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How They Get Away with Murder: The Intersection of Capital Punishment, Prosecutor Misconduct, and Systemic Injustice

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HOW THEY GET AWAY WITH MURDER: THE INTERSECTION OF CAPITAL PUNISHMENT, PROSECUTOR MISCONDUCT, AND SYSTEMIC INJUSTICE

ABSTRACT

Black defendants are executed at a disproportionately high rate, an injustice quietly persisting in the shadow of America's dark history of slavery and Jim Crow. While a variety of intersectional factors have perpetuated this injustice, the role of prosecutors who commit misconduct to secure a conviction is significant. Defendants are presumed innocent until proven guilty, but when the prosecutors who carry the burden of proving that guilt choose not to play by the rules, they wantonly and recklessly embrace the risk of convicting—even killing—an innocent person.

This Comment focuses on two primary forms of prosecutor misconduct: Batson *violations that occur during jury selection when a prosecutor uses his or her peremptory strikes in a racially discriminatory manner, and* Brady *violations that occur when the prosecution suppresses materially exculpatory evidence from the defense. While the Supreme Court has established Fourteenth Amendment safeguards to protect criminal defendants from these forms of misconduct, this Comment argues that those safeguards are incomplete. Fourteenth Amendment jurisprudence fails adequately both to deter prosecutorial misconduct and to guarantee that criminal defendants receive a fair trial. These failures are only amplified for Black capital defendants, who experience disproportionally higher rates of prosecutor misconduct and capital sentencing.*

Seeking to better deter incidents of prosecutor misconduct and better ensure Black capital defendants receive due process of law, this Comment proposes a four-part Model Act. Inspired by the Sentencing Reform Act of 1984 and the Federal Sentencing Guidelines, this Act (1) creates a state commission for prosecutor misconduct, (2) charges the commission with the role of drafting advisory guidelines for classifying prosecutor misconduct, (3) mandates that the commission consider the guidelines prior to imposing sanctions on prosecutors found to have committed misconduct, and (4) mandates that state judges consider the guidelines prior to imposing remedies for cases affected by misconduct.

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INTRODUCTION

Domineque Ray, a Black man from Selma, Alabama, was convicted and sentenced to death in 1999 for the alleged rape, robbery, and murder of a teenage girl.[1] Marcus Owden confessed to the murder, yet he evaded the capital sentence by also incriminating Ray for the same crime.[2] Ray maintained his innocence, arguing "that the evidence against him was false and unreliable."[3] Owden had a known history of mental illness,[4] but the prosecution asserted to the jury that Owden had "'no mental impairment' . . . and that there was 'no question about [his] mental ability.'"[5] In fact, Alabama Department of Corrections records documented Owden's mental illness as early as 1994,[6] yet the prosecution never disclosed these records to Ray's lawyers.[7] In 1999, Ray was convicted and sentenced to death.[8] In 2017, Ray's habeas corpus attorneys obtained Owden's mental health records which revealed the prosecution's knowledge of Owden's mental illnesses and delusions, bringing into question the credibility and accuracy of Owden's accusation against Ray.[9] Ray's attorneys argued that the prosecution's deliberate suppression of the exculpatory evidence of Owden's mental illness violated Ray's due process rights.[10] After the United States

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[1] Ray v. Thomas, No. 11-0543-WS-N, 2013 WL 5423816, at *1, *3 (S.D. Ala. Sept. 27, 2013); *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent#domineque_ray (last visited Oct. 7, 2021).

[2] *Ray*, 2013 WL 5423816, at *2; *Executed but Possibly Innocent*, *supra* note 1. There was no physical evidence connecting Ray to the murder, and Owden was also the only person who alleged that Ray was even in Selma on the day of the murder. *Executed but Possibly Innocent*, *supra* note 1.

[3] *Executed but Possibly Innocent*, *supra* note 1.

[4] *Id.*

[5] *Id.* (alteration in original). Prior to Ray's trial, Owden's attorneys sought an evaluation by a clinical neuropsychologist to prepare for Owden's own trial. *Id.*; Petition for Writ of Certiorari at 3, Ray v. Alabama, 139 S. Ct. 953 (2019) (mem.) (No. 18-7796) [hereinafter Petition for Writ of Certiorari].

[6] *Executed but Possibly Innocent*, *supra* note 1. These records documented Owden's illness years before Owden's and Ray's trials, showing "that Owden had been diagnosed with serious mental illness, psychosis, and schizophrenia; that he was suffering from hallucinations and delusions, and exhibited signs of bizarre speech and distortions of cognition." *Id.*; *see also* Petition for Writ of Certiorari, *supra* note 5, at 4–5.

[7] Petition for Writ of Certiorari, *supra* note 5, at 5; *Executed but Possibly Innocent*, *supra* note 1.

[8] Petition for Writ of Certiorari, *supra* note 5, at 5; *Executed but Possibly Innocent*, *supra* note 1. The prosecution knew of Owden's schizophrenia diagnosis and that he "was suffering from delusions and auditory hallucinations when he accused Ray of the [crimes] and testified against him." *Executed but Possibly Innocent, supra* note 1 (emphasis omitted).

[9] *Executed but Possibly Innocent*, *supra* note 1.

[10] Petition for Writ of Certiorari, *supra* note 5, at 2, 38; *Executed but Possibly Innocent*, *supra* note 1. As Ray's defense team litigated his prosecutorial misconduct claim, the prosecution petitioned the State to schedule Ray's execution. Petition for Writ of Certiorari, *supra* note 5, at 13.

Supreme Court declined to review his case, Ray was executed in February of 2019.[11]

Curtis Flowers, a Black man from Winona, Mississippi, was convicted and sentenced to death four separate times in six separate trials for a quadruple murder that occurred in 1996.[12] The jury convicted Flowers in the sixth trial, but the Supreme Court reversed the conviction based on findings of prosecutorial misconduct.[13] The Court specifically found that the prosecutor used peremptory challenges during the voir dire process to strike at least one member of the venire on the basis of race.[14] Even in the wake of blatant misconduct, Flowers remained on death row for over twenty-two years until he was released on bond in 2019.[15]

Anthony Graves, a Black man from Brenham, Texas, was convicted and sentenced to death for multiple murders that occurred in 1992.[16] Police first arrested Robert Carter, the father of a victim, and during questioning, Carter confessed to the murders and implicated Graves as his accomplice.[17] On multiple occasions Carter recanted his accusations against Graves,[18] but Graves was

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[11] *Executed but Possibly Innocent*, *supra* note 1. Ray's prosecutor misconduct claim was never actually reviewed on the merits, and Alabama courts dismissed Ray's claims primarily on procedural default grounds. *Id.*; Order, *Ray v. Thomas*, Civil Action 11-0543-WS-N, ECF No. 37 at 16, 17–20, 81-84, 88, 90–97, 95, 98, 100.

[12] Flowers v. Mississippi, 139 S. Ct. 2228, 2234–35 (2019); Eric Hatfield, *Six Wrongs Take Away a Right: The Odyssey of Curtis Flowers and the Prosecutorial Misconduct that Caused It*, 47 S.U. L. REV. 347, 347 (2020). Flowers was tried for capital murder six separate times, and in each trial, the same lead prosecutor represented the State against him. *Flowers*, 139 S. Ct. at 2234. The jury convicted Flowers in the first three trials, but the Mississippi Supreme Court reversed each conviction for "numerous instances of prosecutorial misconduct." *Id.* at 2236–37 (quoting Flowers v. State, 773 So. 2d 309, 327 (Miss. 2000)). The fourth and fifth trials resulted in mistrials because of a hung jury. *Id.* at 2237.

[13] *Flowers*, 139 S. Ct. at 2235.

[14] *Id.* ("[A]ll of the relevant facts and circumstances taken together establish that the trial court [at Flowers' sixth trial] committed clear error in concluding that the State's peremptory strike of [a] [B]lack prospective juror . . . was not 'motivated in substantial part by discriminatory intent.'" (quoting Foster v. Chatman, 578 U.S. 488, 513 (2016))). The second and third convictions were reversed by the Mississippi Supreme Court on the same grounds. *Id.*

[15] Hatfield, *supra* note 12, at 354. Although the prosecution committed repeated misconduct significant enough for reversal on four occasions, the prosecutor "faced no substantive consequences for his misconduct." *Id.* at 347.

[16] Graves v. Dretke, 442 F.3d 334, 336 (5th Cir. 2006); Maurice Possley, *Anthony Graves*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3253 (Feb. 10, 2016).

[17] Possley, *supra* note 16.

