Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Anne Gutmann, State Bar No. 2137933

To the Grievance Committee,

Anne Gutmann [1] is a longstanding Brooklyn prosecutor who was found to have acted improperly in her prosecution of three men in two separate cases. The three men served a total of 56 years in prison before their convictions were reversed.[2] The city and state of New York paid at least $32.5 million to settle the ensuing civil rights lawsuits.[3]

In one case, the Appellate Division found that Gutmann failed to comply with her obligation to provide exculpatory evidence.[4] In the other, the Kings County District Attorney's Office ("KCDA") found that Gutmann failed to properly investigate the case, causing her to mislead defense counsel and elicit false testimony from a star witness.[5] The KCDA also found that Gutmann misled the jury about the physical evidence in her closing argument.

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[1] Anne M. Gutmann, State Bar No. 2137933, Kings County District Attorney's Office, 350 Jay Street, Brooklyn, New York 11201. Phone: (718) 250-3500. Though Gutmann is listed at the KCDA on the Attorney Detail Report on New York State Unified Court System website, the Report lists Gutmann's registration status as "Attorney - Due to Register within 30 Days of Birthday" and the registration "next" due in October 2021, so it is not clear to these writers whether her license remains currently valid or whether she remains at the KCDA. These writers do not have personal knowledge of any of the facts or circumstances of Gutmann or the cases mentioned; this grievance is based entirely on the court opinions, briefs, and other documents cited herein.

[2] *See* Jim Dwyer, *A $25 Million Mistake That the City Won't Admit*, NY Times (June 13, 2017), https://tinyurl.com/drwu3t8e (hereafter "Dwyer 2017"); Alan Feuer, *Falsely Imprisoned for 23 Years: Now He's Received $7 Million*, NY Times (Nov. 19, 2019), https://tinyurl.com/5a75rm25; Jim Dwyer, *DNA Test Offers Inmate a Chance at Freedom After 16 1/2 Years*, NY Times (June 4, 2008), https://tinyurl.com/3k2euxk8 (hereafter "Dwyer 2008"); Oren Yaniv and Ginger Adams Otis, *Two men convicted in 1993 kidnapping of Brooklyn teen see guilty verdicts overturned in state appeals court*, NY Daily News (Sept. 18, 2014), https://tinyurl.com/9n74hwk8 (hereafter "Yaniv & Otis 2014").

[3] *See id*.

[4] *See* Exhibit A, *People v Wagstaffe*, 120 AD3d 1361 (2d Dept 2014), available at https://tinyurl.com/4s8vcubb.

[5] Exhibit B, Kings County District Attorney Office, 426 Years: An Examination of 25 Wrongful Convictions in Brooklyn at 54, 87, New York (July 9, 2020), https://tinyurl.com/4273ec6e (hereafter "426 Years Report"); *see also* Exhibit C, KCDA Conviction Review Unit Report for Derrick Hamilton (hereafter "CRU Hamilton Report"), which identifies Gutmann as the trial prosecutor. The 426 Years report refers to Derrick Hamilton by the pseudonym "Robert Hicks," but a comparison of the many identical details reveals that they are the same person, e.g., the year of the crime (1991), the type of conviction (second degree murder), the manner of the homicide (shooting), the amount of prison time served by the accused (20.5 years), that the body was found outside an apartment building (426 Years Report at 87), that the key witness was a woman who "initially told police that she did not see the shooting at all because she was at the store;

In both cases, Gutmann held onto exculpatory evidence until the very start of the jury trial. In both cases, Gutmann provided the exculpatory material interspersed with other discovery or otherwise in a manner that failed to truly identify its significance to defense counsel. In both cases, the accused men were wrongfully convicted and served decades in prison. In both cases, the last-minute exculpatory evidence was so crucial that the convictions were later reversed and the convictions were set aside.

In the first case, Everton Wagstaffe and Reginald Connor were wrongfully convicted of kidnapping a 16-year-old girl. Wagstaffe and Connor spent nearly 23 and 15 years in prison, respectively, for a conviction that was eventually vacated.[6] Prior to the conviction being vacated, a 2008 *New York Times* story noted, "Even though he finished his minimum sentence more than *four years ago*, Mr. Wagstaffe remains imprisoned because he has refused to appear before the parole board and express remorse for a crime he says he had nothing to do with."[7]

In vacating the convictions of Wagstaffe and Connor, the Appellate Division held that Anne Gutmann, the trial prosecutor, withheld until the start of trial exculpatory police reports that could have undermined the credibility of the civilian eyewitness and police witnesses.[8] The court found that Gutmann "delivered the [exculpatory] documents interspersed throughout a voluminous amount of other documentation, without specifically identifying the documents at issue at the time of the delivery."[9] Gutmann's method of providing the documents "deprived the defendants of a meaningful opportunity to employ that evidence during their cross-examination of the

