20] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[21] Consequently, a conviction must be overturned when the suppressed evidence is "material"[22] and where there is a "reasonable probability" that the undisclosed evidence would have changed the result.[23] New York places an even greater burden on prosecutors, as it uses a less stringent standard for *Brady* reversals than the U.S. Supreme Court.[24] In New York, if the defense requested the evidence and the prosecution still failed to provide it, the conviction must be reversed if there is a "reasonable possibility"—less than the "reasonable probability" required under *United States v. Bagley*—that the failure to disclose contributed to the verdict.[25]

In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads, present evidence that the prosecution's case is inaccurate, present evidence that the testimony of the prosecution's witnesses is inaccurate or false, present evidence of the accused's innocence to the jury, and ultimately, to protect the accused from a wrongful conviction. It is unsurprising, then, that suppression of *Brady* evidence has played a role in over 44 percent of known wrongful convictions and 61 percent of known wrongful convictions for murder.[26]

---

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

[21] *Brady*, 373 US at 87.

[22] *United States v Bagley*, 473 US 667, 669, 676 (1984); *Kyles v Whitley*, 514 US 419, 433 (1995). The U.S. Supreme Court has not addressed, and courts and scholars disagree, whether the appellate-level "materiality" standard applies to a prosecutor's pre-trial disclosure burden. *See, e.g.*, *Boyd v United States*, 908 A2d 39, 60 (D.C. 2006) (the "Supreme Court in *Strickler* contemplated the existence of a broad 'duty of disclosure,' but recognized that, when the government fails to carry out its duty, its noncompliance with that obligation will only rise to the level of a constitutional violation if materiality is subsequently established. *The Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.*") (emphasis added). This appears to coincide with Justice Kennedy's understanding, as summed up in a 2012 oral argument: "I think you misspoke when you [were asked] what is the test for when *Brady* material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." Transcript of Oral Argument at 49, *Smith v Cain*, 565 US 73 (2012) (No. 10-8145), https://tinyurl.com/dmmu7b44; *see also* Janet C. Hoeffel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 NYU Rev L & Soc Change 467, 473 (2015) ("[B]y the very nature of appellate and post-conviction review, the Court has not had to decide the proper standard for the prosecution's pretrial duty to disclose favorable evidence."). The ethical rules governing a prosecutor's pretrial disclosure obligations, however, do not include a materiality requirement.

[23] *Bagley*, 473 US 667.

[24] *People v Vilardi*, 76 NY2d 67 (1990).

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

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

A prosecutor has an affirmative duty to search for favorable and material evidence in their own records and those of related agencies—and to turn these over to the defense.[27] Under federal law, a prosecutor who commits an intentional *Brady* violation could seemingly be charged with a felony.[28]

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform legislation, New York State's discovery statute required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.[29] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[30] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[31]

The prosecutor's obligation to provide helpful evidence to the defense is of such import that it is codified into its own subsection in New York Rule of Professional Conduct 3.8(b):

> A prosecutor . . . shall make timely disclosure…of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.[32]

Rule 3.8, which binds New York prosecutors, is broader than the *Brady* obligation in an important respect: the prosecutor must provide *all* evidence that tends to negate the guilt of the accused, not just *materially* exculpatory evidence.[33] That is, there is no requirement that disclosure of the evidence would have any probability of changing the result of the proceeding. As a consequence, a significant amount of conduct will violate Rule 3.8 but not the constitutional rule. Similarly, the Standards of the American Bar Association Standards extend beyond the *Brady* rule with respect to materiality, requiring the prosecutor to "diligently seek to identify" and disclose all

---

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

[28] 18 USC § 242.

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

[30] McKinney's Cons Laws of NY, CPL 240.20 (repealed).

[31] CPL § 245.20(1)(k).

[32] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). This Rule was previously codified in New York's Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)). As is evident from the text of the rule (quoted above), Rule 3.8 only applies to evidence known to the prosecutor, unlike *Brady*, which applies to evidence in the possession of the entire prosecution team, including evidence in the possession of investigative agencies of which the prosecutor is unaware. *See, e.g., United States v. Agurs*, 427 U.S. 97, 110 (1976); *Kyles*, 514 US at 437.

