March 20, 2023

State of New York Grievance Committee for the
Second, Eleventh and Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney Christopher J. McGrath, Registration No. 2011492.

To the Grievance Committee,

We write to complain to the Grievance Committee regarding former prosecutor Christopher J. McGrath's misconduct in the form of *Batson*[1] violations in three separate trials.[2] Three convictions were reversed on this basis, and McGrath himself admitted using a jury selection guide that reflected a detailed, dehumanizing ranking system that typed jurors by race, sex, religion, ethnic background, class, and neighborhood. We believe the Grievance Committee should issue severe public discipline given these serious and egregious *Batson* violations, which violate the most basic rules for attorney conduct. As we explain below, the Grievance Committee should also conduct a thorough and independent investigation of Queens prosecutors' jury selection practice from 1990 to the present.

When the QDAO discovered McGrath's misconduct in the first two cases, *People v. Morant* and *People v. Valdez*, it submitted a joint motion with the defense to vacate these two convictions based on this indefensible misconduct, as it "cannot defend a conviction so ... tainted by unconstitutional discrimination."[3]

The Supreme Court, Queens County agreed, finding McGrath committed *Batson* violations[4] and reversed both convictions on that basis. In the 2020 decision reversing the *Morant* and *Valdez* convictions, Justice J. Joseph Zayas cautioned against downplaying the significance of these smoking gun documents, warning that "it may be tempting to minimize the significance of the disturbing revelations central to these motions by writing McGrath off as a lone 'bad apple' or by noting that these cases were tried nearly a quarter of a century ago."[5] The court noted that

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[1] *Batson v Kentucky*, 476 US 79 (1986).

[2] The three cases are *People v Santiago Valdez* (Ind. No. 5477/95), *People v Paul Morant* (Ind. No. 4904/95) and *People v Lawrence Scott* (cited in press release titled *Queens District Attorney Files Joint Motion to Vacate Conviction Citing Improper Discrimination During Jury Selection* (Oct. 19, 2021), available at https://tinyurl.com/7eb897du). The writers do not have personal knowledge of the facts regarding this attorney or the cases mentioned; this grievance is based on the court opinions and/or briefs and/or other documents cited herein.

[3] Exh. A, *People v Morant*, 70 Misc3d 854, 859 (2020).

[4] *Id.* at 862.

[5] *Id.* at 863.

"whoever created the sheet, as well as whoever relied on it during the jury selection process, 'appeared to proceed as if *Batson* had never been decided.'"[6]

In fact, we still do not know who actually created this document. We do not know how many prosecutors used it or how many accused persons endured a jury selection that was influenced by bias. As the court noted, McGrath indeed "may not have been the only assistant district attorney using the discriminatory guide to select juries in Queens County."[7]

The court's suspicions—that these two cases were not the only cases where McGrath committed a *Batson* violation by using the so-called "cheat sheet"— turned out to be true. A year after the misconduct in *Morant* and *Valdez* was uncovered by an internal QDAO investigation, similar misconduct was revealed in McGrath's prosecution of Lawrence Scott.[8]

When a prosecutor selects a jury based on race, in breach of *Batson*, it is a grave violation of the accused's rights, the excluded juror's rights, and the basic legal principle of equal justice under the law. The "very integrity of the courts is jeopardized," as the United States Supreme Court puts it.[9] Such misconduct is therefore inherently prejudicial to the administration of justice and adversely reflects on the attorney's fitness to practice law, in violation of Rule DR 1-102 of the Code of Professional Responsibility, in effect at the time of this incident. [10]

Batson violations contribute to New York's "second-class system of justice for people of color"—the diagnosis of the state's legal system made by the former U.S. Secretary of Homeland Security, Jeh Charles Johnson, in a 2020 report commissioned by then Chief Judge and former Westchester County District Attorney Janet DiFiore.[11] The report identifies jury selection as part of the problem, and calls for a "strong and pronounced rededication to equal justice under law by the New York State court system."[12]

This second-class system of justice for people already marginalized in the legal system will persist unless prosecutors are held accountable for discriminatory conduct. Yet, despite the public *Batson* findings noted above, as of this writing, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Christopher J. McGrath.[13] Public

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[6] *Id.* at 860 (citing *Flowers v Mississippi*, 139 S Ct 2228, 2246 (2019)).
[7] *Id*. at 863.
[8] Queens District Attorney's Office, Press Release (Oct. 19, 2021), *supra*. The Grievance Committee should investigate whether McGrath disclosed this additional case where he used his "cheat sheet" when he was questioned by the QDAO regarding his use of it in *Morant* and *Valdez*.
[9] *Miller-El v Dretke*, 545 US 231, 238 (2005).
[10] Code of Prof Resp, DR 1-102 (22 NYCRR § 1200.3) (repealed). Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.
[11] Jeh Charles Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts*, Oct. 1, 2020, at 3, 54, available at https://tinyurl.com/23ztwbft.
[12] *Id.* at 8-9, 74-75.
[13] New York Unified Court System, Attorney Online Services – Search, available at https://tinyurl.com/ynrpxf7r.

reporting and an online search suggest that Attorney McGrath has spent many years working as legal counsel to the New York City Police Benevolent Association, earning $197,300 in 2020.[14]

But this discrimination cannot be shrugged off as merely a product of McGrath's malfeasance. While we do not know the full scope of QDAO's jury selection in the 1990's, McGrath was not the only Queens prosecutor who removed jurors based on discrimination; indeed, John Kosinski, a Senior Deputy Bureau Chief at the QDAO as of August 2022,[15] was found to have violated the state Constitution by improperly removing a Muslim juror on the basis of religion in 1996.[16] Despite this finding, as of this writing, Kosinski also has no record of public discipline per the New York Unified Court System website.[17]

Nor can this problem be regarded as a mere relic of the past.

Rachel Buchter, the QDAO Bureau Chief of the Felony Trials III Bureau as of November 2022,[18] was found by the Appellate Division to have "exercised her peremptory challenges in a discriminatory manner" in a 2005 trial.[19] As of this writing, Buchter does not appear to have suffered any public discipline as a result of this court finding.[20]

In 2017, the Appellate Division found that Queens prosecutor Jonathan Selkowe excluded two Black women who were prospective jurors in violation of *Batson* in the 2015 trial of Christopher Brown, a Black man.[21] Despite this finding, Selkowe is listed in a March 2023 press

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[14] David Brand, Queens Daily Eagle, *Ex-Queens Prosecutor Who Kept Non-whites Off Juries is Now NYC PBA Lawyer*, Dec. 11, 2020, available at https://tinyurl.com/3sbpsa47; Nonprofit Explorer Database, ProPublica.

[15] Queens District Attorney's Office, Press Release (Aug. 24, 2022), available at https://tinyurl.com/mr2c3dkk.