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only later did she claim to have witnessed it" (426 Years Report at 45), that the key witness told police that she spent the night before the shooting with the decedent in his sister's apartment (426 Years Report at 87, CRU Report at 3), that the key witness had recanted in a sworn affidavit (426 Years Report at 87, CRU Report at 8), that the defense did not call any witnesses (426 Years Report at 87, CRU Report at 12), that the defense told the court that two alibi witnesses had come forward (426 Years Report at 87, CRU Report at 12), that ballistic evidence showed two or more different guns were used (426 Years Report at 87, CRU Report at 28), that the key witness said that after being shot, the decedent ran after the assailants (426 Report at 87, CRU Report at 25-26), but the running claim was contradicted by medical evidence (same), that the medical examiner was not cross-examined at trial (see 426 Years Report at 49, CRU Report at 11), and most significantly, that the key witness gave a different name to the police initially, the prosecutor did not know they were the same person, and the prosecutor even told the defense that they were not the same person towards the end of trial (426 Years Report at 54, CRU Report at 2). Though the CRU Report initially was marked as "KCDA Confidential Material," it is now a public record as it is a filed exhibit and obtainable via PACER in *Hamilton v. City of New York*, No. 1:15-cv-04574 (ED NY). *See also* Stephanie Clifford, *Conviction to Be Cleared in 1991 Brooklyn Murder Case*, NY Times (Jan. 5, 2015) https://tinyurl.com/ytuss4ay.

[6] *See* Jim Dwyer, A*fter Nearly 23 Years of Legal Struggle, a Conviction Is Reversed*, NY Times (Sept. 17, 2014), https://tinyurl.com/y3vxdkzc (hereafter "Dwyer 2014").

[7] Dwyer 2008 (emphasis added); *see also* Exhibit D, Verified Complaint and Jury Demand at 3 in *Wagstaffe v City of New York* (ED NY, Dec. 11, 2015, No. 1:15-cv-07089) (identifying Gutmann as the prosecutor) (hereafter "Wagstaffe Civil Complaint").

[8] *See Wagstaffe*, 120 AD3d at 1365.

[9] *Id.* at 1363.

prosecution's witnesses."[10] In light of "the lack of any other evidence tying the defendants to the crime," Gutmann's "burying of the subject documents" required the conviction be reversed.[11]

In the second case, Gutmann prosecuted Derrick Hamilton for murder, resulting in Hamilton's wrongful imprisonment for over 20 years,[12] 10 years of which he apparently spent in solitary confinement.[13] Gutmann's star witness, Jewel Smith, testified at trial that she witnessed Hamilton committing the killing—but had originally told police on the scene that she had not witnessed the shooting at all. Gutmann provided the exculpatory police notes showing Smith's original statement as the trial was beginning. The police notes of the witness interview listed the witness's name as "Karen Smith," but also included the moniker "Jewel"—but Gutmann has stated she did not know they were the same person.[14] The KCDA found that when Hamilton's attorney asked Gutmann during the trial if Jewel Smith was Karen Smith, Gutmann responded, "no."[15]

The KCDA agreed to reverse Hamilton's conviction and discussed the case at length—under a pseudonym—in its 2020 report, "426 Years: An Examination of 25 Wrongful Convictions in Brooklyn." The report, which was written by Gutmann's co-workers—as she still worked at the KCDA— finds that "the failure of the prosecution to identify [Karen Smith] and [Jewel Smith] as the same person—and worse, the prosecutor's erroneous representation to defense counsel that they were different people—resulted in a failure to disclose a material, prior inconsistent statement from [Smith] and violated [Hamilton's] right to due process."[16] Though the report does not identify Gutmann by name and states that Gutmann did not realize that the witnesses were the same person, it also finds that Gutmann failed to properly investigate the evidence, falling "far short of the expected standards," and made misleading claims about the physical evidence in her closing argument.[17]

While Wagstaffe, Connor, and Hamilton were locked up, Gutmann's prosecutorial career seems to have flourished. From at least 2008 until at least 2013, Gutmann was an "executive district attorney" at the Kings County office.[18] Though the Appellate Division reversed the convictions of Wagstaffe and Connor in 2014, by 2015, Gutmann was the Chief of the Intake Bureau at the Kings County office.[19] The Kings County District Attorney's Office agreed to the reversal of Hamilton's conviction that same year. In 2017, Wagstaffe and Connor settled their

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[10] *Id.* at 1364.

[11] *Id*.

[12] 426 Years Report at 54, 87; *see generally* CRU Hamilton Report; *see also* Stephanie Clifford, *Conviction to Be Cleared in 1991 Brooklyn Murder Case*, NY Times (Jan. 5, 2015) https://tinyurl.com/ytuss4ay.

[13] Jennifer Gonnerman, *Home Free*, The New Yorker (June 13, 2016), https://tinyurl.com/aa3382k.

[14] CRU Hamilton Report at 14 n 27.

[15] *Id.* at 10.

[16] 426 Years Report at 87.

[17] *Id.* at 64, 76, 87.