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

mitigating, exculpatory and impeachment evidence "regardless of whether the prosecutor believes it is likely to change the result of the proceeding."[34]

Despite the significance of the *Brady* rule and Rule 3.8 in the criminal legal system, the New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence." The New York State Bar has acknowledged that "New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction."[35]

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

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[36] 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.[37]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[38] 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.[39]

---

[34] ABA Criminal Justice Standards: Prosecution Function Standard 3-5.4(c).

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

[36] *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").

[37] *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).

[38] *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).

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

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously."[40] 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."[41] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[42] "Prosecutors engage in misconduct because they know they can get away with it."[43]

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.[44] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[45] But even a short suspension like that received by Rain and Kurtzrock[46]—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 Fengos will continue unabated and undeterred.

2. Fengos's Misconduct Led to Hatchett's Wrongful Conviction and Imprisonment for Nearly 25 Years.

Fengos prosecuted Hatchett for murder, a charge that can entail, upon conviction, a life sentence. The following discussion cites to three main sources. The first is a transcript of the hearing to vacate Hatchett's conviction, in which a prosecutor from the Kings County District Attorney's Office's Conviction Review Unit ("CRU") explained the findings in support of a vacatur ("Hearing Transcript," attached as Exhibit B). The second is a Kings County District Attorney's Office ("KCDA") press release discussing the case and the vacatur ("Press Release," attached as Exhibit C). The third is a CRU report that discussed 25 wrongful conviction cases investigated by the unit ("426 Year Report," attached as Exhibit D).[47]

---

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

[41] *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).

[42] Sapien & Hernandez.

[43] *Id.*

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

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

[46] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State*, HuffPost (Sept. 20, 2017), https://tinyurl.com/yhvmd43k; Bennett L. Gershman, *A Most 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.

[47] This report refers to Hatchett by the pseudonym "Harrison," but a comparison between the Report's discussion of the "Harrison" case and the facts of Hatchett's case reveals that they are the same person, including the following identical facts: the year of the crime (1991), the conviction (second degree

In February 1991, police responded to a 911 call to discover the nude body of a woman who was badly beaten.[48] The medical examiner determined that the victim had died from ligature strangulation and blunt trauma to the head, and that the perpetrator had dragged her body a distance.[49] There was no scientific evidence connecting Hatchett to the crime.[50]

Instead, "[t]he basis" for Hatchett's prosecution and conviction was Williams, the "sole eyewitness" to testify at trial.[51] Williams was "a career criminal," who admitted to police that he had smoked crack cocaine on the day of the murder.[52]

Police arrested Williams for an unrelated burglary a week after the murder occurred.[53] While in the precinct Williams claimed that he recognized one of the other arrestees as the person who committed the murder.[54] After a day, the police and prosecution disproved this false identification: the man Williams identified had been in jail when the murder occurred.[55] Apparently unperturbed, the police then placed Hatchett in a lineup, and Williams—who was apparently still in police custody—identified Hatchett as the perpetrator.[56]

Fengos prosecuted Hatchett, but the first trial, held in October 1991, ended in a mistrial due to defense counsel's ineffectiveness.[57] Fengos continued to prosecute Hatchett in spite of Williams's inconsistent identifications, and in a second trial, held in February 1992, won a conviction and a sentence of 25 years to life in prison.[58]

At trial, Williams claimed that on the night of the murder, he and a friend were walking in a park when they heard a woman screaming.[59] Once they approached, the perpetrator yelled at them to leave, at which point Williams's companion called 911, and both left the area before the police

---

murder), the sentence (25 years to life), the defendant's physical condition, including a leg in a cast and walking with crutches, making it unlikely he could have committed the crime, a sole eyewitness, the witness admitting to being high on crack cocaine at the time, the witness viewing the incident from 30-40 feet away at night with dim street lighting, and the witness initially identifying a different person as the perpetrator.