[16] *People v Langston*, 167 Misc2d 400, 401, 403 (Queens Sup Ct 1996), available at https://tinyurl.com/y3fs9rc5. Kosinski's New York Bar registration lists his current employer as the Queens County D.A.'s Office. Press releases in 2021-22 list his title as "Deputy Bureau Chief" or "Senior Deputy Bureau Chief" of the Homicide Bureau, *see* Queens District Attorney's Office, Press Release (Aug. 24, 2022), *supra.*

[17] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

[18] Queens District Attorney's Office, Press Release (Nov. 15, 2022), available at https://tinyurl.com/ykbdry3m. Buchter's attorney registration number is # 2929941.

[19] *People v Hall*, 64 AD3d 665, 665 (2d Dept 2009). While the court opinion does not name Buchter as the prosecutor, the transcript of jury selection shows she committed the *Batson* violation. *See* Trial Transcript in *People v Hall*, Sup Ct, Queens Cty, Ind. No. 1813/03.

[20] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

[21] *People v Brown*, 153 AD3d 850, 850-52 (2d Dept 2017). While the court opinion does not name Selkowe as the prosecutor, the transcript of the *Batson* challenge does. *See* Trial Transcript in *People v Brown*, Sup Ct, Queens Cty, Ind. No. 10254/2014.

release as a Senior Assistant District Attorney in the QDAO Homicide Bureau[22] and as of this writing, has no record of public discipline per the New York Unified Court System website.[23]

During a 2018 trial, the Supreme Court, Queens County, granted a *Batson* motion, rejecting Queens prosecutor Nicholas T. Cooper's peremptory strikes of two Hispanic prospective jurors;[24] as of this writing, Cooper has no record of public discipline per the New York Unified Court System website.[25]

In 2021, the Appellate Division found that Queens prosecutor Michael Whitney excluded a Black prospective juror in violation of *Batson* in the trial of Corey Johnson.[26] Despite this finding, Whitney is listed in a February 2023 press release as a Senior Deputy Bureau Chief at the QDAO[27] and as of this writing, has no record of public discipline per the New York Unified Court System website.[28]

The QDAO announced that it would review all jury trials conducted by ex-ADA McGrath, but the fact that other Queens prosecutors have also committed *Batson* violations indicates a broader problem. We call upon the Grievance Committee to go further, reviewing every Queens prosecutor's trial file and prosecutor notes from 1990 to the present to determine whether discrimination occurred in jury selection. In so doing, we ask the Committee to use every investigative tool to identify each prosecutor who wrote and/or used the "McGrath" notes and every case where the prosecutor's jury notes reflect discriminatory views or strategies (whether from McGrath or otherwise). A sweeping inquiry, which may seem extraordinary on initial consideration, is actually quite justified given the documented scope of the issue.

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

A. Prosecutorial Misconduct is Pervasive and Unchecked.

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[22] Queens District Attorney's Office, Press Release (Mar. 6, 2023), available at https://tinyurl.com/yuknna27.

[23] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name]. Selkowe's attorney registration number is # 4792040.

[24] *People v R.C.*, Sup Ct., Queens Cty.

[25] New York Unified Court System, Attorney Online Services, Nicholas T. Cooper, Registration No. 5424155 – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

[26] *People v Johnson*, 199 AD3d 1017, 1019 (2d Dept 2021). While the court opinion does not name Whitney as the prosecutor, the transcript of jury selection shows he committed the *Batson* violation. *See* Trial Transcript in *People v Johnson*, Sup Ct, Queens Cty, Ind. No. 953/17.

[27] Queens District Attorney's Office, Press Release (Feb. 17, 2023), available at https://tinyurl.com/275mxcp5.

[28] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name]. Whitney's attorney registration number is # 4031605.

Our legal system holds prosecutors to the highest standards of all attorneys.[29] 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 the lives of their family members, 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.[30]

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."[31] 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."[32]

But misconduct by prosecutors remains unchecked in the New York criminal legal system. From 2004-2008, 151 cases in New York trial and appellate courts found prosecutorial misconduct, but the Grievance Committees disciplined only three.[33] A 2013 study of 10 years of New York state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[34] 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."[35] 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.[36] None of the other implicated prosecutors were disbarred, suspended, or publicly censured and, according to personnel records gathered by ProPublica, several

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[29] *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."), available at https://tinyurl.com/2p8nanz8.

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

[31] *Berger v U.S.*, 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).

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

[33] *See* Ctr. for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct*, at 14 (2013), available at https://perma.cc/F4G7-FF54.

[34] Sapien & Hernandez, *supra*.

[35] *Id.*

[36] *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).

prosecutors were promoted and given raises soon after courts cited them for abuses.[37] In 2016, the Innocence Project released a report about prosecutorial misconduct nationwide from 2004-2008; according to one analysis of that report, of the 148 New York cases with prosecutorial misconduct findings, none of the prosecutors were disciplined.[38] 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."[39]

B. Constitutional Law Has Long Barred Prosecutors From Using Race or Any Status Protected Under the Equal Protection Clause to Strike Prospective Jurors, Yet Prosecution *Batson* Violations Remain Pervasive and Insidious.

For many years, the long-held tradition of jury trials in the United States mostly meant juries of property-owning white male citizens sitting in judgment of anyone asserting their right to a jury trial. Race, gender, religion, and property ownership were often accepted as reasonable means to decide who could, and who could not, decide the fates of Americans as a juror.

With few exceptions, Black people and women of all racial backgrounds were excluded from jury service since the establishment of this country.[40] Congress attempted to address this injustice through the Civil Rights Act of 1875, which guaranteed Black men the right to serve on juries.[41] In 1880, 17 years after emancipation, the Supreme Court in *Strauder v. West Virginia* held that the equal protection rights of Taylor Strauder, a Black man accused of a crime, were violated when he was tried by a jury intentionally devoid of Black men as jurors.[42] In 1895, New York enacted Civil Rights Law §13, making it a crime to exclude anyone from a jury summons on account of "race, creed, or color."[43] In 1935, the Court in *Norris v. Alabama* again held that systematic exclusion of Black people from juries violated the Equal Protection Clause.[44] New York excluded women as potential jurors until 1937,[45] but even after that date, some counties treated women serving as jurors to be permissive, rather than mandatory, allowing an exemption

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[37] *See* Sapien & Hernandez, *supra*.
[38] Rory I. Lancman & Rachel Graham Kagan, *Prosecutorial Misconduct Commission Will Only Be as Strong as Underlying Disciplinary Rules—And That's a Problem*, N.Y. L.J. (Dec. 12, 2018), available at https://perma.cc/69BU-LNJT.
[39] Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), available at https://tinyurl.com/4ntvsv85.
[40] Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), available at https://tinyurl.com/yeyuncj8.
[41] 18 USC § 243 (2010).
[42] *Strauder v West Virginia*, 100 US 303 (1880). The *Strauder* Court nonetheless specifically permitted states to discriminate based on gender, age, citizenship, and education: "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.* at 310.
[43] Civil Rights Law § 13.
[44] *Norris v Alabama*, 294 US 587 (1935).
[45] *The Jury Project: Report to the Chief Judge of the State of New York* (Mar. 31, 1994) at 1, available at https://tinyurl.com/bde7f5ta (hereinafter "*The Jury Project"*).