[18] After Graves's arrest, Carter recanted his statement and asserted that Graves did not participate in the murders. *Id.* One day prior to Graves's trial, Carter again told the prosecutor that he alone had committed the murders and that Graves was never involved. *Graves*, 442 F.3d at 338; Possley, *supra* note 16. At Carter's execution in 2000, his final words again attested to Graves's innocence. *Robert Earl Carter*, CLARK CNTY.

nonetheless convicted.[19] In 1995, the court denied Graves's motion for retrial even though allegations of prosecutorial misconduct had surfaced.[20] In 2006, the United States Court of Appeals for the Fifth Circuit overturned his conviction, finding that the prosecutor had suppressed exculpatory evidence—including Carter's statements of Graves's innocence—from Graves's defense team.[21] In 2010, after eighteen years behind bars, Graves was released from prison.[22] In an all-too-rare act of discipline, the Texas Board of Disciplinary Appeals disbarred the trial prosecutor, Charles Sebesta, for his misconduct in 2016.[23]

Unfortunately, the stories of Domineque Ray, Curtis Flowers, and Anthony Graves are not unique in the criminal justice system, especially for Black capital defendants. While Flowers and Graves both ultimately obtained "justice," it came at a high cost: a combined forty years behind bars because of prosecutors who placed more value on "winning" a conviction than on the life at stake on the other side of the court room. Even worse, Ray's execution was the result of a criminal justice system that placed more value on finality of conviction than on the name listed on the execution warrant. Defendants in this country are deemed innocent until proven guilty, but when the prosecutors who carry the burden of proving that guilt choose not to play by the rules in their pursuit of "justice," they wantonly and recklessly risk convicting—even killing—an innocent person.

Prosecutor misconduct in capital cases has a disparately high impact on Black defendants and violates their Fourteenth Amendment rights when that misconduct goes unaddressed. While the Supreme Court has attempted to rectify

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PROSECUTING ATT'Y, http://www.clarkprosecutor.org/html/death/US/carter637.htm (last visited Oct. 8, 2021) ("At his execution, Robert Carter claimed full responsibility for the entire incident. 'It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court. . . . Anthony Graves don't even know anything about it.'").

[19] *Graves*, 442 F.3d at 336; Possley, *supra* note 16.

[20] Possley, *supra* note 16.

[21] *Graves*, 442 F.3d at 336, 345; Possley, *supra* note 16. The district attorney's office conducted a comprehensive reinvestigation of Graves's case; the prosecutors assigned to retry the case concluded that Graves was innocent and established that the first prosecutor "had misled jurors, manufactured evidence, elicited false testimony and concealed evidence of Graves's innocence." Possley, *supra* note 16.

[22] Possley, *supra* note 16; Pamela Colloff, *Innocence Found*, TEX. MONTHLY (Jan. 2011), https://www.texasmonthly.com/articles/innocence-found/.

[23] Possley, *supra* note 16; Pamela Colloff, *Ex-DA Who Sent Exoneree Anthony Graves to Death Row Is Disbarred*, TEX. MONTHLY (June 12, 2015), https://www.texasmonthly.com/the-daily-post/ex-da-who-sent-exoneree-anthony-graves-to-death-row-is-disbarred/ ("[A] small measure of justice was served when the State Bar of Texas stripped Sebesta of his law license and formally disbarred him. . . . [T]wenty years after Graves' wrongful conviction[,] the bar's chief disciplinary counsel determined there was 'just cause' to believe that the former prosecutor had engaged in misconduct.").

these injustices throughout the last sixty years of its jurisprudence, this Comment argues that these remedies have proven grossly inadequate effectively to eradicate racial discrimination from the American criminal justice system, particularly in capital cases. Current jurisprudence has even spurred unethical prosecutors to develop more subtle and elusive tactics to ensure that Black capital defendants not only are convicted but also receive the death penalty. To bridge the gap between the Fourteenth Amendment safeguards endorsed by the Supreme Court and the conviction and sentencing disparities that Black capital defendants face to this day, this Comment proposes a four-part statutory solution intended adequately to deter future incidents of prosecutor misconduct and effectively to protect defendants and cases impacted by present incidents of prosecutor misconduct.

This Comment proceeds in four parts. Part I describes the background relevant to understanding the interplay of the role of the state prosecutor in capital cases and the United States' history of racial discrimination. Section A contextualizes the evolution of the relationship between the death penalty and American racism; Section B examines the role of the state prosecutor in the American criminal justice system; and Section C establishes the legal landscape surrounding incidents of prosecutorial misconduct.

Part II considers the constitutional violations that exist when prosecutorial misconduct not only occurs, but also targets minorities and people of color, especially in capital cases. It identifies and scrutinizes the failures of the Supreme Court and Congress effectively to respond to prosecutorial misconduct and protect the constitutional rights of the victims of these violations who often remain on death row or are wrongfully executed at the hands of the State.

Part III proposes a novel, four-part statutory framework for effective and meaningful government response to allegations of prosecutorial misconduct against Black and other minority defendants in capital cases. It outlines this Comment's overarching proposal: a Model Act inspired by the Sentencing Reform Act of 1984 and the Federal Sentencing Guidelines. This Act (1) creates a state commission for prosecutorial misconduct, (2) charges the commission with the role of drafting advisory guidelines for identifying and classifying prosecutorial misconduct, (3) requires the commission to consider the guidelines prior to imposing sanctions on prosecutors found to have committed misconduct, and (4) requires state judges to consider the guidelines prior to imposing remedies for cases impacted by misconduct.

Finally, Part IV contemplates the constitutional and practical implications of this proposed Act. It identifies and refutes constitutional concerns through comparative analysis with similar New York legislation and assesses the proposed Act's practical application through a further inquiry into the cases of Mr. Ray, Mr. Flowers, and Mr. Graves.

I. BACKGROUND: RACE, CAPITAL PUNISHMENT, AND THE PROSECUTOR'S ROLE

This Part provides the relevant background and context necessary to understand the role of the prosecutor in the state criminal justice system, particularly in capital cases in light of the United States' history of disparate treatment and discrimination on the basis of race. First, it explains the relationship between capital punishment and racial discrimination and how the two have evolved and intertwined throughout the nation's history. Second, it examines the role of the state prosecutor. Third, it analyzes the current state of the law: the various types of prosecutorial misconduct that commonly occur, the typical investigatory and disciplinary procedures that take place in response to allegations of prosecutorial misconduct, and the current remedies available for defendant-victims of prosecutorial misconduct.

A. *America's History of Racism and the Death Penalty*

Throughout the history of the United States, the use of capital punishment consistently has been intertwined with issues of slavery, racial discrimination, and white superiority.[24] As the slave labor economy grew in the eighteenth and nineteenth centuries, the South began conducting the majority of the country's executions, with Black individuals making up the majority of those executed.[25] Although most people at the time were put to death by hanging, Black people

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[24] *See infra* notes 25, 32, 46–47 and accompanying text.

[25] NGOZI NDULUE, DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 3 (Robert Dunham ed., Sept. 2020), https://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf. While white individuals typically were executed for committing murder, Black individuals were executed for a variety of additional transgressions, such as slave rebellion, arson, and other crimes against white people. *Id.* at 3–4. In an 1852 speech, Frederick Douglass explained that "[t]here are seventy-two crimes in the State of Virginia which, if committed by a [B]lack man . . . subject him to the punishment of death; while only two of the same crimes will subject a white man to the like punishment." AFRICAN AMERICAN INTELLECTUAL HERITAGE: A BOOK OF SOURCES 638 (Molefi Kete Asante & Abu S. Abarry eds., 1996); John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 507 (2016).

were subjected to significantly more cruel and inhumane punishments, such as being "burned at the stake, broken on wheels, gibbeted, decapitated, and dismembered."[26]

In the wake of the Civil War, the Thirteenth Amendment was ratified to abolish slavery in 1865.[27] Although Emancipation and the Reconstruction Amendments improved the legal rights of Black Americans in the South, white southerners enacted Black Codes and Jim Crow laws in their efforts to maintain the "strict racial caste system" and perpetuate the oppression of the Black population in the South.[28] Congress responded by passing the Civil Rights Act of 1866,[29] and after concerns about constitutionality, Congress incorporated the Act's primary provisions into the Fourteenth Amendment, which the states ratified in 1868.[30] The Fourteenth Amendment established equal protection before the law, guaranteeing to all citizens the same protections that "it gives to the most powerful, the most wealthy, or the most haughty."[31]

In response, citizens across the country took the law into their own hands. Particularly, extrajudicial violence—lynchings driven by race and almost exclusively directed at Black Americans—became a prevalent tool for white citizens to retain social control, and it quickly evolved into a "torturous and

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26 NDULUE, *supra* note 25, at 4.

27 Bessler, *supra* note 25, at 503; U.S. CONST. amend. XIII, §§ 1–2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. . . . Congress shall have power to enforce this article by appropriate legislation.").

28 NDULUE, *supra* note 25, at 5. Essentially, southern state legislatures adopted these Black Codes "because they would give the whites the same power over the [B]lacks which slavery had secured for them." *Status of the Southern Freedmen*, N.Y. TIMES, Aug. 22, 1868, at 4; *see* Bessler, *supra* note 25, at 522.

29 Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *Civil Rights Act of 1866*, BALLOTPEDIA, https://ballotpedia.org/Civil_Rights_Act_of_1866 (last visited Oct. 8, 2021). This Act prohibited discrimination, guaranteed citizenship, and provided equal protection and benefit of the laws for all people born in the United States, regardless of race or color. Bessler, *supra* note 25, at 519–20 ("The principal problem addressed by the Civil Rights Act of 1866, the U.S. Court of Appeals for the District of Columbia later emphasized, 'was the refusal of the recently defeated southern states to accord equal legal protection to [Black people].'" (quoting Banks v. Chesapeake & Potomac Tel. Co., 802 F.2d 1416, 1438 (D.C. Cir. 1986) (Buckley, J., concurring))).

