March 20, 2023

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
335 Adams Street, Suite 2400
Brooklyn, New York 11201-3745
ad2-grv2@nycourts.gov

Re: Grievance Complaint Regarding Attorney Lauren Traum, Registration No. 4406872.

To the Grievance Committee:

We write to bring to your attention to a *Batson* violation by Lauren Traum while prosecuting Robert Bell on behalf of the Kings County District Attorney's Office (KCDAO).[1] The Appellate Division of the Second Department found that Traum committed a *Batson* violation in *People v. Bell* when she peremptorily challenged two Black prospective jurors, then proffered pretextual justifications for the strikes.[2] The court specifically held that Traum "exercised her peremptory challenges in a discriminatory manner" and that the facially race-neutral reasons she proffered "were pretextual."[3] Due to this discrimination in violation of the Constitution, the court reversed the manslaughter conviction.

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.[4] Such misconduct is therefore inherently prejudicial to the administration of justice, in violation of New York Rule of Professional Conduct 8.4(d), and adversely reflects on the attorney's fitness, in violation of Rule 8.4(h).

The Committee must also examine the discrimination in this case in light of Rule 8.4(g), which prohibits unlawful discrimination. Though a finding by a *trial court* of discriminatory peremptory challenges does not *alone* establish "unlawful discrimination" under Rule 8.4(g),[5]

[1] The writers do not have personal knowledge of the facts regarding this attorney or the case mentioned; this grievance is based on the court opinions and/or briefs and/or other documents cited herein.
[2] Exh. A, *People v Bell*, 126 AD3d 718 (App. Div. 2nd Dept. 2015). The opinion does not name Traum as the prosecutor who issued the peremptory strikes, but the trial transcript does. Exh. B, Partial Trial Transcript in *People v Bell*, Sup Ct., County of Kings, Ind. No. 9306/2008.
[3] Exh. A.
[4] *Miller-El v Dretke*, 545 US 231, 238 (2005).
[5] 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…." Under Rule 8.4(g)(5), "[c]onduct in the practice of law" includes…representing clients…." Comment 5F to Rule 8.4 specifically mentions the discriminatory

the discriminatory finding in this case was by an appellate court. Unlike a trial court, an appellate court has the benefit of time to consider briefing and the complete trial record, allowing the kind of detailed and comparative analysis that is difficult or impossible at the trial court level. Furthermore, the Grievance Committee's consideration is not limited to a court finding, but rather, should include the full factual context unearthed by the Committee's investigation.

It is additionally disturbing when, as here, the prosecutor gives the trial judge pretextual—that is to say, potentially dishonest—reasons for striking a juror. Ethical rules mandate that all attorneys practice law with integrity and not lie to a court.[6] When it comes to powerful government officials like prosecutors, honesty is an essential safety mechanism against abuse. In deciding to suspend former prosecutor Claude Stuart's license for making a false statement to a judge, the Appellate Division noted that "such conduct strikes at the heart of his credibility as a prosecutor and an officer of the court."[7]

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.[8] 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."[9]

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 *Batson* finding noted above, Traum has received no public discipline, according to the New York Attorney Detail Report.[10]

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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).

[6] The Code of Professional Responsibility, in effect until 2009, prohibited attorneys from knowingly making a false statement of law or fact (Rule DR 7-102) and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Rule DR 1-102). The Rules of Professional Conduct, in effect from 2009 to the present, similarly bar attorneys from knowingly making a false statement of fact (Rule 3.3(a)(1), Rule 4.1) and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 8.4).

[7] "In essence, the respondent made a costly misrepresentation to the trial court which necessitated the retrial of the criminal action involving a major felony." *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).

[8] 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.

[9] *Id.* at 8-9, 74-75.

[10] The New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Traum as of the date of this writing. New York Unified Court System, Attorney Online Services – Search, https://tinyurl.com/347srhpu [search by name; click on "Name" hyperlink].

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.

Our legal system holds prosecutors to the highest standards of all attorneys.[11] 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.[12]

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."[13] 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."[14]

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.[15] 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.[16] 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."[17]

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[11] *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.

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

[13] *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).

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

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

[16] Sapien & Hernandez, *supra*.

[17] *Id.*

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.[18] 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.[19] 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.[20] 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."[21]

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.[22] Congress attempted to address this injustice through the Civil Rights Act of 1875, which guaranteed Black men the right to serve on juries.[23] 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.[24] In 1895, New York enacted Civil Rights Law §13, making it a crime to exclude anyone from a jury summons on

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[18] *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).