for women jurors based on gender.[46] This practice was finally curtailed nationally by the Supreme Court's 1975 decision in *Taylor v. Louisiana*.[47]

Nonetheless, even where such anti-discrimination laws have been enforced, Black prospective jurors have been disproportionately excluded by other means, including courts using unrepresentative databases to select people for jury duty,[48] paltry juror pay and lack of childcare rendering jury service impossible for many,[49] and the outright exclusion of anyone convicted of a felony charge.[50]

When Black prospective jurors are able to clear the above hurdles and enter the courtroom they also regularly face the prospect of removal by prosecutors through the mechanism of a peremptory challenge. The Equal Justice Initiative's 2021 report on discrimination in jury selection concluded that peremptory strikes have "historically and routinely been used to discriminate against Black prospective jurors."[51]

Legal challenges have tried to curtail discriminatory peremptory strikes for decades. As far back as 1965, the Supreme Court in *Swain v. Alabama* held that discriminatory peremptory strikes can be proven by showing systematic exclusion of a group of prospective jurors.[52] Ultimately, in 1986, the Court issued its decision in *Batson v. Kentucky*, prohibiting the use of peremptory strikes during voir dire to remove prospective jurors on the basis of race.[53] The New York Court of Appeals adopted *Batson* under the state Constitution in 1990, prohibiting discrimination by either side against prospective jurors on the basis of constitutionally protected status.[54] The Supreme Court later extended *Batson* protections to Latino prospective jurors[55] and to women.[56]

Despite these advances—including New York Judiciary Law § 500, which specifies that litigants have the right to a jury drawn from a "fair cross-section of the community"[57]—discriminatory strikes continue, in part because the *Batson* standard is difficult—indeed, nearly

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[46] Carol Kammen, *Women Jurors in Tompkins County*, Judicial Notice (2005), available at https://tinyurl.com/28vvjdsm.
[47] *Taylor v Louisiana*, 419 US 522 (1975).
[48] *The Jury Project* at 4-14.
[49] *Id.* at 97-101; *see also* Judiciary Law § 521 (setting juror compensation at $40 a day, to which not all jurors are entitled).
[50] Judiciary Law § 510 (disqualifying as a juror anyone who has been convicted of a felony).
[51] Equal Justice Initiative, *supra*.
[52] *Swain v Alabama*, 380 US 202 (1965).
[53] *Batson*, 476 US 79; *Flowers v Mississippi*, 139 S Ct 2228, 2243 (2019) (applying *Batson* to all races); *Hernandez v New York*, 500 US 352 (1991) (applying *Batson* to claim of discrimination against Latino prospective jurors); *People v Bridgeforth*, 28 NY3d 567, 571 (2016) (quoting *People v Luciano*, 10 NY3d 499, 502-03 (2008)) (applying *Batson* to any status implicating equal protection concerns, including color by either the prosecution or the defense).
[54] *Bridgeforth*, 28 NY3d at 571 (quoting *Luciano*, 10 NY3d at 502-03).
[55] *Hernandez*, 500 US 352.
[56] *J.E.B. v Alabama ex rel. T.B.*, 511 US 127 (1994).
[57] Judiciary Law § 500.

impossible—to prove. Proving systemic exclusion has shown itself to be an impossible bar to effectively challenging discriminatory jury strikes.[58] Even a willing and open-minded court has a hard time determining whether a prosecutor's peremptory strike was in fact "motivated in substantial part by discriminatory intent."[59]

In a 2021 article in the *New York Law Journal*, Barbara Zolot, a senior supervising attorney at the Center for Appellate Litigation, noted New York's "dismal record of Batson reversals," citing that, in the period between 2015 and 2020, there were just 10 reversals on appeal out of 150 *Batson* objections by the accused at trial.[60] Prosecutors can easily assert facially neutral reasons for peremptory strikes, and "courts are ill equipped to second-guess those reasons."[61] One national study of 1,156 *Batson* decisions from 1986-1993 revealed that courts accepted prosecutors' "race neutral" explanations nearly 80 percent of the time.[62]

Nationwide, courts have accepted factors as "race neutral" that strongly correlate with race, such as socioeconomic factors, having relatives prosecuted by the same District Attorney's office, having loved ones who experienced police mistreatment, residence in a "high-crime neighborhood," appearance-based reasons, and a hesitation to accept the court interpreter's translation of Spanish.[63] Notably, a new law in California has rendered many of these most common "race neutral" justifications to be presumptively invalid[64] in a change that the California District Attorneys Association opposed and called "dangerous legislation."[65]

Similarly, in New York, the Special Adviser on Equal Justice to the state courts interviewed participants in the criminal legal system who reported that "when jurors of color express that distrust [of law enforcement], they are automatically struck from the pool . . . [while] potential jurors with family members in law enforcement do not receive the same treatment" and that "some judges uncritically accept the reasons that prosecutors provide when striking jurors for cause . . . ultimately result[ing] in non-diverse juries."[66]

Indeed, evidence has emerged of prosecutor offices in various jurisdictions training staff to assert "racially-neutral" justifications for removing jurors. For example, the now-infamous 1987 Philadelphia District Attorney training video instructed prosecutors to remove Black prospective jurors and cover up this invidious intent: "When you do have a Black jury, you question them at

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[58] *See* LaCrisha L. A. McAllister, *Closing the Loophole: A Critical Analysis of the Peremptory Challenge and Why It Should be Abolished*, 48 SU.L Rev 303, 316 (2021).
[59] *Flowers*, 139 S Ct 2228.
[60] Barbara Zolot, *How New York State Can Fix Broken Promises of 'Batson,'* NYLJ, Apr. 1, 2021. Zolot points out that New York has not yet adopted the *Batson* reforms instituted in Washington and California.
[61] *Batson*, 476 US at 106 (J. Marshall concurrence).
[62] Sandra Guerra Thompson, *The Non-Discrimination Ideal of Hernandez v. Texas Confronts A "Culture" of Discrimination: The Amazing Story of Miller-El v. Texas*, 25 Chicano-Latino L Rev 97, 116–17 (2005).
[63] *Id*. at 116-20.
[64] California Code of Civil Procedure § 231.7.
[65] *See* California District Attorneys Association tweet as an earlier version of the bill was being considered in the Legislature, May 20, 2020, available at https://tinyurl.com/2n4ebdkr.
[66] Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts*, *supra.*

length. And on this little sheet that you have, mark something down that you can articulate later. . . . You may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race."[67] In the 2020 report *Whitewashing the Jury Box*, the UC Berkeley School of Law Death Penalty Clinic reviewed training materials from 15 California District Attorney Offices, finding that training manuals instructed prosecutors to conceal race-based strikes.[68] One 2016 California prosecutor training manual contained a *29-page list* of justifications that courts have accepted for striking prospective jurors.[69] The North Carolina Conference of District Attorneys held a training in the 1990s with handouts entitled "Batson Justifications: Articulating Juror Negatives," listing "race-neutral" reasons to strike prospective jurors such as age or body language, to assist prosecutors in evading a *Batson* challenge.[70] Similarly, a 2004 Texas Prosecutor Association training course instructed prosecutors to offer race-neutral reasons to justify striking Black prospective jurors such as asking if they watched gospel programs or for their views on the O.J. Simpson verdict.[71] The practice of prosecutors masking race-based reasons for striking prospective jurors with "racially neutral" explanations led an Illinois appellate judge to quip in an opinion, "New prosecutors are given a manual, probably entitled 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[72]