30 Bessler, *supra* note 25, at 525–26. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

31 Bessler, *supra* note 25, at 530.

gruesome" practice intended to terrorize the Black population while simultaneously serving as a "spectacle" for the white community.[32] To be sure, lynching was never legal, yet only one percent of all lynchings that occurred after 1900 led to any criminal conviction at all, let alone a murder conviction.[33]

As lynchings declined throughout the early 1900s, state-sanctioned executions increased for crimes that formerly would have prompted a lynch mob.[34] "Neither lynching nor 'legal executions' required reliable findings of guilt,"[35] and Black defendants received only a semblance of a fair trial, decided by entirely white juries.[36] Not only did white southerners defend these pretextual trials "on the ground that at least they were better than lynching,"[37] they also argued that enforcing the constitutional requirement for nondiscrimination in jury participation[38] "would justify a return to lynching."[39] Although the U.S. Supreme Court took a clear stance against racial discrimination in criminal proceedings during the earlier half of the twentieth century, racial injustice persisted in southern states, especially in capital cases.[40]

After a wave of public protests and litigation campaigns, the Supreme Court abolished capital punishment as it was applied in 1972.[41] However, in 1976, in

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[32] NDULUE, *supra* note 25, at 5–6. These lynchings not only persecuted the Black community into submission, but they also reinforced the white community's sense of outrage, hatred, and idea of racial superiority. *Id.* at 6.

[33] *Id.* at 11. During the late 1800s and early 1900s, lynchings often took place as organized, public events, seemingly tantamount to officially and legally permitted executions. *Id.* at 14.

[34] *Id.* at 16.

[35] *Id.* at 12 (quoting EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 60 (3d ed. 2017)).

[36] EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 10 (Aug. 2010).

[37] *Id.*

[38] When Congress passed the Civil Rights Act of 1875, also called the Enforcement Act, it included a clause prohibiting discrimination in jury service on the basis of race. *The Civil Rights Act of 1875 Is Passed*, AFR. AM. REGISTRY, https://aaregistry.org/story/civil-rights-act-of-1875-was-passed/ (last visited Mar. 2, 2023).

[39] EQUAL JUST. INITIATIVE, *supra* note 36, at 10.

[40] In the 1879 decision of *Strauder v. West Virginia*, the Supreme Court overturned a statute prohibiting Black citizens from serving on juries. 100 U.S. 303, 304–05, 312 (1879). In the 1935 case of *Norris v. Alabama*, addressing the appeal of one of the "Scottsboro Boys," the Supreme Court reversed Norris's conviction because of the "sweeping characterization" in the jury commissioner's rationale for the total exclusion of Black citizens from serving on the jury. 294 U.S. 587, 598–99 (1935); *see also* EQUAL JUST. INITIATIVE, *supra* note 36, at 11 ("*Norris* and the related cases signaled a major shift: the Court would no longer tolerate the *total exclusion*, by law or by practice, of [B]lack citizens from jury rolls.").

[41] Bessler, *supra* note 25, at 488–89, 489 n.5; CONST. RTS. FOUND., A HISTORY OF THE DEATH PENALTY IN AMERICA 2 (2012), https://www.crf-usa.org/images/pdf/HistoryoftheDeathPenaltyinAmerica.pdf. In *Furman v. Georgia*, the Court found the death penalty violated the Eighth Amendment's Cruel and Unusual Punishments clause because of its inconsistent application. 408 U.S. 238, 239–40 (1972) (per curiam) ("The Court holds that

Gregg v. Georgia, the Supreme Court held constitutional a capital sentencing law that considered mitigating and aggravating factors to determine its application.[42] With the resurrection of the death penalty in 1976, states were still waiting for the Supreme Court's determination that this new death penalty was constitutional.[43] This decision came ten years later in 1987 with *McCleskey v. Kemp*, in which a Black man in Georgia was sentenced to death for the murder of a white police officer.[44] McCleskey submitted a compelling study of the application of capital punishment in Georgia during the 1970s to argue that McCleskey's death sentence was part of a clear pattern of racial discrimination in violation of the Eighth and Fourteenth Amendments.[45] The Supreme Court recognized the statistical disparity in how Georgia applied the death penalty to Black and non-Black defendants,[46] yet the majority rejected the Eighth and

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the imposition and carrying out of the death penalty . . . constitute cruel and unusual punishment in violation of the Eight and Fourteenth Amendments."); *see also id.* at 256–57 (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."). However, the Court left open the suggestion that capital punishment might be constitutionally acceptable if new laws provided clearer standards for imposing such sentences. *Id.* at 306–08 (Stewart, J., concurring).

[42] 428 U.S. 153, 206–07 (1976) (plurality opinion). In finding capital sentencing constitutional, the Court explained:

> The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. . . . [W]e hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.

Id.

[43] CONST. RTS. FOUND., *supra* note 41, at 3.

[44] 481 U.S. 279, 283, 285 (1987); *see also* Bessler, *supra* note 25, at 493 n.21.

[45] *McCleskey*, 481 U.S. at 286. The majority summarized the study:

> McCleskey proffered a statistical study . . . that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. . . . The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing [Black persons] received the death penalty in only 1% of the cases.

Id.; *see also* Bessler, *supra* note 25, at 493 n.21; CONST. RTS. FOUND., *supra* note 41, at 3.

[46] *McCleskey*, 481 U.S. at 286–87. The "never-refuted statistical evidence" showed that Black defendants accused of killing white victims were given the capital sentence seven times more often than white defendants accused of killing Black victims; even considering other factors and influences, Black defendants were given the death penalty four times more often than white defendants. Bessler, *supra* note 25, at 494; *McCleskey*, 481 U.S. at 287; CONST. RTS. FOUND., *supra* note 41, at 3.

Fourteenth Amendment claims and found that a statistical showing of discrimination was not sufficient to invalidate the death penalty.[47]

Since *McCleskey*, the Supreme Court has decided several capital cases but, for the most part, has left such matters largely to state law.[48] Today, in the United States, twenty-eight states still uphold the death penalty, and, as of April 2022, 2,414 inmates were on death row.[49] Southern states have conducted over 80% of the nation's executions since 1976—over half of them in Texas and Virginia.[50] Currently, Black prisoners make up roughly 41% of death row inmates,[51] but Black individuals only comprise roughly 13.6% of the national population.[52] There is a gross disparity in the proportion of Black prisoners on death row, and "it is not so much that the death penalty has a race problem as it is that the race problems of America manifest themselves through the implementation of the death penalty."[53]

B. The Role of the State Prosecutor

One of the most predominant avenues where such institutional racism manifests in death penalty cases is through prosecutorial misconduct. Whether the death penalty is actively pursued in any capital case often depends on the stance taken by the prosecutor.[54] Particularly in capital cases, prosecutors

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47 *McCleskey*, 481 U.S. at 312–13 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman*.'" (footnote omitted) (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984))); CONST. RTS. FOUND., *supra* note 41, at 3; Bessler, *supra* note 25, at 493–94. The Court then held that to invalidate the death penalty on Equal Protection grounds, the defendant would have to establish that the State actually encouraged the disparate result or that actual discrimination was proven in a particular case, neither of which McCleskey offered evidence to prove. *McCleskey*, 481 U.S. at 306, 313–19; CONST. RTS. FOUND., *supra* note 41, at 3.

48 Notably, in *Atkins v. Virginia*, the Supreme Court invalidated the application of the death penalty against individuals with intellectual disabilities. 536 U.S. 304, 321 (2002). In *Roper v. Simmons*, the Supreme Court invalidated the application of the death penalty against juveniles, holding that the practice was in violation of the Eighth Amendment. 543 U.S. 551, 578 (2005).

49 *Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/overview (last visited Jan. 31, 2023).

50 DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Jan. 13, 2023), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

51 *Id.*

52 *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045222 (last visited Jan. 31, 2023).

53 Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 589 (2020).

54 The prosecutor represents the people of the State, and it is his or her "duty" to ensure that the legal rights of the people of the State, including the accused, are protected. Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE

encounter heightened pressure to win both a conviction and a death sentence.[55] Studies have correlated sentencing patterns in capital cases with both the politics of state-elected prosecutors and the racial makeup of the defendant and the victim.[56] As of 2019, 95% of elected prosecutors in the United States were white, and in nine states that still administer the death penalty, 100% of the elected prosecutors were white.[57] And, since 1976, in homicide cases with interracial defendants and victims, 296 Black defendants were executed for the murder of white victims; however, only twenty-one white defendants were executed for the murder of Black victims.[58] Prosecutorial misconduct, whether quiet and tactful or outright and blatant, may compel "a jury to vote for death in a case that would have resulted in a life verdict" had the prosecutor acted ethically during the trial.[59] Consequently, prosecutorial misconduct, no matter how seemingly harmless or subtle, has a more significant impact in capital cases than in non-capital cases.[60]

Prosecutorial misconduct can occur at any stage of the criminal case, but at the pre-trial and trial stages, the vast majority of misconduct goes entirely unaddressed.[61] In *Berger v. United States*, the Supreme Court explained that prosecutorial misconduct occurs when the prosecutor "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an

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L. REV. 1327, 1328 (2009) (quoting Bennett v. Commonwealth, 28 S.W.2d 24, 26 (Ky. Ct. App. 1930)). "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." Donnelly v. DeChristoforo, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting).