[48] Press Release at 1-2.

[49] *Id.* at 2.

[50] Hearing Transcript at 3.

[51] Hearing Transcript at 3, 13; Press Release at 2. Williams's companion viewed a line up, initially indicating that another man was the perpetrator, and later changed her mind and identified Hatchett. She did not testify at trial. 426 Years Report at 42.

[52] Press Release at 2.

[53] *Id.*

[54] Hearing Transcript at 3-4; Press Release at 2.

[55] Hearing Transcript at 4.

[56] Hearing Transcript at 6-7; Press Release at 2.

[57] Press Release at 2.

[58] *Id.*

[59] *Id.*

arrived.[60] Despite his admission to police that he used crack cocaine on the day of the homicide, Williams testified unimpeached at trial that he had never used crack cocaine in his life.[61] Williams testified inaccurately about his erroneous initial identification of an another man, which the defense could not correct because the defense did not have the exculpatory report documenting the false identification.

A. The Kings County District Attorney Found that Fengos Violated *Brady* by Withholding Williams's Wrong Identification of Someone Else As the Perpetrator and "Likely" Withheld Other Exculpatory Evidence.

Fengos never provided Hatchett the evidence of Williams's initial identification of another person as the perpetrator.[62] In moving to vacate the conviction, the CRU noted that the suppressed evidence bore "directly upon the credibility and accuracy" of Williams's identification of Hatchett.[63] The CRU conceded that this exculpatory evidence should have been disclosed immediately "according to the laws of this country,"[64] and that its suppression was "obviously a *Brady* violation."[65]

The first, inaccurate identification of someone else was crucial in the case because it undermined Williams's credibility. Williams was the sole eyewitness testifying at trial, and there was no forensic evidence tying Hatchett to the crime. Williams was able to claim at trial that he had only thought the other man *looked like* Hatchett and had not positively identified the other person as the perpetrator—but the discovery proved that to be incorrect. By not providing this evidence, Fengos's actions hampered the defense's ability to demonstrate Williams's unreliability and untrustworthiness to the jury and unfairly increased the likelihood of obtaining a conviction.

The KCDA, in its 426 Years Report, also found that Fengos "likely" failed to provide another important piece of evidence. Williams had admitted to the police that he smoked crack cocaine on the day of the murder.[66] At trial, Williams falsely testified that he had never smoked crack cocaine in his life.[67] This piece of evidence could have undermined Williams's credibility and reliability further—for example, by undermining his ability to see the perpetrator and his honesty in sworn testimony to the jury—and in not disclosing it, Fengos's actions potentially increased the chances of a conviction.

In the 426 Years Report and at the hearing, the KCDA suggested that the failure to disclose was not "malicious"[68] and "what may have explained" the *Brady* violation was Fengos's "badly

---

[60] *Id.*

[61] 426 Years Report at 52, n.145.

[62] Hearing Transcript at 12.

[63] *Id.* at 4.

[64] *Id*. at 5.

[65] *Id.* at 12.

[66] Press Release at 2. The 426 Years Report states that "the witness's admission to police that he smoked crack on the day of the crime was likely withheld from the defense, preventing the defense from creating doubt about his ability to identify the defendant on this ground." 426 Years Report at 52.

[67] 426 Years Report at 52.

[68] *Id*. at 5.

disorganized" case file, and that his "performance at trial illustrated a profound lack of diligent preparedness and attention to detail."[69]

Nonetheless, the 426 Years Report indicates that exculpatory documents were, indeed, found in Fengos's file:

> A key initial clue about the cause of a nondisclosure is where the evidence was found. If it was only in the police files, that might indicate that the police never provided it to prosecutors. If the document was in the prosecutor's files, then it is more likely that there was an oversight or deliberate nondisclosure by prosecutors. In [certain cases, including the Hatchett case], the CRU found the key evidence at issue (or a copy) in the prosecutor's files.[70]

At the hearing to vacate Hatchett's conviction, the head of the KCDA CRU told the court that the prior incorrect identification "appeared in a notation that was made by assistants from the District Attorney's office who were investigating the case, and that particular evidence was never turned over to the defense."[71]

The fact that the exculpatory document regarding Williams' initial identification of another person was in Fengos's file nonetheless generates a strong inference that Fengos was aware of this exculpatory evidence (and if so, knowingly suppressed it).