[19] *See* Sapien & Hernandez, *supra*.

[20] 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.

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

[22] Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), available at https://tinyurl.com/yeyuncj8.

[23] 18 USC § 243 (2010).

[24] *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.

account of "race, creed, or color."[25] In 1935, the Court in *Norris v. Alabama* again held that systematic exclusion of Black people from juries violated the Equal Protection Clause.[26] New York excluded women as potential jurors until 1937,[27] but even after that date, some counties treated women serving as jurors to be permissive, rather than mandatory, allowing an exemption for women jurors based on gender.[28] This practice was finally curtailed nationally by the Supreme Court's 1975 decision in *Taylor v. Louisiana*.[29]

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,[30] paltry juror pay and lack of childcare rendering jury service impossible for many,[31] and the outright exclusion of anyone convicted of a felony charge.[32]

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."[33]

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.[34] 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.[35] 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

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[25] Civil Rights Law § 13.
[26] *Norris v Alabama*, 294 US 587 (1935).
[27] *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"*).
[28] Carol Kammen, *Women Jurors in Tompkins County*, Judicial Notice (2005), available at https://tinyurl.com/28vvjdsm.
[29] *Taylor v Louisiana*, 419 US 522 (1975).
[30] *The Jury Project* at 4-14.
[31] *Id.* at 97-101; *see also* Judiciary Law § 521 (setting juror compensation at $40 a day, to which not all jurors are entitled).
[32] Judiciary Law § 510 (disqualifying as a juror anyone who has been convicted of a felony).
[33] Equal Justice Initiative, *supra*.
[34] *Swain v Alabama*, 380 US 202 (1965).
[35] *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).

status.[36] The Supreme Court later extended *Batson* protections to Latino prospective jurors[37] and to women.[38]

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"[39]—discriminatory strikes continue, in part because the *Batson* standard is difficult—indeed, nearly impossible—to prove. Proving systemic exclusion has shown itself to be an impossible bar to effectively challenging discriminatory jury strikes.[40] 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."[41]

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.[42] Prosecutors can easily assert facially neutral reasons for peremptory strikes, and "courts are ill equipped to second-guess those reasons."[43] 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.[44]

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.[45] Notably, a new law in California has rendered many of these most common "race neutral" justifications to be presumptively invalid[46] in a change that the California District Attorneys Association opposed and called "dangerous legislation."[47]

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

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[36] *Bridgeforth*, 28 NY3d at 571 (quoting *Luciano*, 10 N.Y.3d at 502-03).
[37] *Hernandez*, 500 US 352.
[38] *J.E.B. v Alabama ex rel. T.B.*, 511 US 127 (1994).
[39] Judiciary Law § 500.
[40] *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).
[41] *Flowers*, 139 S Ct 2228.
[42] 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.
[43] *Batson*, 476 US at 106 (J. Marshall concurrence).
[44] 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).
[45] *Id*. at 116-20.
[46] California Code of Civil Procedure § 231.7.
[47] *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.

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."[48]

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 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."[49] 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.[50] One 2016 California prosecutor training manual contained a *29-page list* of justifications that courts have accepted for striking prospective jurors.[51] 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.[52] 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.[53] 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.'"[54]

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[48] Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts*, *supra.*

[49] 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.

[50] 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.

[51] 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.

[52] *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.

[53] 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.

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

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.[55] 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.[56] Likewise, North Carolina prosecutors in capital cases struck Black prospective jurors twice as often as white prospective jurors from 1990 to 2010.[57] And from 1992 to 2017, Black prospective jurors in Mississippi were four times more likely to be struck than their white counterparts.[58]

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.[59] 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*).[60] Then, in the six Flowers trials, the prosecutor struck all but one of the Black prospective jurors that he could have struck—forty-one of forty-two in all.[61] The convictions originally resulted in death sentences, but were overturned.[62] 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.'"[63] Yet Flowers was tried three more times, with the same prosecutor using racist peremptory strikes.

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[55] *Id*.

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

[57] 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).

[58] Equal Justice Initiative, *supra*.

[59] McAllister, *supra* at 320.

[60] 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).

[61] *Flowers*, 139 S C. at 2251.

[62] *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).

[63] *McAllister*, *supra* at 320-21; *Flowers v State*, 947 So2d at 937.

Racial discrimination and race exclusion in juries severely harms the accused. Diverse juries are vital to combatting unconscious biases.[64] 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.[65] 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.[66] Discrimination in jury selection can quite literally mean the difference between life or death for the accused.