55 Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 396 (2009). A number of reasons contribute to this pressure, including the conspicuous nature of these types of cases and the considerable resources district attorneys' offices pour into these cases precisely for the purpose of attaining a death penalty in addition to a conviction. *Id.* One commentator argues that elected prosecutors essentially control the state criminal justice system, particularly due to the power imbalance between prosecutors and law enforcement and the reluctance of other legal players to hold district attorneys' offices accountable. Gilbert Stroud Merrit, Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 682 (2009).

56 Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFFALO L. REV. 329, 332–33 (1995).

57 *94.5% of Elected Prosecutors in Death Penalty States Are White*; DEATH PENALTY INFO. CTR. (July 17, 2015), https://deathpenaltyinfo.org/news/94-5-of-elected-prosecutors-in-death-penalty-states-are-white. At the same time, over 75% of murder victims in cases that resulted in executions were white, even though nationally, only about 50% of murder victims in total are part of that demographic. *Race and the Death Penalty by the Numbers*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers (last visited Oct. 9, 2021).

58 Vick, *supra* note 56, at 332 n.12; *Race and the Death Penalty by the Numbers*, *supra* note 57.

59 Minsker, *supra* note 55, at 374.

60 *Id.*

61 Kirchmeier et al., *supra* note 54, at 1333 ("Instances of prosecutor misconduct may occur prior to trial during discovery, during jury selection, and during trial and post-trial.").

officer in the prosecution of a criminal offense."[62] Former Chief Judge of the U.S. Court of Appeals for the Ninth Circuit Alex Kozinski wrote in a 2013 opinion that major forms of prosecutorial misconduct had "reached epidemic proportions in recent years."[63] Indeed, one report found that official misconduct had contributed to the wrongful convictions of over 78% of Black death-row exonerees.[64] In the rare case that does result in a mistrial, reversal, or exoneration, violating prosecutors rarely receive sanctions harsher than a metaphorical slap on the wrist.[65] For example, in criminal cases that resulted in exonerations due to prosecutor misconduct, only 4% of those cases led to prosecutor discipline.[66] With virtually no consequences for the prosecutor's misconduct, there is little to no deterrent effect preventing the prosecutor from engaging in misconduct again while retrying the case.[67]

Currently, defendants are limited in their abilities to raise misconduct violations to the court, and since most courts and state bar associations are reluctant to impose sanctions on prosecutors, most investigative and disciplinary tactics are left to the district attorneys' offices to address internally.[68] As a result, there are ample opportunities for these offices to cover discriminatory conduct behind pretextual venire and evidentiary procedures.[69] District attorneys' offices across the country—including in Philadelphia, Pennsylvania; Dallas County, Texas; and Tuscaloosa County, Alabama—have been found to promote prosecutor training policies that expressly teach tactics to exclude people of color from juries.[70] Often, the worst-case scenario results: defendants are

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[62] 295 U.S. 78, 84 (1935).

[63] United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013).

[64] DEATH PENALTY INFO. CTR., DPIC SPECIAL REPORT: THE INNOCENCE EPIDEMIC 4 (2021), https://documents.deathpenaltyinfo.org/pdf/The-Innocence-Epidemic.pdf.

[65] NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 115 (Samuel R. Gross ed., 2020). Oftentimes, even after mistrial or reversal of conviction, criminal defendants will remain incarcerated while state prosecutors continue with their attempts to convict a second (or third) time. Hatfield, *supra* note 12, at 349, 353.

[66] NAT'L REGISTRY OF EXONERATIONS, *supra* note 65.

[67] Hatfield, *supra* note 12, at 355 ("Existing law, while illustrative of potential consequences for prosecutorial misconduct, produces rare instances of the imposition of substantive deterrents to prosecutorial misconduct. As a result, actual protections of individual liberty, with tangible results, from overzealous, indifferent, or blatantly unethical prosecutors are an exception in the criminal justice system, rather than an expectation." (footnote omitted)).

[68] Kirchmeier et al., *supra* note 54, at 1373.

[69] *See* Hatfield, *supra* note 12, at 351–53. This also creates little incentive for the profession to recognize and discipline misconduct, let alone take any measures to prevent future occurrences of misconduct. *See* Kirchmeier et al., *supra* note 54, at 1373–74.

[70] EQUAL JUST. INITIATIVE, *supra* note 36, at 16.

deprived of their constitutional rights and executed at the hands of the very same system sworn to pursuing and achieving justice for all.

In sum, America's unfortunate history of racism, slavery, and Jim Crow laws is the primary source underlying the disparate application of the death penalty against Black Americans. Because prosecutors exercise such broad discretion in their cases, whether the death penalty is sought depends on the stance of the prosecutor. Moreover, prosecutors have been found to engage in misconduct in capital cases, even more so when the defendant is Black, and that misconduct can play a significant role in whether the jury returns a death sentence. The current systems for identifying instances of misconduct are grossly inadequate, and violating prosecutors often face little to no punishment, leaving them with little incentive to forsake their unethical practices.

C. Current State of the Law: Misconduct, Consequences, and Remedies

This section establishes the legal landscape surrounding incidents of prosecutorial misconduct. First, it examines the case law defining the various forms of prosecutorial misconduct, focusing on two of the most dominant forms: *Batson* and *Brady* violations, named for the two main Supreme Court cases on point. Second, it reviews the general procedures the American Bar Association and state bar associations follow for investigating claims of prosecutorial misconduct. Third, it details the extent of disciplinary action taken against offending prosecutors, or, more appropriately, the lack of disciplinary action taken against offending prosecutors. Finally, it assesses the remedies available to criminal defendants impacted by incidents of prosecutorial misconduct.

1. Prevailing Forms of Prosecutorial Misconduct: Batson and Brady

One dominant form of prosecutorial misconduct occurs early in the trial proceedings during the voir dire process, where the prosecutor uses his peremptory strikes to discriminate among the potential jurors. In *Batson v. Kentucky*, during the voir dire for a criminal trial of a Black man in Kentucky state court, the prosecutor used his peremptory challenges to strike all four of the Black individuals on the venire, resulting in a jury composed of only white individuals.[71] The Supreme Court recognized that, although a prosecutor

[71] 476 U.S. 79, 82–83. Although the defense moved to dismiss the jury, arguing that the prosecutor's striking of the Black veniremen violated the defendant's Sixth and Fourteenth Amendment rights, the trial judge denied the motion, acknowledging that the prosecution was "entitled to use [its] peremptory challenges to 'strike anybody they want[ed] to.'" *Id.* at 83.

typically is allowed to exercise peremptory strikes for almost any reason, the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecutor from striking "potential jurors *solely on account of their race*."[72]

The *Batson* Court set out a three-step process to establish a prima facie case of purposeful discrimination in the voir dire process.[73] This process would require a defendant raising the purposeful discrimination claim to establish the following: (1) that he or she "is a member of a cognizable racial group" and that the prosecutor used his or her peremptory challenges to strike individuals of the defendant's race from the venire; (2) that the "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of mind to discriminate;'" and (3) that the facts and circumstances raised an inference that the prosecutor used the peremptory challenges to exclude individuals "from the petit jury on account of their race."[74] Upon establishing the prima facie case of purposeful discrimination, the burden would then shift to the Government to provide "a neutral explanation for challenging [B]lack jurors."[75] The trial court is then left "to determine if the defendant . . . established purposeful discrimination."[76] The Court remanded the case back to the trial court, holding that if the facts supported prima facie purposeful discrimination and if the prosecution failed to provide a race-neutral explanation for its actions, the defendant's conviction must be reversed.[77]

The prosecutor's suppression of evidence favorable to the accused is among the most typical examples of unconstitutional prosecutor misconduct.[78] In *Brady v. Maryland*, the Supreme Court held that withholding exculpatory evidence in a capital murder case violated the defendant's due process rights.[79] After the defendant was convicted and sentenced to death, he discovered that the prosecution had withheld evidence of another individual confessing to the homicide.[80] The Court found that the prosecution's suppression of evidence

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72 *Id*. at 89 (emphasis added).

73 *Id*. at 96.

74 *Id.* (quoting Avery v. Georgia, 345 U.S. 562, 559 (1953)).

75 *Id*. at 97. While the Court explained that the Government could not merely rebut the defendant's case or reaffirm its own good faith, it broadly construed the requirements for "a neutral explanation." *Id*.

76 *Id*. at 98.

77 *Id*. at 100. The Court also overruled *Swain v. Alabama*, 380 U.S. 202 (1965), to the extent that it required a petitioner to establish a "systemic pattern of discrimination" in jury selection. *Id*. at 92–93 ("[W]e reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.").

78 Kirchmeier et al., *supra* note 54, at 1334.

79 373 U.S. 83, 86 (1963).

80 *Id*. at 84–85.

favorable to the defendant violates the Due Process Clause when the evidence is "material" to the guilt of the defendant or punishment of the crime, regardless of whether the prosecution was acting in good faith.[81] While *Brady* focused on the prosecution's suppression of evidence that the defendant had requested,[82] later cases expanded the requirement for prosecutors to turn over evidence favorable to the defendant regardless of whether the defendant actually requested the information.[83] A prosecutor may be found to have suppressed evidence if she refuses or fails to provide to the defense evidence in her possession that may have an exculpatory impact on the defendant's case.[84]

These two forms of prosecutorial misconduct—violations of *Batson* and *Brady*—have particularly disparate impacts on Black defendants.[85] Especially in capital cases, recognizing this misconduct when it occurs can be dispositive to whether a capital defendant receives a capital sentence, and raising these misconduct claims could be the difference between life and death.