Moreover, it appears that even after Williams identified Hatchett in the line-up, prosecutors involved in the case initially ordered Hatchett's release, perhaps understanding that Williams's identification was flawed.[72] Other prosecutors from Fengos' office were involved in the investigation of the case,[73] rendering it less likely that Fengos would remain unaware of Williams's initial identification of another person.[74]

In his testimony at Hatchett's *first trial* in 1991, Williams himself alluded to the prior identification, putting Fengos—if he did not know before—on notice that exculpatory evidence could exist.[75]

---

[69] 426 Years Report at 56; *see also* Hearing Transcript at 5 (claiming suppression "was not malicious but rather it was through carelessness or lack of a thorough examination.").

[70] 426 Years Report at 55.

[71] Hearing Transcript at 4.

[72] Exhibit A, NYSCEF Doc No. 1, complaint at 6, in *Hatchett v The State of New York*, Ct Cl, NY County, claim No. 128658 (Oct. 7 2016). While this is an allegation made in a complaint, the Grievance Committee could quickly verify it through its investigative powers.

[73] *See* Hearing Transcript at 4 (mentioning prosecutorial involvement in investigation leading to arrest of Hatchett).

[74] It appears that Fengos was not one of the prosecutors involved in the investigation at that early stage. Given that the investigation involved prosecutors were from his office, the Grievance Committee should investigate when he learned of the initial identification of someone else as the perpetrator.

[75] Exhibit E, Excerpt from Williams's First Trial Testimony at 2-3 (file pages, not transcript pages) in *People v Hatchett*, Ind. No 3771/91 (Sup Ct, Kings County. October 23-25, 1991).

Also, in Hatchett's *second trial* in February 1992, Fengos elicited testimony from Williams that Williams had told police that he had someone who looked "similar."[76] Here again, Fengos was on notice—if he did not know before—that another identification had taken place. But he continued prosecuting Hatchett without disclosing that the witness had initially identified another person as the perpetrator and that the witness' explanation of the incident at trial was false.

If Fengos's failure to provide this evidence was unintentional and the result of his own gross incompetence—an ignorance of exculpatory police and prosecution documents within his own file—it still constitutes misconduct, as will be explained below.

B. The Kings County District Attorney Found that Fengos Failed to Correct a Witness's False Testimony.

As noted above, the KCDA found Fengos likely did not provide the report indicating Williams's crack use on the night of the murder.[77] At trial, Fengos elicited testimony from Williams that he never smoked crack in his life.[78] The CRU found no affirmative evidence that Fengos had knowingly elicited, or intentionally failed to correct, this false testimony[79] (but other prosecutors involved in the case had explicitly memorialized Williams's admission[80]). While not finding a knowing violation, the KCDA found that the elicitation of false testimony represented a failure to investigate the case and "fell far short of the expected standards."[81]

C. The Grievance Committee Should Investigate Whether Fengos' Pursuit of Charges Against Hatchett Based on Unreliable Evidence Constitutes a Separate Ethical Violation.

In its 2020 report, the KCDA detailed numerous causes for wrongful convictions, one of which was "the decision to prosecute."[82] The Report explained:

> Among the most important decisions a prosecutor makes is the decision to prosecute. However, the police conduct their investigation into a case, it is ultimately the responsibility of the prosecutor to review the evidence against the defendant and determine whether to proceed. This requires *evaluating whether the available evidence is reliable and sufficient to prove the elements of a crime beyond a reasonable doubt* and whether bringing that prosecution is in the interests of justice.[83]

---

[76] Exhibit F, Excerpt from Williams's Second Trial Testimony at 3 (file pages, not transcript pages) in *People v. Hatchett*, Ind. No 3771/91 (Sup Ct, Kings County February 11, 1992).