[18] Joaquin Sapien, *Watching the Detectives: Will Probe of Cop's Cases Extend to Prosecutors?*, ProPublica (June 21, 2013), https://tinyurl.com/4wnce5nc; YWN Desk, *DA Hynes Announces Sentencing Of Former Judge Michael Garson*, The Yeshiva World (July 1, 2008), https://tinyurl.com/7n56atmm.

[19] Noah Hurowitz, *Free To Move About The Country: Murder Exoneree Overjoyed, Planning Vacation*, Brooklyn Paper (Jan. 13, 2015), https://tinyurl.com/3rnj9xvb.

lawsuits for $25.5 million. In 2019, Hamilton settled his lawsuit for $7 million. In 2020, the KCDA released a report that discussed Hamilton's case at length (under a pseudonym). But Gutmann's registration *still* lists her employer as the KCDA; as of March 2021, the KCDA publicly announced that Gutmann "oversees our Early Case Assessment Bureau, which screens tens of thousands of new arrests the very moment they are received by the Office."[20]

Despite the misconduct noted in this grievance, as of this writing, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Gutmann.[21]

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.[22] 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.[23]

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."[24] 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."[25]

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

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[20] Twitter post,

[21] *See* New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by attorney Anne Gutmann, click on Name hyperlink].

[22] *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.").

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

[24] *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).

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

dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[26] 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."[27] 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.[28] 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.[29] 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."[30]

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

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[31] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[32] Consequently, a conviction must be overturned when the suppressed evidence is "material"[33] and where there is a "reasonable probability" that the undisclosed evidence would have changed the result.[34] New York

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[26] *Id.*

[27] *Id.*

[28] *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).

[29] *See* Sapien & Hernandez.

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

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

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

[33] *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.

[34] *Bagley*, 473 US 667.

places an even greater burden on prosecutors, as it uses a less stringent standard for *Brady* reversals than the U.S. Supreme Court.[35] 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.[36]

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.[37]

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.[38] Under federal law, a prosecutor who commits an intentional *Brady* violation could seemingly be charged with a felony.[39]

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.[40] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[41] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery obligations.[42]

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,

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

[36] 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.

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

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

[39] 18 USC § 242.

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

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

[42] CPL § 245.20(1)(k).

> mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.[43]

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.[44] 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 mitigating, exculpatory and impeachment evidence "regardless of whether the prosecutor believes it is likely to change the result of the proceeding."[45]

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."[46]

C. 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.[47] In 1976, the U.S. Supreme Court partly justified absolute immunity for

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[43] 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.

[44] 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*").

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

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

[47] *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").

prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[48]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[49] 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.[50]

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."[51] 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."[52] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[53] "Prosecutors engage in misconduct because they know they can get away with it."[54]

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.[55] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[56] But even a short suspension like that received by Rain and Kurtzrock[57]—indeed, public discipline of any kind—remains rare.

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[48] *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).

[49] *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).

[50] 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).

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

[52] *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).

[53] Sapien & Hernandez.

[54] *Id.*

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

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

[57] 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,

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 Gutmann will continue unabated and undeterred.

2. The Appellate Division Found That Gutmann Suppressed Exculpatory Police Documents in the *Wagstaffe* and *Connor* case.

On January 1, 1992, the police found the body of a 16-year-old girl, Jennifer Negron.[58] The police subsequently arrested Wagstaffe and Connor based on an identification made by Brunilda Capella,[59] who, according to Wagstaffe's federal civil rights lawsuit, regularly acted as a police informant.[60] Wagstaffe's lawsuit contends that he and Connor had never even met prior to being arrested.[61] According to media reports, both men insisted on their innocence from the beginning.[62]

Capella, the key prosecution eyewitness, testified that she saw Wagstaffe and Connor with Negron, who was being forced into a vehicle.[63] According to the prosecution's 2013 appellate brief, Cappella claimed that she had previously known both men from the neighborhood[64]—something that presumably bolstered the credibility of her identification.

But there were reasons to doubt this account. Cappella was under the influence of drugs and alcohol at the time.[65] According to the appellate brief, though Cappella knew Negron's family and had even lived with the family "on and off,"[66] Cappella did not initially report that she had seen Negron being kidnapped. The prosecution's brief also states that Capella "was a heroin addict and had used heroin since she was seventeen" and also used cocaine and crack.[67] The prosecution brief cites to police testimony that Capella had provided information to police on approximately 17-20 occasions in the past.[68]

Before the trial, the court held a *Wade* hearing, which permitted the defense to examine the circumstances of Capella's identification.[69] At least one officer testified that *it was Capella's*

What Happens When Prosecutors Break the Law?, NY Times (June 18, 2018), https://tinyurl.com/52ar9tjx.

[58] *Wagstaffe*, 120 AD3d at 1362.

[59] *Id.* at 1362, 1364.

[60] *See* Wagstaffe Civil Complaint at 3.

[61] *See id*. at 13.

[62] Dwyer 2008; Yaniv & Otis 2014.

[63] *Wagstaffe*, 120 AD3d at 1362.

[64] *See* Brief for Respondent at *12-13 in *People* v *Wagstaffe*, 120 AD3d 1361 (2d Dept 2014), available at 2013 WL 12219405 (hereafter "Respondent Brief").