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[81] *Id.* at 87. The "material" requirement has constructed some barriers to ameliorating allegations of suppression of evidence. Kirchmeier et al., *supra* note 54, at 1334–35. In *United States v. Bagley*, the Supreme Court explained that even when a prosecutor intentionally suppresses requested evidence, there is no remedy for that misconduct unless "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985). In *Kyles v. Whitley*, the Supreme Court explained that the "material" requirement is satisfied when the evidence favorable to the accused "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. 419, 434–35 (1995). Accordingly, under this precedent, even if the court finds the prosecution suppressed exculpatory evidence at trial, unless that evidence meets the high bar for materiality, the case very well may likely not be reversed. Kirchmeier et al., *supra* note 54, at 1335–36.

[82] *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process . . . ." (emphasis added)).

[83] Kirchmeier et al., *supra* note 54, at 1334; *see also Bagley*, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 110–11 (1976) (holding that prosecutors must disclose evidence favorable to the defense even if the defense does not specifically request such). *Brady* also applies to other mitigating evidence, capital sentencing evidence, and impeachment evidence because it applies "where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87; *see also* Banks v. Dretke, 540 U.S. 668, 698 (2004); *Bagley*, 473 U.S. at 676 ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."). Further, prosecutors have an affirmative obligation to seek out favorable evidence known by police and others acting on the government's behalf. *Kyles*, 514 U.S. at 437 ("This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

[84] *Suppression of Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The destruction of evidence or the refusal to give evidence at a criminal proceeding. . . . The prosecution's withholding from the defense of evidence that is favorable to the defendant.").

[85] *See supra* notes 56–59 and accompanying text.

2. *Investigatory and Disciplinary Procedures for Claims of Prosecutorial Misconduct*

All states have methods for investigating claims of alleged prosecutorial misconduct.[86] ABA Model Rule 3.8 provides the ethical responsibilities for prosecutors, but it fails adequately to demarcate the standards regarding misconduct.[87] Rule 3.8's identification of various forms of misconduct is vague and incomplete, yet it creates a higher requirement for reporting misconduct than the Constitution demands.[88] The Model Rules do not provide a framework for disciplining identified misconduct; yet, some states' variations of the Model Rules expressly limit prosecutor discipline.[89] These limitations, coupled with the lack of disciplinary requirements, provide the courts and bar disciplinary boards wide discretion on whether to impose sanctions for incidents of prosecutorial misconduct.

When the court or a professional ethics authority has found a prosecutor to have committed misconduct, most states adhere to the same general progression of severity for imposing punishments.[90] For minor or first offenses, punishments may constitute a private warning or scolding; the severity of punishment then escalates to a public reprimand, temporary suspension from practice, and, at

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[86] Because every state has adopted some variation of the ABA Model Rules of Professional Conduct (which this Comment refers to as "the Model Rules"), the Model Rules will serve as the standard of reference to streamline the discussion for the remainder of this Section. AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR (November 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf. An investigation into prosecutorial misconduct typically begins with "the filing of a complaint at the bar disciplinary authority," after which the bar authority begins its inquiry into the allegation. Neil Gordon, *Misconduct and Punishment*, CTR. FOR PUB. INTEGRITY, https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/ (last visited Mar. 3, 2023). Depending on the circumstances, the complainant may be the criminal defendant, the defense attorney, or the trial judge. *Id*. The review into the misconduct allegations may result in formal charges against the prosecutor and a formal hearing similar to a trial. *Id*. If warranted, the disciplinary authority may impose sanctions, to which the prosecutor may appeal thereafter; however, the claim may be dismissed at any point in the proceedings. *Id*. Some states further require the highest court to review all cases that could potentially result in suspension or disbarment. *Id*.

[87] *See* AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., *supra* note 86.

[88] Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 901 (2015).

[89] AM. BAR ASS'N CPR POL'Y IMPLEMENTATION COMM., *supra* note 86. For example, Georgia's version of Rule 3.8 maintains that "[t]he maximum penalty for a violation of this Rule is disbarment." *State Bar Handbook: Rule 3.8 Special Responsibilities of a Prosecutor*, STATE BAR OF GA., https://www.gabar.org/Handbook/index.cfm#handbook/rule83 (last visited Apr. 7, 2023).

[90] Gordon, *supra* note 86.

maximum, "permanent disbarment from the practice of law."[91] These disciplinary standards and sanctions for prosecutorial misconduct are inadequately utilized and severely underenforced.[92] For instance, in a survey of over 11,000 criminal cases with allegations of prosecutor misconduct, only forty-four cases resulted in prosecutor discipline.[93] Misconduct and other breaches of ethics policies seldom are reported to disciplinary authorities due to inadequate or virtually nonexistent investigative standards, both at the state and federal levels.[94] The professional entities responsible for enforcing these disciplinary measures against offending prosecutors "are poorly equipped to do so,"[95] and trial judges only sporadically impose the sanctions available to the court, preferring to encourage professional ethics entities to take disciplinary measures instead.[96] In short, "[m]isconduct is commonly met with judicial passivity and bar association hypocrisy."[97]

3. *Remedies: Availability and Limitations*

The availability of direct remedies for victims of prosecutorial misconduct has a narrow scope, on top of a nearly insurmountable threshold.[98] The almost complete bar on civil redress against an offending prosecutor further limits the

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[91] *Id*. Of course, at any stage of the proceedings, the disciplinary authority may decide against imposing sanctions and ultimately dismiss the complaint. *Id*. Additionally, sanctions directly available to the judiciary include the imposition of contempt citations, fines, and reprimands, suspension from the court's bar, and removal or disqualification from office. *Id.*

[92] Sullivan & Possley, *supra* note 88, at 891.

[93] *Id.* at 891–92.

[94] *Id.* at 895. Nevertheless, nearly all professional rules of conduct mandate that prosecutorial misconduct be reported even if it is questionable whether the misconduct rises to the unconstitutional level. *Id.* at 901. Although both the ABA Standards for Criminal Justice and the National Prosecution Standards (adopted by the National District Attorneys Association) require the disclosure and reporting of known misconduct, demanding a professional ethical duty greater than the constitutional caselaw, professional responsibility requirements have proven almost entirely ineffective at deterring and disciplining prosecutorial misconduct. *Id.* at 895. "In short, prosecutors have virtually carte blanche authority to misinform jurors, to play to irrational fears, and to employ unscrupulous experts. And there are virtually no voices raised in opposition." *Id.* at 894 n.55 (quoting Michael L. Perlin, *"Power and Greed and the Corruptible Seed": Mental Disability, Prosecutorial Misconduct, and the Death Penalty*, 43 J. AM. ACAD. PSYCHIATRY L. 266, 270 (2015)).

[95] *Id.* at 893.

[96] *See id.* at 891; Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 830 (1999).

[97] Sullivan & Possley, *supra* note 88, at 891 n.43 (quoting BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT ix (1st ed. 1985)).

[98] Unlike use of the exclusionary rule, which provides a remedy for and deterrence of police investigatory misconduct, no direct constitutional remedy exists to ameliorate the impacts of prosecutorial misconduct unless the misconduct directly affected the fairness of the capital defendant's trial. Henning, *supra* note 96, at 818.

availability of remedies for prosecutorial misconduct.[99] When a capital defendant alleges a claim of prosecutorial misconduct during the course of the trial, the court must first decide whether the prosecutor's statements or conduct were, in fact, improper.[100] If so, the court determines whether the misconduct impaired or undermined the defendant's Sixth Amendment right to a fair trial.[101] Courts usually remedy prosecutorial misconduct that prejudices the fairness of the trial by declaring a mistrial.[102] The government can then retry the defendant on the same charges because there was a "manifest necessity" for ordering the mistrial.[103] The same applies to reversals on appeal.[104] The Supreme Court has also discussed dismissal as a potential remedy for due process violations caused by prosecutorial misconduct.[105] Such a remedy, however, would be contingent upon the showing of substantial prejudice necessary for the constitutional violation.[106] Otherwise, most remedies available to the court involve sanctioning the offending prosecutor to deter future misconduct but do not provide any relief to the victim defendant.[107]

Prosecutorial misconduct can manifest in a variety of forms, but the two highlighted in this Comment involve the racially discriminatory use of peremptory strikes during jury selection as prohibited under *Batson v. Kentucky* and the prosecutor's withholding of evidence favorable to the defense as prohibited under *Brady v. Maryland*. When defendants' misconduct claims are reviewed on the merits, there is virtually no direct remedy available to them,

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99 *Id.* at 818–19. In *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976), the Court imposed absolute immunity protecting prosecutors accused of misconduct from civil liability, and, in doing so, "shield[ed] the vast majority of prosecutorial conduct from subsequent civil claims, even for those wrongful acts done intentionally." Henning, *supra* note 96, at 819.

100 Henning, *supra* note 96, at 797.

101 *Id.*

102 *Id.*

103 United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); Henning, *supra* note 96, at 799–800.

104 United States v. Ball, 163 U.S. 662, 672 (1896); Henning, *supra* note 96, at 799.

105 Henning, *supra* note 101, at 820.

106 *Id.* Often, though, prosecutorial misconduct is insufficient for dismissal of the indictment "unless the misconduct ha[s] a direct impact on the propriety of the underlying charges." *Id.* at 823. After *United States v. Hollywood Motor Car*, the only circumstance of prosecutorial misconduct in violation of due process that should lead to dismissal of a charge "*before trial* is when, but for the prosecutorial misconduct, there would have been *no* probable cause to charge the defendant." *Id.* at 823–24 (first emphasis added).