Given the difficulty of proving a *Batson* violation in court, the rare cases where courts are able to conclude that prosecutors committed intentional discrimination demand a response that deters these difficult-to-detect violations of law. Indeed, recent studies have revealed that many prosecutors continue to strike Black prospective jurors at far higher rates than white prospective jurors. For example, between 1997 and 2009, Louisiana prosecutors struck 48 percent of Black prospective jurors but only 14 percent of white prospective jurors.[73] This trend continued: after analyzing over 5,000 cases in Louisiana from 2011 to 2017, researchers concluded that prosecutors struck Black prospective jurors at 175 percent of an expected, race-neutral rate.[74]

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[67] Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, The New Yorker, June 5, 2015, available at https://tinyurl.com/mr4dzn33.

[68] Elisabeth Semel et al. *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, UC Berkeley School of Law (2020), available at https://tinyurl.com/5cr3aecj.

[69] Santa Clara County District Attorney's Office, *The Inquisitive Prosecutor's Guide,* June 10, 2016, 51-80, available at https://tinyurl.com/42yxe8pa. The UC Berkeley School of Law Death Penalty Clinic has made available *Batson*-related training materials from various California District Attorney Offices, available at https://tinyurl.com/2p9exv6h.

[70] *Id.*, handout available at https://tinyurl.com/3amrfahc; *see also* Brief of Amicus Curiae North Carolina Association of Black Lawyers and North Carolina State Conference of the NAACP in Support of Russell William Tucker, *North Carolina v Russell William Tucker*, No. 113A96-4 (July 13, 2021), 2021 WL 3173721.

[71] Equal Justice Initiative, *supra*, citing Brief for the ACLU of Southern California et al. as Amici Curiae Supporting Petitioner at 23, *Smith v California*, No. 18-7094 (filed Jan. 18, 2019) (citing Texas District & County Attorney Association 2004 Prosecutor Trial Skills Course at 11), brief available at https://tinyurl.com/44f6ytkk.

[72] Edelman, *supra* (quoting *People v Randall*, 283 Ill.App.3d 1019, 1025 (1996)).

[73] *Id*.

[74] Equal Justice Initiative, *supra* (citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vanderbilt L Rev 1621, 1626 (2018)).

Likewise, North Carolina prosecutors in capital cases struck Black prospective jurors twice as often as white prospective jurors from 1990 to 2010.[75] And from 1992 to 2017, Black prospective jurors in Mississippi were four times more likely to be struck than their white counterparts.[76]

The case of Curtis Flowers, which was ultimately heard by the United States Supreme Court in 2019, encapsulates the nature of the problem. Flowers was tried six times, with the threat of a seventh, for the same crime and by the same prosecutor.[77] Long before any peremptory challenges, many Black prospective jurors were removed by the court "for cause" (rather than by a party's exercise of a peremptory challenge, the practice regulated by *Batson*).[78] Then, in the six Flowers trials, the prosecutor struck all but one of the Black prospective jurors that he could have struck—41 of 42 in all.[79] The convictions originally resulted in death sentences, but were overturned.[80] The appellate court, in reversing the third conviction on appeal, noted the "'State engaged in racially discriminatory practices' and that the 'case evinces an effort by the State to exclude African Americans from jury service.'"[81] Yet Flowers was tried three more times, with the same prosecutor using racist peremptory strikes.

Racial discrimination and race exclusion in juries severely harms the accused. Diverse juries are vital to combatting unconscious biases.[82] All-white juries appear to be more likely to convict a Black defendant than a white defendant for the same charges, and more likely to convict a Black defendant generally.[83] One prominent example: Curtis Flowers's four juries that had either no Black member or one Black member sentenced him to death; his two juries with more than one Black juror, by contrast, could not agree on a verdict.[84] Discrimination in jury selection can quite literally mean the difference between life or death for the accused.

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[75] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L Rev 1531, 1554 (2012).
[76] Equal Justice Initiative, *supra*.
[77] McAllister, *supra* at 320.
[78] The process of "'qualifying' the jury through challenges for cause shifted the racial composition of the jury pool from 42% black to 28% black." Thomas Ward Frampton, *What Justice Thomas Gets Right About Batson*, 72 Stan L Rev Online 1, 14–15 (2019).
[79] *Flowers*, 139 S Ct at 2251.
[80] *Flowers v State*, 947 So2d 910, 939 (Miss. 2007) (asserting State's intentional discrimination in jury selection warrants reversing conviction); *see also Flowers v State*, 842 So2d 531, 538 (Miss. 2003) (reversing conviction due to various errors, including prosecutorial misconduct); *see also Flowers v State*, 773 So2d 309, 334 (Miss. 2000) (finding Mississippi Circuit Court erred in overruling the *Batson* challenge).
[81] *McAllister*, *supra* at 320-21; *Flowers*, 947 So2d at 937.
[82] Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 BU L Rev 155, 156 (2005).
[83] Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Quarterly J Economics 1017 (2012), available at https://tinyurl.com/bdf7e7z3; John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 Vt L Rev 297, 301-02 (2005) (discussing the history of peremptory challenges).
[84] Frampton, *supra* at 11.

Moreover, discriminatory jury selection harms the excluded jurors as well,[85] as "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[86] The suppression of the right to vote based on race is one of the ugliest forms of discrimination in this country and the right to serve on a jury is just as essential. Indeed, unlike an election, where an individual's vote rarely impacts the results, an individual juror's dissenting vote will quite literally, on its own, prevent a criminal conviction.[87] Of course, discriminatory jury selection also harms the entire community by undermining public confidence in the criminal legal system,[88] but more importantly, it strips the power of participation from members of oppressed communities, making it clear that the system is only democratic for favored groups, which is to say, not democratic at all.

This ugly problem is not confined to the South or the past. In 2021 alone, Appellate Division courts reversed convictions in Manhattan,[89] Suffolk County,[90] and Queens,[91] because prosecutors discriminated in jury selection. There is reason to think this may be the tip of the iceberg given New York courts' abysmal record of holding prosecutors accountable for *Batson* violations.[92]

C. The Grievance Committee, as the Only Body Entrusted with Disciplining 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.[93] 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.[94]

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[85] Exh. A, *Morant*, 70 Misc3d at 862.
[86] *Flowers*, 139 S Ct at 2238.
[87] Until recently, Louisiana and Oregon did not require unanimous verdicts.
[88] *Batson*, 476 US at 87.
[89] *People v Murray*, 197 AD3d 46 (1st Dept 2021).
[90] *People v Gurtata*, 73 Misc3d 127(A) (2d Dept 2021).
[91] *Johnson*, 199 AD3d 1017.
[92] *See* Zolot, *supra*.
[93] *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").
[94] *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).