Moreover, discriminatory jury selection harms the excluded jurors as well,[67] as "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[68] 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.[69] Of course, discriminatory jury selection also harms the entire community by undermining public confidence in the criminal legal system,[70] 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,[71] Suffolk County,[72] and Queens,[73] because prosecutors discriminated in jury selection.

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

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[64] Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 BU L Rev 155, 156 (2005).
[65] 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).
[66] Frampton, *supra* at 11.
[67] *Morant*, 70 Misc3d at 862.
[68] *Flowers*, 139 S Ct at 2238.
[69] Until recently, Louisiana and Oregon did not require unanimous verdicts.
[70] *Batson*, 476 US at 87.
[71] *People v Murray*, 2021 NY Slip Op 04108, 197 AD3d 46 (App. Div. 1st Dept. 2021).
[72] *People v Gurtata*, 73 Misc.3d 127(A) (App. Div. 2nd Dept. 2021).
[73] *People v Johnson*, 2021 NY Slip Op 06627, 199 AD3d 1017 (App. Div. 2nd Dept. 2021).

accountability.[74] 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.[75]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions would "provide an antidote to prosecutorial misconduct"—has not been borne out.[76] 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.[77]

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."[78] 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."[79] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.[80] "Prosecutors engage in misconduct because they know they can get away with it."[81]

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[74] *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").

[75] *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).

[76] *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).

[77] 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).

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

[79] *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).

[80] Sapien & Hernandez, *supra*.

[81] *Id.*

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.[82] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[83] But even short suspensions like those received by Rain and Kurtzrock[84]—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.

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

II. The Appellate Division of the Second Department Found that Traum Committed a *Batson* Violation by Removing Two Prospective Black Jurors in 2010.

In *People v. Bell*, the Appellate Division found that Traum struck two Black prospective jurors in violation of *Batson*.[85] The Court reversed Bell's manslaughter conviction and ordered a new trial. [86]

Two prosecutors tried the *Bell* case, Assistant District Attorneys Lauren Traum and Cary Fischer. During jury selection in the *Bell* trial, the prosecution appears have used at least 14 out of a total of 19 peremptory challenges against Black prospective jurors.[87]

In response to the defense's final *Batson* challenge, the trial court found a *prima facie* case of discrimination, but after listening to the prosecutors' supposedly race-neutral justifications, denied the *Batson* motion.[88] Prosecutor Traum made a *Batson* challenge that the defense was discriminating against white jurors, which was also denied.

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

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

[84] 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.

[85] Exh. A, *Bell*, 126 AD3d 718.

[86] *Id*.

[87] The Respondent's Brief on appeal notes that after the prosecution had struck 14 Black prospective jurors out of 17 total peremptory challenges, prosecutors used two peremptory challenges against two alternate prospective jurors, who are not identified by race (See, e.g., Respondent's Brief at p.5). It seems that no *Batson* objection occurred at that point. Assuming, without knowing, that those two prospective jurors were not Black, the prosecution would have used 14 peremptory challenges against Black jurors and five against all other prospective jurors.

[88] However, before ultimately denying the challenge, the trial court questioned the prosecutors' given reasons for striking prospective juror Ms. Peters: "This does create some difficulty, as they all do. These

Bell was ultimately convicted. On appeal, the appellate division reversed the conviction on the basis that the prosecution had removed at least two of the Black prospective jurors in violation of the Constitution.

In matching up the Appellate Division's description to the prospective jurors, it seems clear that the two jurors the prosecution was found to have purposefully discriminated against were Deacon Espin George and Mr. Jason Henderson. Though two prosecutors tried the case, both of these two jurors were removed by Traum,[89] who also made the *Batson* argument.[90]

For Juror George, Traum claimed that she struck him peremptorily because she was concerned that his position as a church deacon would make it difficult for him to sit in judgment of another individual. On appeal, the court pointed out that George had told the court that the position would not affect his jury service and that Traum had not offered any explanation as to how this position related to the circumstances of the case or qualifications to serve as a juror. The court found that "the facially race-neutral reason advanced by [Traum] for employing a peremptory challenge was pretextual."[91]

For Juror Henderson, Traum claimed she struck the prospective juror because ADA Fischer observed Henderson "shaking his head in agreement" with a white juror, who was explaining the trouble she would have in reaching a verdict and "deciding the outcome of someone else's life."[92] However, Henderson said he would convict if the case was proved beyond a reasonable doubt. And, most surprisingly, the white juror who *did* express reservations about deciding someone else's fate was *not* challenged peremptorily. For that reason, the court concluded that the challenge to juror Henderson was pretextual.[93]