[77] Press Release at 2.

[78] 426 Years Report at 64.

[79] *Id.*

[80] *See* Exhibit G, Kings County District Attorney, Homicide Bureau Information Sheet at 2.

[81] 426 Years Report at 64.

[82] *Id.* at 60.

[83] 426 Years Report at 60.

Moreover, the decision to prosecute "is not a one-time decision" but an "ongoing" one that the prosecutor "must reevaluate throughout the case as new information comes in."[84]

In this case, the KCDA's CRU, upon reviewing all the evidence (including Hatchett's medical records, which Fengos did not obtain), found that Hatchett "should not have been charged with this homicide; or, if he was charged with this homicide, it should have been discontinued or dismissed prior to undergoing the trial."[85]

At the hearing to vacate Hatchett's conviction, the CRU stated that the evidence that Williams identified another man and was smoking crack on the day of the incident had such "tremendous impact" on the case, that "perhaps, [it should have] even impacted the decision on whether or not to bring charges."[86] Later in its statement to the court, the CRU said that Williams's "utility as a witness should have ended" as soon as he made the initial identification of another person as the perpetrator, which effectively would have ended Hatchett's prosecution.[87]

Fengos must have been aware of the inconsistency and implausibility of Williams's account. Williams claimed he could identify Hatchett after seeing him at the murder scene, even though he saw the crime from a distance of 30 to 40 feet, at nighttime, with dim street lighting, and under conditions in which he claimed he could not even make out the gender of the perpetrator.[88] Moreover, Williams gave different stories about whether he saw the perpetrator hold a crutch or a weapon.[89]

Besides Williams's own seemingly implausible and inconsistent assertions, facts about Hatchett himself should have led Fengos to realize Williams's unreliability. Hatchett had been shot in the legs and trachea six months before the murder, causing him to use two crutches and significantly weakening his voice.[90] At the time of the crime, Hatchett still suffered from "serious physical limitations"—his leg was in a cast, he was unable to walk without crutches, and his voice was weak.[91] The details regarding Hatchett's voice are particularly relevant because Williams testified that the perpetrator shouted loudly, and that his voice carried to Williams from across the

---

[84] *Id.* at 61.

[85] Hearing Transcript at 12.

[86] *Id.* at 6.

[87] *Id.* at 8. *See also* 426 Years Report at 40 (After Williams's "erroneous unequivocal identification of a different person as the shooter … his use as an eyewitness should have come to an end."). Note that the CRU statements on this point suggest that Fengos knew or should have known about the witness' initial identification of someone else.

[88] 426 Years Report at 35. It is unclear whether Williams claimed these improbable conditions before and during the trial, or only during the trial, for example during cross-examination. Nevertheless, it would be expected that a prosecutor on a murder case would speak to his witness and learn about this kind of information before the trial. If so, Fengos would have known this information before trial. If not, he utterly failed in investigating his own case. Regardless, after hearing this testimony—well before the verdict—Fengos should have known Williams's identification was unreliable.

[89] Hearing Transcript at 7-8; 426 Years Report at 41.

[90] Press Release at 2.

[91] 426 Years Report at 69; Hearing Transcript at 10-11.

park.[92] The details of Hatchett's mobility were also relevant. According to the medical examiner, "the blows to the victim's head required a significant degree of physical force," the crime involved "a violent struggle," and the victim's body "was dragged and arranged in a certain position."[93] The CRU concluded that it was "implausible to the point of saying impossible" that someone in Hatchett's physical condition could have committed these actions.[94]

Though neither the defense counsel nor Fengos obtained Hatchett's medical records, and thus were not exposed to the full extent of his physical limitation, Fengos apparently knew that Hatchett used crutches at the time of the murder.[95]