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[95] 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 two percent—were ever publicly disciplined.[96]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics scholars Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously."[97] 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."[98] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[99] "Prosecutors engage in misconduct because they know they can get away with it."[100]

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.[101] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[102] But even short suspensions like those received by Rain and Kurtzrock[103]—indeed, public discipline of any kind—remain rare.

Our research has not revealed any instance of a New York prosecutor being disciplined by the courts or the Grievance Committee for a *Batson* violation.

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[95] *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, 242-43 (2012).

[96] Ctr. for Prosecutor Integrity, *supra*; *see also* Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), available at https://tinyurl.com/vy4mpfed; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn LJ 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).

[97] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2016).

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

[99] Sapien & Hernandez, *supra*.

[100] *Id.*

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

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

[103] 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, available at https://tinyurl.com/yhvmd43k; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost, Oct. 1, 2016, available at https://tinyurl.com/fp9yfs8x; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, June 18, 2018, available at https://tinyurl.com/52ar9tjx.

Prosecutors, the officials tasked with holding the public accountable, are not being held accountable for their own misconduct.

II. The Queens District Attorney's Office Conceded that McGrath Committed *Batson* Violations in Three Cases.

McGrath prosecuted three men in separate trials. Santiago Valdez was convicted in 1993 and sentenced to 40 years-to-life in prison, Paul Morant was convicted in 1995 and sentenced to 25 years-to-life in prison, and Lawrence Scott was convicted in 1996 and sentenced to five to 10 years in prison.[104] Following these Constitutionally-defective convictions rooted in discriminatory jury selection, 27, 25, and 25 years passed, respectively, before McGrath's notes were publicly revealed and the convictions finally reversed. The Supreme Court, Queens County described the notes as a "jury discrimination 'cheat sheet'—a smoking gun evincing pernicious and invidious discrimination clearly designed to eviscerate the constitutional right to be tried by a jury of one's peers."[105]

The jury selection guide described Black neighborhoods as either "good" or "IFFY." The script demanded "no Hispanics," wrote then crossed out "No Jews," encouraged the prevention of "too many females"[106] on the jury, warned of prospective jurors from a "Prof, Jews, Middle Class" neighborhood, and cautioned against allowing Italian-American prospective jurors to serve if the defendant is Italian-American. The notes further detailed an intent to preclude women from serving as jurors by advising prosecutors to "stay away from" "grandmotherly types" and "motherly types."[107]

Furthermore, the "cheat sheet" scored on a scale from one to five every neighborhood in Queens County, one of the most diverse in the country, as well as what to look for in each neighborhood, e.g., in Far Rockaway, Queens's prosecutors should look for a "Good if good solid B[lack] person,"[108] and in, Howard Beach, Queens's prosecutors should be aware that prospective jurors from the area are "Good but other B's [Blacks] will fight them."[109]

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[104] Exh. A, *Morant*, 70 Misc3d 854; Queens District Attorney's Office, Press Release (Oct. 19, 2021), *supra.*

[105] *Morant*, 70 Misc3d at 855. The instant case and *People v Superior Ct. (Jones)*, 34 Cal App 5th 75 (2019), aff'd and remanded sub nom. *People v Superior Ct. of San Diego Cty.*, No. S255826, 2021 WL 5707638 (Cal. Dec. 2, 2021) demonstrate the necessity of courts to preserve and provide defense with prosecutor voir dire notes on appeal. *Jones* is a California post-conviction death penalty case where prosecutors defended against a *Batson* objection by claiming they used a neutral rating system based on answers to a jury questionnaire. The court ruled that since prosecutors relied on the assertion that they were using a rating system, any work product claim was waived.

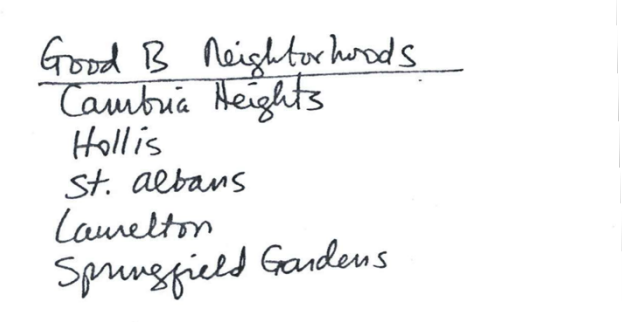
[106] Exh. A, *Morant*, 70 Misc3d at 857.

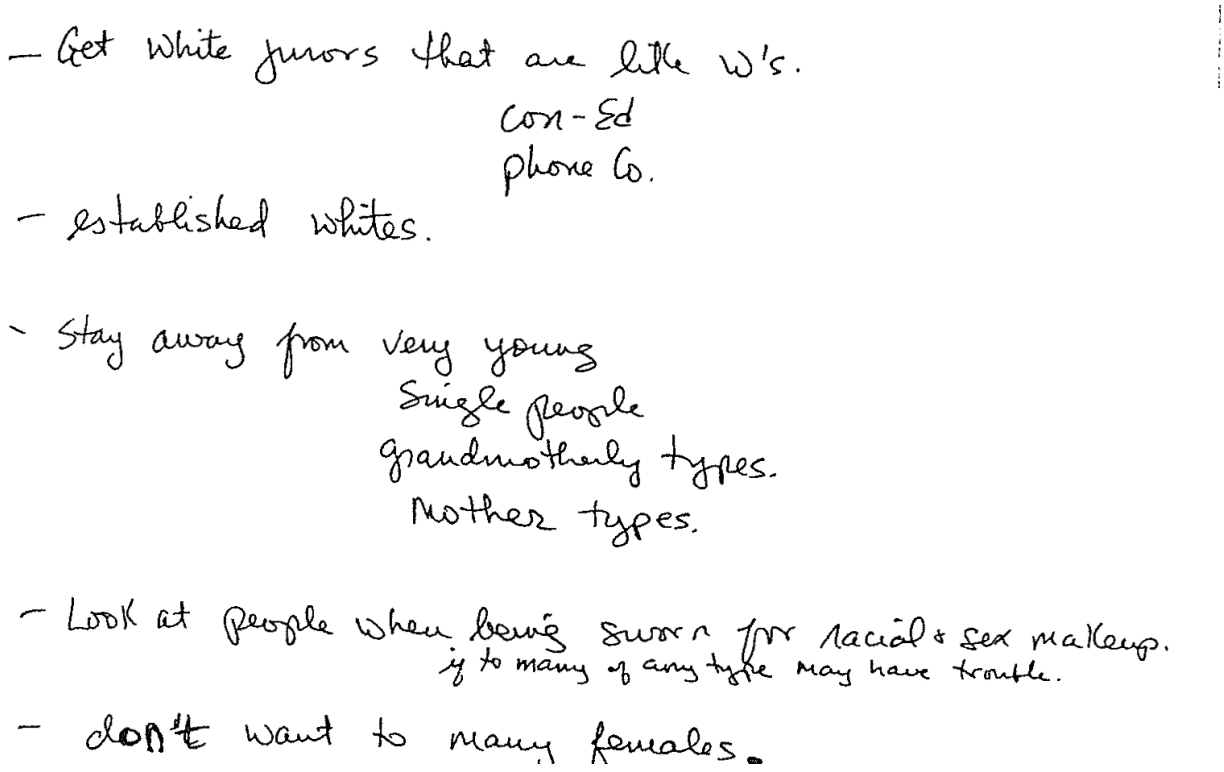
[107] *Id.* at 857.