[65] *See Wagstaffe*, 120 AD3d at 1362.

[66] Respondent Brief at *9.

[67] *Id.* at *9-10.

[68] *Id*. at *48. The prosecution brief concedes that this information was also not disclosed to the defense, though the brief contends that Gutmann did not know of the previous police cooperation.

[69] *Wagstaffe*, 120 AD3d at 1362.

identification that led officers to suspect Wagstaffe[70] and Connor, which appears to give credence to the legitimacy of Capella's identification.[71] But this police testimony turned out to be false. As explained below, police were already investigating Wagstaffe and Connor before Capella's alleged identification.[72] At the later trial, the jury convicted Wagstaffe and Connor of kidnapping.[73]

Decades later, the Appellate Division vacated the conviction because Gutmann suppressed highly-relevant police documents. These documents were "a Request for Record Check, dated January 1, 1992," for Connor, and "New York State Police Information Network requests for records pertaining" to both Wagstaffe and Connor.[74] The documents revealed that the police investigated Wagstaffe and Connor a day *before* Capella identified them, not afterwards as the detective had testified.[75] This discovery posed a potential challenge to Capella's accuracy as an identification witness and contradicted the police testimony about why Wagstaffe and Connor were suspected in the first place. The court found that Gutmann did not disclose these documents before, or during, the *Wade* hearing—but only when jury selection began.[76] Moreover, Gutmann "delivered the subject documents interspersed throughout a voluminous amount of other documentation, without specifically identifying the documents at issue at the time of the delivery."[77]

It is this context that reveals the documents' importance. "[T]he prosecution's case rested almost exclusively on the testimony of Capella."[78] The documents "call[ed] into question" whether the police had targeted Wagstaffe and Connor "without an evidentiary basis," prior to speaking to Capella.[79] The Appellate Division opinion does not explain the issue in greater detail, but notes that the documents bore "negatively upon the credibility of Capella and the investigating detectives," which was of "primary importance" in the case.[80]

The Appellate Division determined that had Gutmann disclosed the documents on time instead of "burying" them, there would have been a "reasonable probability" that Wagstaffe and Connor

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[70] Respondent Brief at *5-6.

[71] *Wagstaffe*, 120 AD3d at 1364.

[72] *Id.*

[73] *Id.* at 1362.

[74] *Id.* at 1364.

[75] *See id.*

[76] *Id.* at 1363.

[77] *Id.*

[78] *Id.* at 1365.

[79] *Id.*

[80] *Id.* The court does not go into detail about the significance of the timeline, but in his civil rights complaint, Wagstaffe alleged, "To frame Everton Wagstaffe and his criminal case co-defendant Reginald Connor for the kidnapping and murder of Jennifer Negron, detectives from the 75th Precinct fabricated a statement from a regular police informant implicating Mr. Wagstaffe and Mr. Connor in the crime…. The Police Defendants then hid their misconduct, falsely representing that the informant was the original source of Mr. Connor and Mr. Wagstaffe's names. Records clearly contradict this account, proving that the Police Defendants were focusing on Mr. Connor before they ever spoke to the informant, and on Mr. Wagstaffe before the informant allegedly identified him from a photograph." Exhibit D at 2.

would have been acquitted.[81] By failing to "properly disclose" documents that "clearly fell" within her *Brady* obligation,[82] Gutmann led to the wrongful conviction of two men and their imprisonment for decades.

Wagstaffe was in prison for nearly 23 years; Connor for nearly 15. The KDCA fought their appeals, even after newly-tested DNA evidence excluded Wagstaffe and Connor as contributors.[83] As noted above, the *New York Times* reported that Wagstaffe remained imprisoned in 2008 because he refused to go in front of the parole board and express remorse for a crime he said he had nothing to do with.[84] Even after the Appellate Division reversed their convictions and dismissed the indictment, KCDA Ken Thompson told media, "We disagree on the basis for which they vacated the conviction and set aside the verdict."[85] The KCDA moved for leave to appeal, which was denied.[86]

The state and city of New York combined to pay $25.5 million to Wagstaffe and Connor for their wrongful convictions.[87] But the much-lauded KCDA Conviction Review Unit never agreed to exonerate Wagstaffe and Connor and their case does not seem to be included in the KCDA 2020 report, "426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York." Gutmann, whose *Brady* violation was the reason the convictions were finally reversed, remained a Brooklyn prosecutor.

3. The Kings County District Attorney's Office Determined that Gutmann Failed to Identify Exculpatory Evidence and Presented Witness Testimony "That Was Patently Inconsistent with the Medical Evidence" in the *Hamilton* case.