Disturbingly, instead of obtaining Hatchett's medical records, Fengos chose to attack Hatchett's claims about his medical condition. Fengos's cross-examination of Hatchett "attempted to cast doubt" on the nature and severity of Hatchett's injuries, even though "there was no dispute" that Hatchett had been using crutches on the night of the incident.[96] Such an attack—especially in the context of Fengos's failure to obtain the medical records—was "problematic."[97]

The Grievance Committee should investigate Fengos's decision to continue pursuing the charges against Hatchett. Since no forensic evidence connected Hatchett to the crime and he denied being involved, Fengos was left with a single witness of questionable reliability and questions about whether Hatchett's medical conditions made it impossible that he could have committed the crime at all. If, as seems to be the case, the charges against Hatchett were not supported by competent evidence demonstrating probable cause of his guilt, it was improper for Fengos to pursue the charges.[98]

D. The Kings County District Attorney found that Fengos Was Unprepared and Improperly Cross-Examined a Defense Witness.

The CRU indicated that Fengos engaged in at least two other forms of misconduct. First, while cross-examining Hatchett, Fengos attempted to introduce a prior violent, bad act that Fengos had not previously disclosed.[99] This conduct evinced a "significant lack" of preparedness and attention.[100] Second, while cross-examining a different defense witness, Fengos "improperly

---

[92] Press Release at 2.

[93] *Id.* at 2.

[94] Hearing Transcript at 12.

[95] 426 Years Report at 66.

[96] *Id.*

[97] *Id.*

[98] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) ("A prosecutor … shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor … knows or it is obvious that the charge is not supported by probable cause."). The rule at the time of Fengos's misconduct mandated the same. Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)).

[99] 426 Years Report at 66 n. 196.

[100] *Id.*

implied" that the witness had previously failed to step forward as an alibi witness for Hatchett, when in fact the individual had done so.[101]

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."[102] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[103] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[104]

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."[105]

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."[106]

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."[107] 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.[108] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[109] 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.

---

[101] *Id.*

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

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

[104] *How to File a Complaint*.

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

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

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

[108] 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.").

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

A. Fengos's Misconduct Violated Rules of the New York Code of Professional Responsibility.

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.[110] 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."[111]

The applicable professional set of rules in 1992, when Fengos tried Hatchett for the second time and obtained a conviction, was the Code of Professional Responsibility ("Code"). As discussed above, Fengos violated the Code in at least four ways.

First, Fengos violated the Code by withholding favorable evidence. Rule DR 7-103(b) required a prosecutor to make "timely disclosure … of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."[112] Under Rule DR 7-102(a)(3), attorneys were not to "[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal";[113] this mandate is codified today in Rule 3.4(a)(3) of the Rules of Professional Conduct.[114] Finally, Rule DR 7-109(a) instructed that a "lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce."[115] This Rule is now codified under Rule 3.4(a)(1) of the Rules of Professional Conduct.[116]

Notably, a prosecutor's "deliberate pattern of avoidance, or willful blindness," to the existence of such evidence—including failure to conduct a *Brady* analysis of evidence, or delegation of this duty to law enforcement—constitutes knowledge under Rule 3.8(b), the "successor" of Rule DR 7-103(b).[117]

The KCDA suggested that Fengos did not maliciously suppress Williams's initial wrong identification, but rather did so as the result of sloppiness. The KCDA also found that Fengos "likely" failed to provide the report documenting Williams' use of crack on the day of the incident (directly contradicting his sworn trial testimony). The Grievance Committee should investigate whether Fengos was aware of this evidence. There is a strong suggestion that Fengos was aware of this evidence: prosecutors from his office knew about this evidence; some or all of it was

---

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

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

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

[113] Code of Professional Responsibility DR 7-102(a)(3) (22 NYCRR 1200.33 (repealed)).

[114] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4(a)(3).

[115] Code of Professional Responsibility DR 7-109(a) (22 NYCRR 1200.40 (repealed)).

[116] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.4(a)(1).