107 *Id.* at 830. Trial courts have various alternatives to "curb" prosecutorial misconduct, including the imposition of contempt citations, fines, and reprimands, "suspension from the court's bar," and "removal or disqualification from office." *Id.* at 828–29. Courts can also recommend that bar associations and other ethics authorities take disciplinary action for a prosecutor's misconduct, but professional discipline has proven inadequate at effectively deterring prosecutorial misconduct and fails to provide any further relief for the defendant. *Id.* at 829–30.

even after misconduct is identified. As for the state, little incentive exists for rogue prosecutors to reform their ways, as the disciplinary process rarely results in any meaningful consequences. This utter lack of accountability emboldens unethical prosecutors, pacifies the judiciary, facilitates implicit (and explicit) racial prejudice, and violates the constitutional rights of capital defendants.

II. *BATSON* AND *BRADY* FAIL SUFFICIENTLY TO PROTECT BLACK CAPITAL DEFENDANTS

Part II argues that the current legal landscape insufficiently responds to the incidence of prosecutorial misconduct, particularly against Black capital defendants. The law's failure to fully rectify the consequences of prosecutorial misconduct against these capital defendants and death row inmates only perpetuates and further enables the constitutional violations resulting from this misconduct. First, this Part explores the inadequacies and limitations of the legal framework surrounding *Batson* violations and identifies the Fourteenth Amendment Equal Protection violations that continue to occur despite *Batson* and its progeny. Second, it examines the failures of the *Brady* doctrine effectively to deter prosecutors from withholding favorable evidence from the defense and identifies the Fourteenth Amendment due process violations that continue to occur as a result.

A. Constitutional Shortcomings of Batson

This section discusses the constitutional violations that the shortcomings of the *Batson* doctrine have enabled and perpetuated. First, this section identifies the long-term consequences created by *Batson* and how they have resulted in injustice for Black defendants in capital cases. Second, it explains the constitutional rights triggered by the failures to address *Batson* misconduct. Third, and finally, it discusses why these shortcomings comprise constitutional violations.

The *Batson* legal framework, created to correct the constitutional violations that occur from racially discriminatory use of peremptory strikes in jury selection, has failed effectively in preventing racial discrimination from tainting the jury selection process.[108] This primarily is because the procedures the Supreme Court established, allowing for post hoc facially neutral justifications for seemingly racially discriminatory peremptory strikes, create a wide path for

[108] Kirchmeier et al., *supra* note 54, at 1350–51.

prosecutors (and defense attorneys) to circumvent *Batson*'s demands.[109] The burden to rebut a *Batson* accusation is meager at best;[110] the Supreme Court has underscored that a prosecutor's facially neutral reason does not even need to be *plausible* or persuasive.[111] As a result, criminal defendants raising a *Batson* claim statistically have had very little success.[112] In one study analyzing seventy-six cases with *Batson* claims, the court rejected the prosecutors' facially neutral reasoning only three times.[113] Although *Batson* made clear that it is unconstitutional to strike even one juror on the basis of race, the Supreme Court neglected to establish a mechanism effectively for eliminating racial discrimination in voir dire proceedings.[114] As Justice Marshall deplored in his concurrence in *Batson*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[115] Commentators have argued that the Supreme Court's approach has done more harm than good because it has created a "roadmap" for unethical prosecutors to use their peremptory strikes for racially discriminatory purposes under the pretext of a facially neutral reason to which trial courts are directed to give great deference.[116] Reports of district attorneys' offices across the country equipping prosecutors with tools to cover discriminatory efforts to remove

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[109] *Id.*

[110] EQUAL JUST. INITIATIVE, *supra* note 36, at 15.

[111] Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam) ("The second step of this process does not demand an explanation that is persuasive, or even plausible."); Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring) ("'[P]rosecutors need only tender a neutral reason, not a persuasive, or even plausible' one." (quoting *Purkett*, 514 U.S. at 768)); Rice v. Collins, 546 U.S. 333, 338 (2006) ("'[The *Batson* standard] does not demand an explanation that is persuasive or even plausible;' so long as the reason is not inherently discriminatory, it suffices." (quoting *Purkett*, 514 U.S. at 767–68)); EQUAL JUST. INITIATIVE, *supra* note 36, at 15.

[112] Kirchmeier et al., *supra* note 54, at 1353.

[113] *Id.* at 1353 n.155.

[114] EQUAL JUST. INITIATIVE, *supra* note 36, at 16.

[115] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring); EQUAL JUST. INITIATIVE, *supra* note 36, at 16.

[116] Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545 (1999) ("The *Batson* doctrine has been rendered so ineffective a tool against racism or sexism that one jurist has been led to note that Batson and its progeny have proven to be less an obstacle to discrimination than a roadmap to it."); Henning, *supra* note 96, at 719–20 ("[T]he *Batson* court's approach does more harm than good because it permits attorneys to be less than honest in explaining their reasons in challenging a particular juror. The *Batson* inquiry results in a denigration of the judicial process when courts accept responses that 'strain credulity.'" (quoting United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring))); Kirchmeier et al., *supra* note 54, at 1353 ("[T]he potential for an unethical prosecutor to commit misconduct by striking jurors for prohibited reasons while concealing that intent with neutral reasons is significant, given the extraordinary range of 'neutral' reasons that have been found acceptable.").

people of color from jury service serve to substantiate this concern.[117] Exacerbating *Batson*'s failure is the virtual nonexistence of personal or professional consequences against a prosecutor who has been found to have unconstitutionally excluded people of color from juries.[118] Prosecutors who engage in this misconduct widely remain in office and have little incentive to correct their unethical practices.[119]

The *Batson* doctrine's low burden of proof requires significant judicial foresight and prudence to find a prosecutor's seemingly neutral explanation for peremptory strikes racially discriminatory.[120] For example, in review of Curtis Flowers's sixth trial alone, the Mississippi Supreme Court found that the prosecution's use of peremptory strikes against five of the six prospective Black jurors did not constitute a *Batson* violation.[121] The court affirmed Flowers's conviction despite compelling evidence of discrimination against potential jurors.[122] Unfortunately, this example of judicial discretion permitting blatant misconduct is not unique to Mr. Flowers's case.[123]

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117 EQUAL JUST. INITIATIVE, *supra* note 36, at 16 (providing examples of prosecutor training policies in Philadelphia, Pennsylvania; Dallas County, Texas; and Tuscaloosa County, Alabama; that expressly teach tactics to exclude people of color from juries).

118 *Id.* at 21.

119 *Id*. For example, the former district attorney for Montgomery County, Alabama, has had thirteen cases reversed due to *Batson* violations but remained in office until she retired in 2014. *Id.*; *see also Longtime Montgomery Co. District Attorney Ellen Brooks Suddenly Retires*, WSFA12 NEWS, https://www.wsfa.com/story/24819526/longtime-montgomery-co-district-attorney-ellen-brooks-suddenly-retires/ (Mar. 27, 2014, 7:46 PM).

120 Batson v. Kentucky, 476 U.S. 79, 105–06 (1986) (Marshall, J., concurring) ("[W]hen a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." (citation omitted)); Linda Greenhouse, *The Supreme Court's Gap on Race and Juries*, N.Y. TIMES (Aug. 6, 2015), https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html ("Prosecutors have learned to game the system [of *Batson* claims] by providing explanations that are accepted as persuasive to judges who appear all too eager to be persuaded.").

121 Flowers v. State, 240 So. 3d 1082, 1127 (Miss. 2017) ("[T]he trial judge did not err in denying Flowers's *Batson* challenges as to the juror."); Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) ("On appeal, Flowers argued that the State again violated *Batson* in exercising peremptory strikes against [B]lack prospective jurors. . . . [T]he Mississippi Supreme Court affirmed the conviction.").

122 The Court found evidence that the prosecution engaged in obviously disparate questioning of Black prospective jurors compared to white prospected jurors in an effort to develop pretextual reasons to strike Black jurors. *Flowers*, 139 S. Ct. at 2235. The prosecution also struck at least one Black prospective juror who was similarly situated as white prospective jurors who the prosecution did not strike. *Id.* Over the course of the six trials, the prosecution utilized its peremptory challenges to strike forty-one out of the forty-two Black prospective jurors in total. *Id.*

123 Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162 (2010) ("The promise of *Batson* remains illusory for two reasons in particular: trial judges are reluctant

Consequently, *Batson* violations that go unchecked in the voir dire process increase the likelihood that the jury ultimately will return a capital sentence.[124] Studies have shown a "distinct correlation" between the racial makeup of a jury and the likelihood the jury will return a capital sentence: the more Black members on a jury, the lower the likelihood the jury will return a death sentence.[125] Thus, when life is at stake, the failure of *Batson* to protect Black defendants from racially motivated peremptory challenges skews the balance of justice significantly toward a sentence of death.[126]

Batson's failure to prevent prosecutors from exercising peremptory strikes on the basis of race during the voir dire process violates the Equal Protection Clause of the Fourteenth Amendment.[127] To raise a successful Equal Protection claim, an individual must first establish that the government action giving rise to the claim imposed a burden (or conferred a benefit) on one class of people to the exclusion of others, which includes classifications based on race, ethnicity, or national origin.[128] Even if the government action is facially neutral but nonetheless levies an unequal burden on a class or group, Equal Protection will still apply if the government has a discriminatory motive.[129] Upon a finding that the government conduct applied against a class, the court must next identify the

to doubt prosecutors' proffered reasons for their challenged strikes, and appellate courts are highly deferential to the trial courts' decisions on these matters."); *see, e.g.*, Taylor v. State, 620 S.E.2d 363, 366 (Ga. 2005) (permitting the use of all five peremptory strikes against Black prospective jurors because the "race-neutral" rationale for exclusion was based on "limited educational and work experience"); Stokes v. State, 194 S.W.3d 762, 764–65 (Ark. 2004) (affirming the trial court's denial of a *Batson* challenge on the ground that the Black prospective jury member stricken seemed "a little quiet").