[108] *Id.*

[109] *Id.* at 857.

Some sections of McGrath's jury guide are below—the complete, three-page document is attached as an exhibit:[110]


Good B Neighborhoods
Cambria Heights
Hollis
St. albans
Laurelton
Springfield Gardens


– Get White jurors that are like W's.
Con-Ed
phone Co.
– established whites.
– Stay away from very young
Single people
grandmotherly types.
Mother types.
– Look at people when being sworn for racial & sex makeup.
if to many of any type may have trouble.
– don't want to many females.

McGrath admitted using this ugly document during the *Morant* and *Valdez* trials.[111] In *Morant*, McGrath used peremptory strikes against five Black prospective jurors, seven female jurors, and two Jewish jurors.[112] When considering that two of the prospective jurors removed by McGrath had Italian surnames, McGrath used nine of the 10 peremptory challenges against potential jurors from his disfavored ethnic and religious groups. In *Valdez*, McGrath used all seven strikes against prospective jurors of color, six of whom were Black and one of whom was Hispanic/Latino—and six of the seven prospective jurors were women.[113] In *Scott*, McGrath

[110] Exh. B; see also, David Brand, Queens Daily Eagle, *Ex-Queens Prosecutor Who Kept Non-whites Off Juries is Now NYC PBA Lawyer*, Dec. 11, 2020, available at https://tinyurl.com/3sbpsa47.
[111] Exh. A, *Morant*, 70 Misc3d at 856, 862.
[112] *Id.* at 861.
[113] *Id*.

exercised at least six of the prosecution's 13 peremptory strikes against minorities, five Black jurors and one Hispanic.[114] The Queens DA's Conviction Integrity Unit conceded that McGrath could have also struck three more minority jurors but they could not be sure as they could not determine the race of these jurors from McGrath's notes.[115] Though 46% of McGrath's strikes were against known Black and Hispanic jurors, known Black and Hispanic jurors comprised only 28% of the jury pool.[116] As the Conviction Integrity Unit conceded, "[t]here is evidence in the Strikes Sheets that the former ADA was actively utilizing the advice in the Jury Selection Notes."[117]

The *Morant* opinion indicates that McGrath not only admitted to using the so-called "cheat sheet," but also did not try to justify himself, and "that there were apparently no efforts [to justify his own behavior] speaks volumes."[118] The Queens District Attorney made no attempt to defend McGrath's reprehensible conduct and joined a joint defense motion to vacate the convictions, as it "'cannot defend a conviction so ... tainted by unconstitutional discrimination.'"[119]

The Supreme Court, Queens County agreed, finding McGrath committed *Batson* violations in *Morant* and *Valdez*.[120] In the decision, the court cautioned against downplaying the significance of these smoking gun documents, warning that "it may be tempting to minimize the significance of the disturbing revelations central to these motions by writing McGrath off as a lone 'bad apple' or by noting that these cases were tried nearly a quarter of a century ago."[121] McGrath indeed "may not have been the only assistant district attorney using the discriminatory guide to select juries in Queens County."[122] The court further noted that as a prosecutor, McGrath "surely tried other cases," and suggested that a further inquiry may be needed to resolve whether McGrath's notes reflect a "more pervasive" problem.[123]

The court's suspicions—that these two cases were not the only *Batson* violations—turned out to be true. A year after the misconduct in *Morant* and *Valdez* was uncovered, similar misconduct was raised publicly in McGrath's prosecution of Lawrence Scott and that conviction was reversed as well.[124] In its filing in *Scott*, the QDAO's Conviction Integrity Unit notes that "[t]he facts relating to the *Batson* violation in Mr. Scott's case are indistinguishable from those leading

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[114] Queens District Attorney's Office Conviction Integrity Unit, Affirmation in Support of Motion to Vacate Convictions and Sentence Pursuant to C.P.L. § 440.10(1)(f) and (h) and 440.10(4), *People v Lawrence Scott*, Ind. No. 0983/92, Oct. 14, 2021, at 4.
[115] *Id*.
[116] *Id.* at 4-5.
[117] *Id.* at 5.
[118] Exh. A, *Morant*, 70 Misc3d at 862.
[119] *Id.* at 859.
[120] *Id.* at 862.
[121] *Id.* at 863.
[122] *Id*.
[123] "With respect to the former point, the Court, of course, need not decide — at least for now — the important question of whether the unlawful jury selection practices in which McGrath engaged in these cases are isolated occurrences, as opposed to evidence of a more pervasive problem. That issue may have to be resolved, though, since McGrath surely tried other cases." Exh. A, *Morant,* 70 Misc3d at 863.
[124] Queens District Attorney's Office, Press Release (Oct. 19, 2021), *supra*.

to the agreed outcome in *People v. Morant & Valdez* [citation omitted]… There is no question that the former ADA relied on his Jury Selection Notes in exercising the People's peremptory strikes, based on his own admission and because the Strike Sheets in this case contain annotations reflecting the race and religion of the potential jurors and place emphasis on potential jurors' neighborhoods. These notes, when combined with the former ADA's Strike Sheets from Mr. Scott's trial, provide direct and convincing evidence of the unconstitutional motive behind his use of peremptory strikes against potential jurors."[125]

Though these cases were tried decades ago, the *Batson* rule even then was nothing new, as "*Batson*—a monumental decision which should have transformed jury selection practices in every prosecutor's office in the country—was decided a decade before Morant's and Valdez's trials."[126]

III. The Grievance Committee Should Seek Discipline for the Serious Professional Misconduct That Occurred.

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."[127] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[128] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[129]

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."[130]

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us that "[p]rosecutors, 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."[131]

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 for guaranteeing "procedural

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[125] Queens District Attorney's Office Conviction Integrity Unit, Affirmation in Support of Motion to Vacate Convictions and Sentence Pursuant to C.P.L. § 440.10(1)(f) and (h) and 440.10(4), *Scott*, Ind. No. 0983/92, at 10.
[126] *Id.* at 863.
[127] Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, available at https://tinyurl.com/39axvffr.
[128] Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).
[129] Attorney Grievance Committee, *supra*.
[130] *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).
[131] *Kurtzrock*, 192 AD3d at 219.

justice and that guilt is decided upon the basis of sufficient evidence."[132] 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.[133] The New York Rules of Professional Conduct reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[134] 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 legal system, the bar as a whole, and the rule of law itself.