Hamilton was charged and convicted of the murder of a man named Nathaniel Cash. The circumstances leading to Derrick Hamilton's wrongful conviction can be found in the KCDA's Conviction Review Unit Report[88] and the "426 Years" Report (under the pseudonym "Hicks").[89]

The initial police investigation of the homicide became essential, years later, to the eventual vacating of Hamilton's conviction. When investigating the homicide of Cash, police officers found the decedent lying down, with multiple gunshot wounds, in front of an apartment building.[90] In forensic details that would contradict the testimony of the prosecution's key witness, officers recovered deformed bullets and shell casings from near the vestibule; from outside the apartment

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[81] *Id.*

[82] *Id.* at 1364. *Brady* evidence must be turned over "in time for [the defendant] to use it in a meaningful fashion during cross-examination or as evidence during his or her own case." *Id.* at 1363 (citing to *People v Cortijo*, 70 NY2d 868, 870 (1987)).

[83] Dwyer 2008.

[84] *Id.*

[85] Dwyer 2014.

[86] *People v Wagstaffe*, 25 NY3d 1173 (2015).

[87] Dwyer 2017.

[88] *See generally* CRU Hamilton Report.

[89] *See* 426 Years Report at 54, 87.

[90] CRU Hamilton Report at 1.

building; and from near the body.[91] There was blood pooling by the deceased's body, but there was no blood in the vestibule or anywhere else outside the building.[92]

Jewel Smith, later the key prosecution witness at trial, identified herself as Karen Smith to police. But as can be seen from the detective's notes below, Karen Smith apparently also gave her first name as "Jewel." Smith told Detective DeLouisa that *she was at a nearby store when the shooting occurred*. DeLouisa did not create an official report for this statement, instead writing a summary of it in his memo book.[93]

The Conviction Review Unit ("CRU") report described the investigation as follows:

> Detective DeLouisa arrived at the scene and met Jewel Smith, a twenty-year-old single mother and [redacted][3] standing on the sidewalk in front of 215 Monroe Street and interviewed her relative to the homicide. Smith identified herself as "Karen" Smith, but also told DeLouisa another first name, "Jewel." Detective DeLouisa wrote a summary of the interview in his spiral notebook:
>
> > Karen Smith bailed Nate out of jail. "Jewel", in bedroom, 215 Monroe. 1/4/91, 1230 hours. I was here to see Nate. Went to store on corner. Came back, he was on floor. Two people were by him. They said get an ambulance. I stood the night with him. Around 10:25 I went to the store. It was going on 11.[4]

But afterwards, Smith told a different officer that she was present during the shooting and identified Hamilton as the shooter.[94] She claimed that she and the deceased came down to the vestibule of the building, where Hamilton shot the deceased.[95] She added that the decedent Cash attempted to run after Hamilton and his accomplices, but collapsed on the sidewalk.[96]

Gutmann had received DeLouisa's notes of his conversation with Smith before trial.[97] According to the CRU investigation, because Gutmann did not consider the note an official report, she turned it over to the defense only before jury selection, as part of a "packet."[98] She "never identified the document as *Brady*" or advised the defense or court that the source of the information was Jewel Smith.[99]

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[91] *Id.*

[92] *Id.* at 1-2.

[93] *Id.* at 2.

[94] *Id.* at 2-3. This same narrative can be found in Exhibit B, where the prosecutors identify Hamilton under the pseudonym "Hicks."

[95] *Id.* at 3.

[96] *Id.*

[97] *Id.* at 2 n 4.

[98] *Id.*

[99] *Id.*

Before trial, Smith signed a sworn affidavit that Hamilton had not been present when Cash was shot.[100] At trial, Smith reversed course, testifying that Hamilton shot Cash.[101]

Long after a jury convicted Hamilton at trial and numerous appeals were rejected, the KCDA CRU finally agreed to vacate Hamilton's conviction in 2015. The CRU and 426 Years reports discussed herein implicate Gutmann in serious misconduct.

A. Gutmann's Conduct Resulted in the Withholding of Powerful Exculpatory Evidence from the Defense.

Jewel Smith "was the prosecution's main witness, and only eyewitness" against Hamilton.[102] According to the 426 Years Report, upon the conclusion of Smith's testimony, Hamilton's attorney approached Gutmann and asked if the witness, Jewel Smith, was Karen Smith, from Detective DeLouisa's notebook.[103] The report indicates that Gutmann replied, "no."[104] The report goes on to document that still during trial, Hamilton's attorney asked Gutmann if she knew who Karen Smith was, and Gutmann responded that she "had no idea, or, she did not know."[105]

While the CRU Hamilton Report discussed the facts of what had happened, some pages are redacted, possibly including a discussion of the relative responsibility of the various actors in this *Brady* violation. However, the 426 Years Report, where the KCDA analyzes 25 different exonerations by referring to the exonerees using pseudonyms—discussed the different factors, and responsible parties, that were involved in each wrongful conviction. The 426 Years Report discussed Hamilton's case, referring to him as "Hicks." Therefore, it is possible to learn the KCDA's conclusions regarding Gutmann's responsibility.[106]

The 426 Years Report found that Gutmann failed to "recognize," "investigate," and "highlight" the significance of Detective DeLouisa's notes as "*Brady* material."[107] Gutmann thus "fell short" of her "obligations to do justice."[108] The Report similarly noted that Gutmann's "erroneous[]" description of these notes to Hamilton's attorney "obscured the fact that [they were] *Brady* material."[109]

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[100] *Id.* at 7.