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are very serious challenges. I therefore conclude that the reasons offered by the assistant district attorney are pre-textual and it's not the genuine reason for this particular challenge, because I don't see any basis in fact that the juror who responded to the questions, I thought, quite candidly and was very articulate - I just don't see that as being a basis, the fact that she did serve on a prior case. You know, the guidance from the Appellate Court to the trial judges is that basically if we find - even though we might not agree there is a real basis other than discrimination, that we should disallow the challenge because the burden, of course, is with the party challenging, to wit, the defense counsel here. And this one is really a difficult one for the court because at first blush, it seems that the basis given by the assistant is something that if I were a trial lawyer, I would probably not have made the challenge. However, in completely trying to balance this with the guidance from the Appellate Court and feeling that it is the defense's ultimate burden to persuade the Court that the reasons, although somewhat weak are merely pre-textual for intentional discrimination, I am going to find that the defense has not met the burden that the law puts on it and the Court finds that there was no discrimination based upon membership in the Black race as far as this particular juror. And I am going to - therefore, the peremptory challenge is allowed and the juror is excused." (Exh. B, Trial Transcript at 680-81, emphasis added).

[89] Exh. B, Trial Transcript at 410.

[90] Exh. B, Trial Transcript at 489-96.

[91] Exh. A, *Bell*, 126 AD3d 718.

[92] *Id.*

[93] *Id.*

The *Bell* opinion did not include an analysis of the 12 other prospective Black jurors removed by the prosecution via peremptory challenges, pointing out, "For the purposes of equal protection, the constitutional violation is the exclusion of any blacks solely because of their race (internal citation omitted). Accordingly, the race-based challenges to the two subject prospective jurors require reversal and a new trial. In view of our decision, we need not determine whether peremptory challenges exercised by the prosecutor with regard to other black prospective jurors were race-based (internal citation omitted)."[94]

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."[95] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[96] Grievance Committees are "committed to . . . recommending discipline for lawyers who do not meet the high ethical standards of the profession."[97]

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."[98]

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."[99]

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 justice and that guilt is decided upon the basis of sufficient evidence."[100] 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.[101] The New

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[94] *Id*.

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

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

[97] Attorney Grievance Committee, *supra*.

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

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

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

[101] 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.

York Rules of Professional Conduct reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[102] 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.[103] 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."[104] 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*.[105]

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 professional conduct, the accused's rights, the excluded juror's rights, and the fundamental legal principle of equal justice under law.[106]

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[102] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b). Different rules obviously apply to judges as well.
[103] *Bridgeforth*, 28 NY3d 567.
[104] *Gurtata*, 73 Misc3d 127(A) (emphasis added).
[105] *People v Smocum*, 99 NY2d 418, 422 (2003) (internal citation omitted, emphasis added)).
[106] 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).

In our view, *Batson* violations are patently "prejudicial to the administration of justice" in violation of Rule 8.4(d) of the New York Rules of Professional Conduct.[107] It is an understatement to say that discrimination during jury selection prejudices the administration of justice. [108] Discrimination by the attorney representing the Government "invites cynicism respecting the jury's neutrality" and "undermines public confidence in adjudication."[109] 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.[110]

Purposeful discrimination runs afoul of Rule 8.4(g), which prohibits lawyers from "unlawfully discriminat[ing] in the practice of law."[111] Though a finding by a *trial court* of discriminatory peremptory challenges does not *alone* establish "unlawful discrimination" under Rule 8.4(g),[112] the discriminatory finding in this case was by an appellate court. Unlike a trial court, an appellate court has the benefit of time to consider briefing and the complete trial record, allowing the kind of detailed and comparative analysis that is difficult or impossible at the trial court level. Furthermore, in considering the conduct in this case, the Grievance Committee's consideration is not limited to a court finding, but rather, should include other contextual factors such as the number of prospective jurors the prosecutor discriminated against, the racial background of the prospective jurors and the defendant, the prosecutor's voir dire notes, the prosecutor's explanation to the Committee of the strikes, and the resulting consequences of the misconduct for the accused and the community.