[124] Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 31 (2002).

[125] *Id.*; *see also* William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 241 (2001) ("The defendant in a B/W case [Black defendant, white victim] who draws an all-white jury is much more likely to receive a death sentence than the defendant who draws a jury with one or more [B]lack males."); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 97 (2019) ("The racial danger inherent in jury selection isn't that [B]lack jurors will side with guilty [B]lack defendants. The danger is that white jurors will convict black defendants regardless of their guilt or innocence . . . ."). This correlation applies in capital cases but "grows [significantly] stronger when the capital defendant is [B]lack." Ogletree, *supra* note 124.

[126] *See, e.g.*, Ogletree, *supra* note 124, at 32 ("When evaluations of the defendant's character are so starkly different along racial lines, and when the result of the evaluation means the difference between lethal injection or life in prison, we can see that battles over who sits on the jury really are battles for life or death.").

[127] The Fourteenth Amendment states that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[128] Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989).

[129] *Id.*; Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that a facially neutral government action that has both a disparate impact and a discriminatory motive violates the Fourteenth Amendment).

governmental interest or goal at stake and whether the justification for discrimination is a sufficient means for attaining that end interest.[130] When the class affected is suspect or a fundamental right is at stake, courts are required to assess the claim using strict scrutiny.[131] Under strict scrutiny, the government's discriminatory action violates Equal Protection unless the government can show that the action is narrowly tailored to achieve a compelling state interest.[132] In such cases, the court will be skeptical of the government's evidence and will view the evidence in the light most deferential to the individual rights at stake.[133]

Batson ultimately created a pathway to permissible discrimination on the basis of race in voir dire proceedings disguised as a framework to accomplish the opposite—permitting, even encouraging, judges to accept explanations that could hardly be considered plausible emboldens unethical prosecutors to justify their discriminatory actions with pretextual excuses.[134] *Batson* as it currently stands fails effectively to remedy Fourteenth Amendment violations and secure Equal Protection for Black capital defendants. It has been well established since 1879 in *Strauder v. West Virginia* that exclusion of an identifiable racial or ethnic group from service on a jury denies a defendant equal protection of the law.[135] Notwithstanding *Batson*'s mandate, the continued allowance in practice of the exclusion of Black prospective jurors from serving on juries constitutes a discriminatory government action that affects a suspect class.[136]

Even if the prosecution's proffered facially neutral rationale for use of the discriminatory peremptory strike satisfies *Batson*'s weak threshold,[137] studies have uncovered numerous incidences across the country of intentionally discriminatory use of peremptory strikes under the pretext of neutral reasons.[138]

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[130] Galloway, *supra* note 128, at 124.

[131] *Id.* at 125.

[132] *Id.*

[133] Devan W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 17 (2022) (explaining that under a strict scrutiny standard, "the presumption is that the government acted unconstitutionally"). "Even if the government has a rather powerful justification that might be sufficient to justify other kinds of government action that are subject to strict scrutiny, the Court is very unlikely to approve a disadvantaging racial classification." Galloway, *supra* note 128, at 135 (footnote omitted).

[134] *See supra* note 116 and accompanying text.

[135] 100 U.S. 303, 308 (1879) ("The very fact that colored people are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color . . . is . . . a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.").

[136] *Id.* at 310.

[137] *See supra* note 111 and accompanying text.

[138] *See supra* note 117 and accompanying text.

Therefore, the prosecution's seemingly race-neutral actions still trigger Equal Protection because evidence has made the discriminatory, bad-faith motive behind use of these peremptory strikes apparent.[139] At this point, strict scrutiny applies, and viewing the evidence in the light most deferential to the individual rights at stake, it is difficult to imagine the government action is narrowly tailored to achieve a compelling government interest.[140] If the compelling government interest is in achieving justice,[141] then putting a Black defendant "on trial before a jury from which members of his race have been purposefully excluded"[142] is a far cry from a narrowly tailored means to achieving that interest. It is much more likely that the government interest at stake is in securing a conviction;[143] not only would that interest fall short of the level of compelling needed to satisfy strict scrutiny, but the systemic exclusion of Black prospective jurors to secure that conviction may arguably violate the Sixth Amendment as well.[144] Still, the *Batson* doctrine as it stands today fails the Equal Protection analysis and thus is unconstitutional.

Justice Marshall's concurrence in *Batson* lamented that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."[145] The collapse of *Batson*'s protections occurred at the Court's blind acceptance of the prosecution's race-neutral reasons for using peremptory strikes against Black prospective jurors, rather than requiring the prosecution to meet the burden of strict scrutiny.[146] If the defense can establish the prima facie case of a *Batson* violation,[147] the permissibility of the prosecution's facially neutral reasons notwithstanding, the lack of any strict

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139 *See supra* notes 117, 133 and accompanying text.

140 *See supra* note 133 and accompanying text.

141 *See supra* note 54 and accompanying text.

142 Batson v. Kentucky, 476 U.S. 79, 85 (1986); *accord* Strauder v. West Virginia, 100 U.S. 303, 305 (1879).

143 *See supra* note 55 and accompanying text.

144 *Cf.* Taylor v. Louisiana, 419 U.S. 522, 537–38 (1975) (holding that the systemic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments). Although the Sixth Amendment argument was not considered in *Batson*, the concept is similar: if Black individuals "are systemically eliminated from jury panels, the Sixth Amendment fair-cross-section requirement cannot be satisfied." *Id.* at 531. How much more would the Sixth Amendment violation apply when the systemic exclusion is for the implicit purpose of preventing "an impartial jury"? U.S. CONST. amend. VI.

145 *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

146 *See id.* at 106 ("If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today *may be illusory*." (emphasis added)).

147 *Id.* at 95–97 (majority opinion).

scrutiny assessment constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.

B. *Constitutional Shortcomings of* Brady

This section examines the inadequacies and constitutional violations that result as consequences of the *Brady* doctrine as it stands today. First, this section identifies how current responses to *Brady* violations disparately impact and lead to injustice for Black capital defendants. Second, it explains the constitutional rights triggered by the failures adequately to respond to *Brady* violations. Third, and finally, it details why these deficiencies, at best, are problematic and, at worst, constitute violations of a defendant's due process rights.

The *Brady* legal framework, created to remedy prosecutor misconduct of withholding exculpatory evidence from the defense, has failed adequately to deter this form of misconduct, and effectively to ensure a finding of due process for defendants once this misconduct has occurred. This is predominantly the result of the unrealistic and confusing materiality standard backed by nearly sixty years of Supreme Court precedent.[148] Prosecutors are only required to turn over favorable evidence to the defense that is "material" to guilt or punishment, with "material" meaning that there must have been a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.[149] For judges, this standard ultimately presents an impossible task: anticipate how the withheld evidence would have impacted an entirely hypothetical trial and jury, and decide whether the criminal defendant is entitled to a remedy based solely on that hypothetical.[150] Such a task is even more inconceivable in capital cases, where the court's assessment of such a

[148] Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."); United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."); Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."); Banks v. Dretke, 540 U.S. 668, 698 (2004) ("[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (quoting *Kyles*, 514 U.S. at 435)).

[149] *See* cases cited *supra* note 148.

[150] Riley E. Clafton, *A Material Change to* Brady*: Rethinking* Brady v. Maryland*, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307, 323 (2020).

hypothetical can be determinative of whether a defendant lives or dies.[151] Justice Marshall remarked:

> [T]he existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.[152]

In that light, each juror's thought process, rationale, and perspective are unpredictable and variable, yet have a direct impact on the result of a verdict;[153] that variability demonstrates how there simply is no feasible way to expect a judge to predict how even a single piece of undisclosed evidence may have influenced an entire jury's reasoning.[154] And, especially in a criminal justice system where official misconduct has contributed to wrongful convictions of over 78% of Black death-row exonerees,[155] ensuring that the defense and jury have access to all exculpatory evidence is even more vital. Therefore, permitting the prosecution to deprive information from the defense also deprives information from the juror, undermining the accuracy and soundness of verdicts.[156]

Consequently, even after a judge has identified a prosecutor's *Brady* misconduct, *Brady*'s materiality standard still often results in the execution of capital defendants while simultaneously allowing offending prosecutors to escape any meaningful discipline for their misconduct.[157] Because *Brady* only demands a remedy when the suppressed exculpatory evidence is material to either guilt or punishment, any finding of *Brady* misconduct that the court does not deem material will leave the defendant with no judicial recourse.[158] Again,

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151 *See generally Kyles*, 514 U.S. 419 (1995); *Banks*, 540 U.S. 668 (2004).