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

apparently noted in Fengos's file; and Williams testified—twice—about pointing out an alternative suspect in the precinct. But even if Fengos did not know of the evidence that was apparently in his own file, his lack of knowledge may constitute a pattern of "willful blindness," and thus would be sufficient to fulfill the knowledge requirement.

Second, the Grievance Committee should also investigate whether Fengos violated the Code by eliciting, and then permitting to stand, perjured evidence. Under the Code, Rule DR 7-102(a)(4) prohibited attorneys from knowingly using perjured testimony or false evidence.[118] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[119]

Williams misled the jury when he testified on direct-examination that he had not smoked crack on the day of the murder and mischaracterized what occurred at the previous erroneous identification. Fengos's file seems to have contained reports that directly undermined Williams' sworn testimony. Even if the Committee's investigation shows that Fengos was somehow unaware of this evidence in his own file, the Committee should investigate whether the "willful blindness" principle noted in *Kurtzrock* would constitute the element of knowledge for violations of Rules DR 1-102 and 7-102.

Third, Fengos violated the Code by prejudicing the administration of justice and conducting himself in a manner not befitting a lawyer. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[120] An attorney's misrepresentation during a legal proceeding prejudices the administration of justice and reflects adversely on the lawyer's fitness, in violation of Rule DR 1-102.[121] A prosecutor's violation of Rule DR 7-103(b) also violated Rule DR 1-102.[122]

The Grievance Committee should investigate Fengos's actions in relation to the above rules. Fengos's conduct, as described in the publicly-available documents cited herein, seems to have

---

[118] Code of Professional Responsibility DR 7-102(a)(4) (22 NYCRR 1200.33 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.4(a)(4) of the Rules of Professional Conduct replaced it in 2009.

[119] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(c). *See also In re Muscatello*, 87 AD3d 156, 158-59 (2d Dept 2011) (prosecutor misrepresentation of content of document in evidence to the grand jury violated Rule 8.4(c)).

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

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

[122] Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009. *See also Kurtzrock*, 192 A.D.3d at 218-19 (finding disclosure violation prejudiced the administration of justice and reflected adversely on the prosecutor in violation of Rules 8.4(d), (h)); *Rain*, 162 AD3d at 1461 (same).

contributed to the immense harm of an innocent person spending nearly 25 years in prison. Such conduct would inherently, then, prejudice the administration of justice: (i) Fengos withheld evidence of the witness' identification of someone else and likely withheld evidence of crack use by the only testifying eyewitness; (ii) he elicited and permitted to stand perjured evidence; (iii) he continued to prosecute Hatchett based on unreliable evidence; (iv) he tried to undermine Hatchett's testimony about his physical limitation without even attempting to obtain the medical records, and while it was uncontested that Hatchett had used crutches; (v) he improperly attempted to introduce Hatchett's prior bad act without having disclosed it; and (vi) he improperly suggested to the jury that an alibi witness had not stepped forward before, when in fact that witness had.

Fourth, Fengos violated the Code by acting incompetently. Under Rules EC 6-1 and DR 6-101, an attorney had to act with proper care and with adequate preparation.[123] Also under Rule DR 6-101, an attorney had to refrain from neglecting any legal matter entrusted to the attorney.[124] The CRU found that Fengos kept a disorganized file and his behavior evinced a lack of preparedness, which the CRU suggested could have led to the *Brady* violation above. Such incompetence and neglect is unacceptable in these serious circumstances.

Finally, the Committee should investigate Fengos's decision to prosecute Hatchett at trial. Since no forensic evidence connected Hatchett to the crime and he denied being involved, Fengos was left with a single, unreliable witness and questions about whether Hatchett's medical conditions made it impossible that he could have committed the crime at all. If, as seems to be the case, the charges against Hatchett were not supported by competent evidence demonstrating probable cause of his guilt, it was improper for Fengos to pursue the charges.[125]

B. For His Misconduct, Fengos Must be Suspended or Disbarred.

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."[126] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[127]

---

[123] Code of Professional Responsibility EC 6-1 (repealed); Code of Professional Responsibility DR 6-101 (22 NYCRR 1200.3 (repealed)). These rules were in effect when the misconduct, as outlined above, occurred. However, Rule 1.1(a) of the Rules of Professional Conduct replaced them in 2009.