[101] *Id*.

[102] *Id.* at 7.

[103] *Id.* at 10.

[104] *Id.*

[105] *Id.*

[106] The KCDA moved the court to vacate Hamilton's conviction. Therefore, there are no detailed judicial findings of how the wrongful conviction happened and who the responsible parties were. Following his conviction, Hamilton had appealed his conviction multiple times, but the courts repeatedly denied all of his claims. *See, e.g.*, *People v Hamilton*, 272 AD2d 553, 553 (2d Dept 2000) (DeLouisa's notebook disclosed on time). While courts had rejected Hamilton's claims and did not find Gutmann at fault, the KCDA's investigation made more detailed and troubling findings in its CRU report and the 426 Years Report.

[107] 426 Years Report at 54.

[108] *Id.*

[109] *Id.* at 55.

In these sections, the 426 Years Report stopped short of describing Gutmann's conduct as a violation of *Brady* and did not characterize Gutmann's actions as intentional. "[D]isclosure was technically made," the report noted, when Gutmann gave the notes "in a package of materials" to Hamilton's attorney "at the start of the trial."[110]

Initially, it is important to note how Gutmann's conduct here resembles her *Brady* violation in Connor and Wagstaffe's case. In both cases, Gutmann disclosed exculpatory evidence at the start of the trial—rather than much earlier. In these cases, she disclosed the key evidence "in a package of materials"[111] or "interspersed throughout a voluminous amount of other documentation, without specifically identifying the documents at issue at the time of the delivery."[112] As noted above, the Appellate Division found that Gutmann's delayed disclosure of favorable evidence within a "voluminous amount" of other documents to be a *Brady* violation in Connor and Wagstaffe's case.[113]

In its concluding section on Hamilton's case, the 426 Years Report stated:

> The CRU also found that the failure of the prosecution to identify [Karen and Jewel Smith] as the same person—and worse, the prosecutor's erroneous representation to defense counsel that they were different people—resulted in a *failure to disclose a material*, prior inconsistent statement from [Smith] and violated [Hamilton]'s right to due process.[114]

Even if unintentional, this conduct merits discipline, as explained below.

B. Due to Gutmann's Failure to Investigate, She Elicited False Testimony and Argued For Credibility on False Premises.

Another important finding of the 426 Years Report is that Gutmann failed to properly handle the contradictions between her star witness's incriminating testimony and the forensic and physical evidence at the scene. The KCDA report found that Gutmann "elicited various testimony from witness [Smith] that clearly was not true in light of the medical evidence."[115] According to the report, the forensic evidence flatly contradicted Smith's account of the shooting, tending to show that Smith's initial denial of having witnessed the shooting was true—and her trial testimony was false. The report places some blame on Hamilton's attorney for failing to highlight the significance of the forensic evidence, but also found that Gutmann was "at fault," as "she should not have simply presented witness testimony that was patently inconsistent with the medical evidence."[116]

The KCDA report explained how the forensic evidence, rather than supporting the accuracy of Smith's testimony, actually supported the accuracy of her initial statement to the police, where she said she had not witnessed the shooting:

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[110] *Id.* at 54.

[111] *Id.*

[112] *Wagstaffe*, 120 AD3d at 1363.

[113] *Id.*

[114] 426 Years Report at 87 (emphasis added).

[115] *Id.* at 64.

[116] *Id.* at 49.

> [T]he medical evidence showed that most of the gunshots entered the victim through his back, resulting in exit wounds through the chest. Someone viewing the body on the street might see the exit wound in the chest and assume that was where he was shot. That is in fact what [Smith] testified, suggesting her original account that she only saw the body on the street when she came home, was the correct one. This is in a sense like the "false fed fact" discussed in the false confession section; she was not just wrong, but wrong in a way that corroborates how the error may have arisen.[117]

The report explained that the nature of the decedent's wounds "made it unlikely, if not impossible, for him to run after his assailants" as Smith had claimed; blood evidence, and ballistics evidence from the deceased's clothing did not support Smith's claim that the shooting occurred inside the vestibule; and there was "ballistic evidence supporting a finding that two different guns were used in the shooting, in contrast" with Smith's claim that Hamilton "was the lone shooter."[118]

Based on these findings, the 426 Years Report adopted strong language about what would have been possible. "[M]edical and scientific evidence proved conclusively that the shooting did not occur" as Smith testified.[119] Smith's testimony about how the shooting occurred was a "physical impossibility."[120]

But Gutmann never "presented to the jury" any of these "anomalies or inconsistencies,"[121] even though, as a prosecutor, she was "charged not simply with seeking convictions but also with ensuring that *justice* is done."[122]

This failure was compounded by Gutmann's direct examination and summation at trial. In a subsection titled "Eliciting False Testimony," the 426 Years Report noted:

> [Prosecutors should] have reconsidered putting forward witnesses with particularly problematic testimony. Thus, for example, in the [Hamilton] case, [Gutmann] elicited various testimony from [Smith] that clearly was not true in light of the medical evidence.[123]

Gutmann, then, "did not meet" her "obligation to ensure that any testimony [she] introduced in support of [her] case was accurate and not misleading."[124] The report noted "there was no evidence" that Gutmann "knowingly elicited this false testimony," but that it nevertheless

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[117] *Id.* at 46.