A. Prosecutorial Discrimination in Jury Selection Breaches Ethical Rules, Warranting Discipline.

When a court finds that a prosecutor committed a *Batson* violation, a necessary implication is that the court has found that the prosecutor engaged in purposeful discrimination. *Batson* requires a three-step process.[135] The first *Batson* step involves the moving party, who objects to the other side's peremptory strike, alleging a *prima facie* case of discrimination. The second step, which only occurs if the court finds a *prima facie* case of discrimination, requires the lawyer who made the strike to offer nondiscriminatory reasons for it. The third step involves the trial court's assessment of those reasons: "At the third step, the burden shifts back to the moving party to prove *purposeful discrimination* and the trial court must determine whether the proffered reasons are pretextual."[136] According to the Court of Appeals:

> The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented. Unlike step two, this determination is a question of fact, focused on the credibility of the race-neutral reasons. Courts may determine that the proffered reasons are pretextual without further arguments by the moving party, but the moving party has the ultimate burden of persuading the court that the reasons are *merely a pretext for intentional discrimination*.[137]

Accordingly, it is fair to infer that when a trial court, or an appellate court, reaches and resolves that third step and finds a *Batson* violation, this signifies a court finding that the prosecutor engaged in intentional discrimination.

A *Batson* violation implicates the rules governing lawyers' ethics. When a prosecutor removes jurors based on race, sex, or another protected class, it is a violation of the rules of

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[132] Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1], available at https://tinyurl.com/5683z4c2.

[133] ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), available at https://tinyurl.com/bdz5twaw.

[134] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). Different rules obviously apply to judges as well.

[135] *Bridgeforth*, 28 NY3d 567.

[136] *Gurtata*, 73 Misc3d 127(A) (emphasis added).

[137] *People v Smocum*, 99 NY2d 418, 422 (2003) (internal citation omitted, emphasis added)).

professional conduct, the accused's rights, the excluded juror's rights, and the basic legal principle of equal justice under law.[138]

At the time of this trial, the Code of Professional Responsibility (hereinafter "Code") was the applicable professional set of rules. Rule DR 1-102 of the Code 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.[139]

In our view, a *Batson* violation is patently "prejudicial to the administration of justice" and therefore in violation of Rule DR 1-102.[140] It is an understatement to say that discrimination during jury selection prejudices the administration of justice.[141] Government discrimination "invites cynicism respecting the jury's neutrality" and "undermines public confidence in adjudication."[142] In addition to undercutting "public confidence in the fairness of the criminal justice system," it thwarts the fundamental promise of equal justice under law for defendants and jurors.[143] Moreover, the court's finding of discrimination reflects serious misconduct that adversely reflects on an attorney's fitness to practice law.[144]

The court found that McGrath used peremptory challenges in three separate trials to improperly discriminate against prospective jurors, which amounts to very serious misconduct. The Grievance Committee should investigate and discipline McGrath for professional misconduct in violating *Batson*.

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[138] Government officials violating people's rights in a discriminatory manner is serious; indeed, it is a federal offense for law enforcement to willfully deprive someone of their Constitutional rights under the color of law on the basis of race (18 USC § 242).

[139] Code of Prof Resp, 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.

[140] *See also* Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(d).

[141] "[D]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice. . . . Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Peña-Rodriguez v. Colorado*, 580 US 206, 223.

[142] *Miller-El*, 545 US at 238.

[143] *See Flowers*, 139 S Ct at 2242 (explaining that *Batson* enforces the principle that equal justice under law requires a criminal trial free of racial discrimination in the jury selection process and noting that "*Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system").

[144] Code of Prof Resp, 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. As of June, 2022, the Judicial Departments of the Appellate Division of the New York State Supreme Court amended Part 1200 of Rule 8.4(g) (*N.Y. Rules of Professional Conduct*) of Title 22 of the Official Compilation of the Codes, Rules, and Regulations of the State of New York as follows: " A lawyer…shall not engage in conduct in the practice of law that the lawyer…knows or reasonably should know constitutes (1) unlawful discrimination…." Comment 5F to Rule 8.4 specifically mentions the discriminatory exercise of peremptory challenges, though cautions that "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation" section (g).

B. For This Misconduct, There Should Be Serious Public Discipline.

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.[145] As the Court of Appeals has 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."[146]

In measuring the appropriate discipline, the Appellate Division has considered the role of a prosecutor as a "substantial factor in aggravation."[147] 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."[148] Similarly, extensive prosecutorial experience can merit a more serious sanction.[149]

We believe that serious public discipline is the proper result in this case. *Batson* violations are often difficult to establish and thus rarely addressed, but discrimination by government lawyers against prospective jurors is abhorrent and must be taken seriously by courts and ethical authorities. This form of misconduct strikes at the heart of perhaps the most important fundamental right and promise of the legal system: a jury trial free of discrimination. If the courts do not impose very serious discipline when a prosecutor has been found to have discriminated in jury selection, others will not be deterred from doing the same.

McGrath was not an uninformed novice when he committed the misconduct found by the court. To the contrary, McGrath appears to have begun his prosecutorial career in 1985,[150] so that by the time he committed these documented acts of misconduct he was an experienced attorney. Were it not for the written so-called "cheat sheets," McGrath's misconduct would likely never have been discovered in these three cases. As a seasoned prosecutor, his conduct, rightly termed "reprehensible"[151] by the court, justifies severe discipline.

IV. The Grievance Committee Should Conduct An Independent Investigation into QDAO's Jury Selection Practices from 1990 to the Present.

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[145] *See e.g.*, *Matter of Capoccia*, 59 NY2d 549, 551 (1983).
[146] *Matter of Seiffert*, 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).
[147] *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.").
[148] *Kurtzrock*, 192 AD3d at 219.
[149] *Id*.
[150] New York Unified Court System, Attorney Online Services – Search, available at https://tinyurl.com/ynrpxf7r.
[151] Exh. A, *Morant*, 70 Misc3d at 861.

A. The QDAO Has a Documented History of *Batson* Violations and the Public Record Suggests that a QDAO Bureau Chief, two Senior Deputy Bureau Chiefs, and a Senior ADA have discriminated against potential jurors.

There is no question that discrimination occurs in every county (indeed, every state), but the growing record of *Batson* violations out of Queens merits an immediate and thorough investigation.

We still do not know who actually wrote the racist and sexist "cheat sheet" used by McGrath or everyone who used them in jury selection. But unfortunately, the problem of discrimination in jury selection by Queens prosecutors cannot be ignored as confined to McGrath or the past.