[124] Code of Professional Responsibility DR 6-101 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 1.3(b) and (h) of the Rules of Professional Conduct replaced it in 2009.

[125] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) ("A prosecutor … shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor … knows or it is obvious that the charge is not supported by probable cause."). The rule at the time of Fengos's misconduct mandated the same. Code of Professional Responsibility DR 7-103 (22 NYCRR 1200.34 (repealed)).

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

[127] *Id.*

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[128] 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."[129] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[130]

Prosecutorial misconduct such as Fengos's has real-world, grave consequences. Whether out of intentional maliciousness or gross incompetence, Fengos's conduct contributed to the wrongful conviction of Andre Hatchett, who was imprisoned for nearly 25 years. During his incarceration, Hatchett's younger son, parents, two close aunts, and younger brother all passed away.[131]

The Grievance Committee, in investigating how Fengos's misconduct occurred, should consider whether disbarment is the appropriate sanction for the misconduct described in this grievance. As prosecutorial misconduct becomes increasingly identified as a stain on our legal system's promise of justice and fairness, some state courts have taken decisive action, disbarring prosecutors for egregious misconduct. While several states have disbarred prosecutors for on-the-job misconduct, including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona, we have not found a single such occurrence in New York, despite the many criminal cases that pass through New York's large court system every year.

If disbarment is *never* applied as a sanction for prosecutorial misconduct—if it is *de facto* taken off the table—prosecutors can rest assured that, even if they are caught committing the most severe misconduct, they will face at most a short suspension of their law license. Career advancement by developing a reputation for winning cases at all costs is an obvious incentive for prosecutors to bend and break rules. If the Grievance Committee and courts do not apply an actual—rather than theoretical—disincentive, prosecutorial misconduct will continue unabated.

Conclusion

Fengos committed serious misconduct in his prosecution of Andre Hatchett, but to these writers' knowledge, Fengos remains unsanctioned publicly or privately.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[132] 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."[133] The KCDA and court documents identified in this grievance provide far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but

[128] *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.").

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

[130] *Id.*

[131] Exhibit A, NYSCEF Doc No. 1, complaint at 6, in *Hatchett v The State of New York*, Ct Cl, NY County, claim No. 128658 (Oct. 7 2016).

[132] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, https://tinyurl.com/47scv4pb.

[133] *Id.*

we call upon the Grievance Committee to go further and investigate far beyond the issues 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 Fengos. 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."[134] 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 Fengos's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

   This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic 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.[135] 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."[136]

   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.[137] 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-

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

[135] *Kurtzrock*, 192 AD3d 197.

[136] *Id.* at 220.

[137] 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.

to-life sentence, was released.[138] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[139]

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.[140] The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[141] which the report characterized as a "potential systemic issue."[142]

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**. [143] These disclosures have already spurred applications to review convictions.[144] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[145] 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"[146] 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 KCDA 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

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

[139] 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).

[140] 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.

[141] *Id.* at 5.

[142] *Id.* at 4.

[143] *Id.* at 6.

[144] *Id.*

[145] *Id.* at 7.

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

knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[147]

3. The Grievance Committee should investigate whether the KCDA and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.[148]

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

---

[147] 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.

[148] 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."

Cynthia Godsoe
Professor of Law
Brooklyn Law School

Nicole Smith Futrell
Associate Professor of Law
CUNY School of Law

Steven Zeidman
Professor of Law
CUNY School of Law

Daniel S. Medwed
University Distinguished Professor of
Law and Criminal Justice
Northeastern University

Abbe Smith
Scott K. Ginsburg Professor of Law
Director, Criminal Defense & Prisoner Advocacy Clin
Co-Director, E. Barrett Prettyman Fellowship Program
Georgetown University Law Center

Justin Murray
Associate Professor of Law
New York Law School