[118] *Id.* at 87. The CRU Hamilton Report also analyzes how Smith's account of the shooting contradicts the forensic and medical evidence. *See* CRU Hamilton Report at 25-28.

[119] 426 Years Report at 76.

[120] *Id.* at 57.

[121] *Id.* at 76.

[122] *People v Santorelli*, 95 NY2d 412, 421 (2000); *Berger*, 295 US at 88 (the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

[123] 426 Years Report at 64.

[124] *Id.*

"constitute[d] a failure . . . to investigate" and thus Gutmann "fell far short of the expected standards."[125]

Similarly, in a subsection titled "Arguing for Credibility on False Premises," the report concluded that Gutmann "wrongly argued" for Smith's credibility "on a basis that [Gutmann] should have known was false but for [her] failure to investigate."[126] Because Gutmann "apparently" did not see DeLouisa's notes of his conversation with Smith or "understand their significance," she "argued in summation (incorrectly)" that Smith immediately told detectives that she saw the shooting.[127] Since this was "inaccurate," Gutmann "significantly misled the jury" about Smith's credibility.[128]

Gutmann "further misled the jury," the report continued, when she argued that physical, medical and ballistic evidence corroborated Smith's account:

> So we have [Smith] who's telling us what happened that day, and we have everything that she tells corroborated by the physical evidence, that the shooting happened in the vestibule…. [H]er testimony is supported by the Crime Scene detectives who found that ballistic evidence in this vestibule … [i]t's exactly what she told you, corroborated by the medical examiner.[129]

Yet "[n]one of this was true," the report concluded, and continued:

> [A] prosecutor must fairly present the evidence, and explain in summation why any inconsistencies do not give rise to reasonable doubt. The prosecutor cannot simply declare that the evidence corroborates the witness's testimony when it does not. The prosecutor's obligations to present the evidence fairly is not excused because the defense could have made—but failed to make—arguments about how the testimony was inconsistent with the physical evidence. Whatever the defense argues, the prosecutor must present the evidence fairly and then explain why any inconsistencies do not give rise to reasonable doubt.[130]

Due to Gutmann's failures, the jury voted to convict based on unreliable evidence.

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

As noted by one Grievance Committee, "[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct."[131] Professional misconduct occurs with a "violation of any of the Rules of Professional

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[125] *Id.*

[126] *Id.* at 67.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

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

Conduct."[132] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[133]

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."[134]

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."[135]

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."[136] 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.[137] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[138] 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. Gutmann's Misconduct Violated 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.[139] 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."[140]

Since Gutmann's misconduct occurred in 1991 (Hamilton's case) and 1993 (Connor and Wagstaffe's case), the now-repealed Code of Professional Responsibility governed attorney

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

[133] *How to File a Complaint*.

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

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

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

[137] 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.").

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

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

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

professional conduct. The Rules applicable in 1993 were the same as in 1991.[141] Gutmann's conduct implicates multiple Rules.

Rule DR 7-103(b) required prosecutors 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."[142] This Rule has become Rule of Professional Conduct 3.8(b).[143] 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";[144] this mandate is codified today in Rule 3.4(a)(3) of the Rules of Professional Conduct.[145] 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."[146] This Rule is now codified under Rule 3.4(a)(1) of the Rules of Professional Conduct.[147]

In the *Wagstaffe* and *Connor* case, the court found that Gutmann "delivered the [exculpatory] documents interspersed throughout a voluminous amount of other documentation, without specifically identifying the documents at issue at the time of the delivery."[148] Gutmann's method of providing the documents "deprived the defendants of a meaningful opportunity to employ that evidence during their cross-examination of the prosecution's witnesses."[149] In light of "the lack of any other evidence tying the defendants to the crime," Gutmann's "burying of the subject documents" required the conviction to be reversed.[150] Thus, the Grievance Committee should investigate whether Gutmann violated her obligation to make "timely disclosure" of exculpatory evidence.

In the *Hamilton* case, there was not a finding that Gutmann intentionally and knowingly suppressed *Brady* evidence. But as with *Wagstaffe*, this is not a case where exculpatory evidence remained in police files and never came into the possession of the prosecutor. In fact, there appears to be no dispute that Gutmann was in possession of the exculpatory police notebook that identified the witness as "Karen Smith," but also included the name "Jewel" on the same line. Given the circumstances, including Gutmann's decision to not call the police detective who interviewed Smith to testify at trial, the Grievance Committee should investigate whether Gutmann's conduct was either intentional or represented a "deliberate pattern of avoidance, or willful blindness" to

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[141] *See* Code of Professional Responsibility, McKinney's Cons Laws of NY, Book 29 App. (1991 ed) (in effect in 1993).