In 2009, Rachel Buchter, the QDAO Bureau Chief of the Felony Trials III Bureau as of November 2022,[152] was found by the Appellate Division to have "exercised her peremptory challenges in a discriminatory manner" in a 2005 trial.[153] Despite this finding, as of this writing, Buchter has no record of public discipline per the New York Unified Court System website.[154]

In 2017, the Appellate Division ruled that Queens prosecutor Jonathan Selkowe excluded two Black women who were prospective jurors in violation of *Batson* in the 2015 trial of Christopher Brown, a Black man.[155] And during jury selection itself, the Supreme Court, Queens County, concluded that Selkowe had exercised a peremptory challenge against *still another* Black woman in violation of *Batson*. Selkowe thus violated *Batson*[156] three times in the course of a single trial, all against Black women, requiring reversal of Mr. Brown's conviction. Despite this finding, Selkowe is listed in a March 2023 press release as a Senior Assistant District Attorney in the QDAO Homicide Bureau[157] and as of this writing, has no record of public discipline per the New York Unified Court System website.[158]

During a 2018 trial, the Supreme Court, Queens County, granted a *Batson* motion, rejecting Queens prosecutor Nicholas T. Cooper's peremptory strikes of two Hispanic prospective

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[152] Queens District Attorney's Office, Press Release (Nov. 15, 2022), available at https://tinyurl.com/ykbdry3m.
[153] *Hall*, 64 AD3d at 665. While the court opinion does not name Buchter as the prosecutor, the transcript does. *See* Trial Transcript in *Hall*.
[154] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].
[155] *Brown*, 153 AD3d at 850-52. While the court opinion does not name Selkowe as the prosecutor, the transcript of the *Batson* challenge does. *See* Trial Transcript in *Brown*.
[156] 476 US 79.
[157] Queens District Attorney's Office, Press Release (Mar. 6, 2023), available at https://tinyurl.com/yuknna27.
[158] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

jurors;[159] as of this writing, Cooper has no record of public discipline per the New York Unified Court System website.[160]

Prosecutor John Kosinski, a Senior Deputy Bureau Chief in Queens as of March 2023,[161] was found to have violated the state Constitution's equal protection rights in a trial in 1996. In *People v. Langston*, the trial court found that Kosinski improperly removed a Muslim juror, leading the court to re-instate the prospective juror and to rebuke Kosinski's "impairment of the integrity of the judicial system."[162] Despite the trial court's finding that Kosinski acted "purposefully" to discriminate based on religion,[163] as of this writing, Kosinski has no record of public discipline per the New York Unified Court System website.[164]

In 2021, the Appellate Division found that Queens prosecutor Michael Whitney excluded a Black prospective juror in violation of *Batson* in the 2018 trial of Corey Johnson,[165] requiring reversal of the conviction.[166] Most troublingly, Whitney is listed in a February 2023 press release as a Senior Deputy Bureau Chief at the QDAO[167] and as of this writing, has no record of public discipline per the New York Unified Court System website.[168]

McGrath's conduct, then, is not a relic of the past. The public record suggests that to this day, a QDAO Bureau Chief, two Senior Deputy Bureau Chiefs, and a Senior ADA in the Homicide Bureau have discriminated against potential jurors. We do not know how many prosecutors in the 1990's and/or 2000's used, or how many jurors were removed due to the smoking gun discriminatory jury notes. The totality of the circumstances, then, including McGrath's three *Batson* violations and the documented violations by four current QDAO prosecutors, reveals a clear need for a much broader investigation of jury selection by Queens prosecutors.

B. The Grievance Committee Should Investigate the QDAO's Jury Selection Practices from 1990 to the Present to Determine Whether Queens Prosecutors Used Discriminatory Notes and/or Discriminated Against Potential Jurors in Other Cases.

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[159] *People v R.C.*, Sup Ct., Queens Cty.

[160] New York Unified Court System, Attorney Online Services, Nicholas T. Cooper, Registration No. 5424155 – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

[161] Queens District Attorney's Office, Press Release (Mar. 6, 2023), available at https://tinyurl.com/yuknna27.

[162] *Langston*, 167 Misc2d at 401, 403.

[163] *Langston*, 167 Misc2d at 403.

[164] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

[165] *Johnson*, 199 AD3d at1019. While the court opinion does not name Whitney as the prosecutor, the transcript of jury selection shows he committed the *Batson* violation. *See* Trial Transcript in *Johnson*.

[166] *Johnson*, 199 AD3d at 1019.

[167] Queens District Attorney's Office, Press Release (Feb. 17, 2023), available at https://tinyurl.com/275mxcp5.

[168] New York Unified Court System, Attorney Online Services – https://tinyurl.com/347srhpu [click on "Name" hyperlink and search by name].

The judicial finding identified above provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline an individual prosecutor, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation by the Grievance Committee:

1. The Grievance Committee should begin by investigating all of the other cases prosecuted by McGrath. 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."[169] 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 investigate each and every case file and specifically jury selection notes.

2. Given the totality of the circumstances, including the smoking gun discriminatory jury notes, McGrath's *three Batson* violations, and discrimination committed by Buchter, Kosinski, Selkowe, and Whitney, there is a clear need for a much broader investigation of jury selection by Queens prosecutors.

   Most importantly, it has not been established—at least in the public record—*who actually wrote* the racist and sexist notes that McGrath used and *whether other prosecutors used them*.

   Thus, for *all* QDAO trial cases from 1990 to the present, the Grievance Committee should inspect every trial file for jury selection notes and investigate whether discrimination occurred in jury selection. The Grievance Committee should also review any and all QDAO training manuals, emails, memos, and any other documentation that reflected policy and practice decisions about jury selection, including, but not limited to, any records that relate to *Batson* challenges and who the office deemed "favorable" or "unfavorable" jurors.

   This broader investigation is not just necessary but also imminently feasible in light of the very few cases that proceed to trial.

   The Committee should ask McGrath where he obtained the notes and other Queens prosecutors from that era if they remember, or used, the notes.

   The Committee should pay special attention to document and carefully review every Queens case where a defense *Batson* objection was made at trial or where a *Batson* issue was raised on appeal, regardless of the outcome.

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

3. The Grievance Committee should promptly investigate whether any supervising attorney at the Queens County District Attorney's Office is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[170]

4. The Grievance Committee should investigate whether the Queens County District Attorney's Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.

5. The Grievance Committee should identify any prosecutors trained and/or supervised by McGrath and determine whether instances of misconduct can be found in their work as prosecutors.

Conclusion

"Equal justice under law requires a criminal trial free of . . . discrimination in the jury selection process."[171] Any violation of this principle is a serious one and such misconduct warrants investigation and public discipline.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[172] 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."[173]

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified in this letter. For that reason, it is just as important

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[170] 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.

[171] *Flowers*, 139 S Ct at 2242.

[172] New York State Bar Association Committee on Prof Discipline, Guide to Attorney Discipline, available at https://tinyurl.com/47scv4pb.

[173] *Id*.

that the Grievance Committee conduct the investigation of QDAO's jury selection practices described above.

Thank you for your careful consideration of this matter.

Yours,

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