In addition, *Batson* misconduct may violate other Professional Conduct Rules. The Appellate Division not only concluded that Traum "exercised her peremptory challenges in a discriminatory manner" but also that the facially race-neutral reasons she proffered "were pretextual."[113] Giving a pretextual reason arguably constitutes dishonesty[114] in violation of Rule 3.3(a)(1) (knowingly making a false statement of fact to a tribunal), Rule 4.1 (knowingly making a false statement of fact to a person other than a client—here, the trial judge), Rule 8.4(b) (engaging in illegal conduct that adversely reflects on the lawyer's honesty or trustworthiness or

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[107] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(d).

[108] "[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.

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

[110] *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").

[111] *See* discussion of Rule 8.4(g) and related Comment, *supra*.

[112] *Id*.

[113] Exh. A.

[114] For example, a 2022 article in the American Bar Association's Litigation journal notes that for a *Batson* claim to succeed, a court "must agree that the striking party was lying and that the person of color was excluded because of that person's race." Fixing Batson, *Litigation*, Vol. 48, No. 4, Summer 2022, available at https://tinyurl.com/34adf4u9.

fitness as a lawyer),[115] and Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

The court found that Traum committed a *Baston* violation and offered pretextual (that is, potentially dishonest) explanations for the peremptory strike, serious misconduct that adversely reflects on the attorney's "fitness as a lawyer"[116] as reflected in Rule 8.4(h)—the catchall provision sanctioning any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

The Grievance Committee should investigate and discipline Traum for professional misconduct in violating *Batson*.

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.[117] 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."[118]

In measuring the appropriate discipline, the Appellate Division has considered the role of a prosecutor as a "substantial factor in aggravation."[119] 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."[120] Similarly, extensive prosecutorial experience can merit a more serious sanction.[121]

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

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[115] A *Batson* violation is illegal in that it violates the Constitution. Although sanctions under 8.4(b) often follow criminal prosecutions, neither criminal proceedings nor a finding that a crime has been committed is necessary to sustain a violation of Rule 8.4(b). *See, e.g.*, *In Matter of Simon*, 169 AD3d 211 (2d Dept 2019); *In re Mpaka*, 92 AD3d 1203 (3d Dept 2012).

[116] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4(h).

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

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

[119] *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.").

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

[121] *Id*.

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.

Conclusion

"Equal justice under law requires a criminal trial free of… discrimination in the jury selection process."[122] 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."[123] 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."[124]

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

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

1. The Committee should begin by investigating all the other cases prosecuted by Traum. 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."[125] 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 Traum'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 necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed an egregious *Brady* violation, leading the Appellate Division to issue a December 2020 ruling suspending his law

[122] *Flowers*, 139 S Ct at 2242.
[123] NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, available at https://tinyurl.com/47scv4pb.
[124] *Id.*
[125] Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

license for two years.[126] In determining 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."[127]

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. Indeed, after the Appellate Division's 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.[128] The investigation and resulting public report identified that prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"[129] which the report characterized as a "potential systemic issue."[130]

As a result of the investigation, the SCDAO provided new evidence to defendants in 100 percent of Kurtzrock's homicide cases reviewed and 76 percent of all cases reviewed.[131] These disclosures have already spurred applications to review convictions.[132] The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate.[133]

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 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 Kings 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

[126] *Kurtzrock*, 192 AD3d 197.
[127] *Id.* at 220.
[128] The SCDAO's Conviction Integrity Bureau (CIB) "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." County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, at 4.
[129] *Id.* at 5.
[130] *Id.* at 4.
[131] *Id.* at 6.
[132] *Id.*
[133] *Id.* at 7.

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.[134]

3. The Grievance Committee should investigate whether the Kings 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.[135]

4. The Committee should identify any prosecutors trained and/or supervised by Traum 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 in this letter. For this reason, we also call for the implementation of an independent public commission empowered to investigate all cases handled by this prosecutor and recommend the vacating of convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the District Attorney's Office, but rather a commission that operates transparently and includes 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.

Yours,

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[134] 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

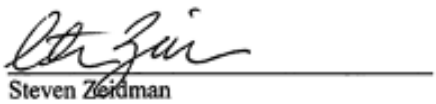
(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(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.

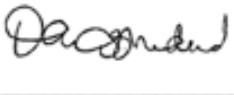
[135] District Attorney offices qualify as "law firms" under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). "'Firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to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

Cynthia Godsoe
Professor of Law
Brooklyn Law School

Nicole Smith Futrell
Associate Professor of Law
CUNY School of Law



Steven Zeidman
Professor of Law
CUNY School of Law



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

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

Justin Murray
Associate Professor of Law
New York Law School