[142] Code of Professional Responsibility DR 7-103(b) (22 NYCRR 1200.34 (repealed)).

[143] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) (requiring prosecutors to "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 . . . .").

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

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

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

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

[148] *Wagstaffe*, 120 AD3d at 1363.

[149] *Id.* at 1364.

[150] *Id*.

exculpatory evidence—for which the Second Department Appellate Division disciplined ex-prosecutor Glenn Kurtzrock.[151]

Gutmann's conduct in *Hamilton* also raises the issue of competence. Rule EC 6-1 stated that "a lawyer should act with competence and proper care in representing clients."[152] Rule DR 6-101 ("Failing to Act Competently") barred lawyers from handling "a legal matter without preparation adequate in the circumstances."[153] This competency requirement continues to live in the current Rules of Professional Conduct as Rule 1.1(a).[154] The KCDA report found that Gutmann's conduct in *Hamilton* fell "far short of the expected standards." It is hard to imagine a competent prosecutor failing to recognize the unreliability of the eyewitness evidence in that case and the exculpatory nature of the police notes of the witness interview.

Gutmann's conduct prejudiced the legal process. Under Rules DR 1-102(a)(5) and DR 1-102(a)(7), a lawyer shall not engage "in conduct that is prejudicial to the administration of justice" or "in any other conduct that adversely reflects on the lawyer's fitness to practice law."[155] These Rules have become the Rules of Professional Conduct 8.4(d) and 8.4(h).[156]

Gutmann's conduct contributed to three men being wrongfully convicted in serious cases and imprisoned for many years. The Appellate Division found that Gutmann's "burying" of exculpatory evidence constituted a *Brady* violation and reversed the convictions of Wagstaffe and Connor. The KCDA found that Gutmann's conduct in *Hamilton* fell far short of the proper standards as she presented unreliable testimony, touted the credibility of an unreliable witness, failed to properly identify and provide the glaring exculpatory evidence, and misled the jury in summation. These failures—in such high stake cases—prejudiced the administration of justice.

B. For Her Misconduct, Gutmann Must be 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."[157] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[158]

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[151] *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)).

[152] Code of Professional Responsibility EC 6-1 (repealed).

[153] Code of Professional Responsibility DR 6-101(a)(2) (22 NYCRR 1200.3 (repealed))..

[154] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.1. (requiring attorneys to provide "competent representation," which entails "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[155] Code of Professional Responsibility DR 1-102(a)(5), (a)(7) (22 NYCRR 1200.3 (repealed)).

[156] Rules of Professional Conduct (22 NYCRR 1200.0) rules 8.4(d), (h).

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

[158] *Id.*

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[159] 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."[160] Similarly, extensive prosecutorial experience weighs towards a more serious sanction.[161]

Gutmann's violations of the Rules had real-world, grave consequences. Her failings were at least partly responsible for two men, Connor and Wagstaffe, spending a combined 36 years in prison, and another man, Hamilton, spending 20 years in prison, 10 of them in solitary confinement.

We believe 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 the state'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

Gutmann's misconduct had a devastating impact on a three men's lives and on the integrity and professionalism of our criminal legal system.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[162] 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."[163] The KCDA's and judicial findings 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 we call upon the Grievance Committee to go further and investigate far beyond the

[159] *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.").

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

[161] *Id.*

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

[163] *Id.*

findings 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 Gutmann. 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."[164] 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 Gutmann'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.[165] 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."[166]

   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.[167] 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-

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

[165] *Kurtzrock*, 192 AD3d 197.

[166] *Id.* at 220.

[167] 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.[168] The judge concluded that the suppression constituted "more than exceptionally serious misconduct."[169]

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.[170] 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,"[171] which the report characterized as a "potential systemic issue."[172]

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**. [173] These disclosures have already spurred applications to review convictions.[174] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,[175] 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"[176] 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

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

[169] 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).

[170] 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.

[171] *Id.* at 5.

[172] *Id.* at 4.

[173] *Id.* at 6.

[174] *Id.*

[175] *Id.* at 7.

[176] 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.[177]

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.[178]

4. The Committee should identify any prosecutors trained and/or supervised by Gutmann 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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[177] 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:

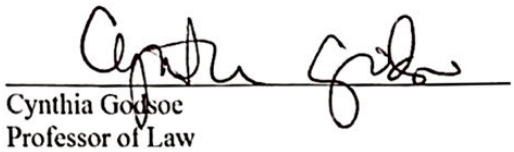
(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(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.

[178] 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."



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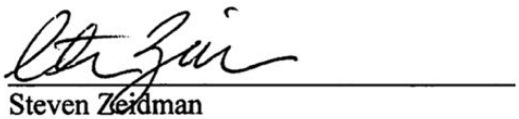

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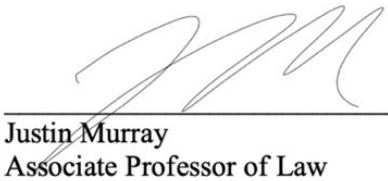

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