152 *Bagley*, 473 U.S. at 693 (Marshall, J., dissenting).

153 Clafton, *supra* note 150, at 324.

154 *Id.* at 324–25.

155 DEATH PENALTY INFO. CTR., *supra* note 64, at 4.

156 *Bagley*, 473 U.S. at 693 (Marshall, J., dissenting) ("When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict."); *see* Clafton, *supra* note 150, at 324.

157 *See, e.g.*, Petition for Writ of Certiorari, *supra* note 5, at 2–3, 38.

158 Brady v. Maryland, 373 U.S. 83, 87 (1963). Studies of over 200 exonerations based on post-conviction DNA evidence revealed that prosecutorial suppression of exculpatory evidence in violation of *Brady* comprises a predominant cause of wrongful convictions. Sullivan & Possley, *supra* note 88, at 920 ("[N]early half of the cases in which innocent defendants have been exonerated based on post-conviction DNA evidence involved

especially for capital defendants, the arbitrary and ultimately unpredictable determination of materiality can lock in a death sentence, when, in reality, the jury just as readily may have relied on that suppressed evidence to reach a not guilty verdict.[159]

The *Brady* doctrine also does not provide for any mandated disciplinary action against a prosecutor who suppressed exculpatory evidence from the defense, even when the court finds the suppressed evidence material to punishment or guilt.[160] And, although the ABA Model Rules of Professional Conduct demand a higher obligation of prosecutorial ethics than the Constitution demands of *Brady*,[161] studies have revealed that prosecutors are rarely, if ever, sanctioned for *Brady* violations.[162] With virtually no consequences for rogue prosecutors and a seemingly unachievable and unpredictable standard to authorize a remedy for *Brady* violations, *Brady* as it stands neither provides a deterrent factor to discourage prosecutors from committing misconduct nor any sufficient protections or recourse for criminal defendants when the misconduct occurs.

At its best, *Brady* is highly problematic even when the court finds the suppressed evidence to be "material." Since *Brady*, Supreme Court jurisprudence has appeared implicitly to expand how it assesses materiality while simultaneously maintaining its original language regarding materiality as good law.[163] In the 1985 case of *United States v. Bagley*, the Court recognized that hearing the defendant's complete account at trial, as opposed to a partial explanation that is lacking evidence, could be the deciding factor that shifted a

prosecutorial misconduct, and more than a third of the misconduct involved the nondisclosure of exculpatory evidence." (alteration in original) (quoting Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 509–10 (2009))).

159 *Bagley*, 473 U.S. at 693 (Marshall, J., dissenting).

160 Instead, enforcement of disciplinary action most typically is left to state bar associations and local district attorneys' offices to self-police. *Cf.* Sullivan & Possley, *supra* note 88, at 890–92, 901.

161 Kirchmeier et al., *supra* note 54, at 1336–37. Unlike *Brady*, the Model Rules do not impose a materiality element in its mandate that prosecutors disclose exculpatory evidence to the defense; prosecutors are required to disclose all exculpatory evidence to the defense. Sullivan & Possley, *supra* note 88, at 910 n.113.

162 Kirchmeier et al., *supra* note 54, at 1337–38.

163 *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."); *Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

jury's verdict from guilty to not guilty.[164] It then advised courts to consider the totality of the circumstances in materiality determinations and recognize the difficult task of "reconstructing . . . the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."[165] Ten years later, in *Kyles v. Whitley*, the Court focused on measuring the "cumulative effect" of the exculpatory evidence in determining materiality.[166] When the Court, in *Banks v. Dretke*, determined materiality, it focused on how the exculpatory evidence would have fit within the defense's case it advanced at trial, how that evidence would have altered the defense's strategy, and how the suppression of that evidence contributed to the prosecution's case.[167] On its face, this flexibility in *Brady* jurisprudence seems encouraging, but the subjectivity of the materiality assessment[168] nonetheless fails to provide any substantial direction or clarity for judges effectively to recognize and remedy *Brady* misconduct.

At its worst, *Brady* permits, if not promotes, unethical prosecutorial practices that deprive criminal defendants of their due process rights. Simply put, by denying the defense access to exculpatory evidence, the prosecution denies the defense "access to meaningful participation in the trial."[169] Juries decide cases based on how each party presents the available evidence.[170] Withholding evidence from the defense minimizes its ability to present its case, which ultimately deprives the jury of all the tools it needs to reach a fair verdict.[171]

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164 *Bagley*, 473 U.S. at 676; Clafton, *supra* note 150, at 322. The Court observed that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959).

165 *Bagley*, 473 U.S. at 683. The *Bagley* majority explained:

> The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Id.

166 514 U.S. 419, 421 (1995) ("On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland* to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government . . . ." (citation omitted)).

167 540 U.S. 668, 698–703 (2004); Clafton, *supra* note 150, at 328.

168 Clafton, *supra* note 150, at 331–32 ("Applying such a subjective approach to the element of materiality—asking judges to essentially guess at the probability that the outcome of the trial could change—results in almost complete subjectivity and irrationality.").

169 *Id.* at 330.

170 *See id.* at 330–31.

171 *Id.* at 331–32.

Justice Marshall contended that a defendant's right to exculpatory evidence and the prosecutor's duty to disclose such evidence is "the essence of due process of law."[172] Permitting the prosecution to suppress exculpatory evidence deemed immaterial by the court when suppression of that evidence hinders the defendant's ability fully to make his case interferes with the defendant's due process rights and brings into question the accuracy of the trial.[173]

It is evident that although *Batson* and *Brady* provide a meaningful starting point for tackling prosecutor misconduct, their Fourteenth Amendment protections are incomplete in terms of protecting the rights of Black capital defendants and deterring the future occurrence of misconduct. Under this backdrop, Part III proposes a statutory recommendation intended to bridge the gap between the Fourteenth Amendment safeguards endorsed in *Batson* and *Brady* and the disproportionate consequences Black capital defendants face as a result of prosecutor misconduct.

III. A NEW APPROACH: THE PROSECUTORIAL MISCONDUCT REFORM ACT

This Part proposes a novel Model Act, the Prosecutorial Misconduct Reform Act, for an effective and meaningful government response to allegations of prosecutorial misconduct, particularly against Black capital defendants. First, this Part discusses the rationale behind the proposed statutory scheme, explaining the comparisons with the criminal sentencing statutes from which it was inspired while highlighting the differences between this Act and similar New York legislation passed in June 2021. Next, this Part provides the text of the Prosecutorial Misconduct Reform Act. After outlining the language therein, it elaborates upon the key provisions embodied in the proposed Act. Finally, this Part demonstrates how this Act cures the constitutional shortcomings of *Batson* and *Brady* by improving deterrence of future misconduct and providing stronger protections for cases impacted by present misconduct. First, the Act will set clear guidelines to identify prosecutorial misconduct; second, it clearly will elaborate and enforce the standards of prosecutorial conduct; and third, it will provide clear remedies for criminal defendants affected by misconduct.

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[172] United States v. Bagley, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting) ("Formulation of this right, and imposition of this duty, are 'the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair.'" (quoting Moore v. Illinois, 408 U.S. 786, 809–10 (1972) (Marshall, J., concurring in part and dissenting in part))).

[173] *See* Clafton, *supra* note 150, at 331.

A. *Foundation: The Sentencing Reform Act and Federal Sentencing Guidelines*

The Prosecutorial Misconduct Reform Act is inspired by the Sentencing Reform Act of 1984 ("SRA").[174] The SRA established the United States Sentencing Commission, which is responsible for drafting guidelines that create structure and consistency for criminal sentencing.[175] The Commission and guidelines accomplish this by clearly defining the offense elements and offender requirements to be considered in every criminal case prior to the imposition of a sentence.[176] Through the assessment of each offense and offender element, organized in some variation of a worksheet, matrix, or grid-like scoring system, the guidelines recommend a sentencing range.[177] By including provisions in this proposed Act similar to requirements of the SRA and other state sentencing statutes,[178] this proposed Act ultimately creates a more effective and concentrated government response to prosecutorial misconduct against Black capital defendants.

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[174] Sentencing Reform Act of 1984, 28 U.S.C. § 991.

[175] *Id.*; NEIL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 3 (July 2008), https://www.ncsc.org/__data/assets/pdf_file/0022/25474/state_sentencing_guidelines.pdf.

[176] Kauder & Ostrom, *supra* note 175, at 3.

[177] *Id.*

[178] The United States Sentencing Commission, for example, is required to take into account relevant aggravating and mitigating factors in establishing categories for offense use in the imposition of punishment such as "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense," "the nature and degree of harm caused by the offense," "the community view of the gravity of the offense," and "the deterrent effect a particular sentence may have on the commission of the offense by others." 28 U.S.C. § 994(c)(2)–(4), (6). Several states, including North Carolina, Maryland, and Pennsylvania, also mandate the consideration of aggravating and mitigating factors prior to the imposition of criminal punishment. LORRIN FREEMAN, N.C. SENT'G & POL'Y ADVISORY COMM'N, THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION: A HISTORY OF ITS CREATION AND ITS DEVELOPMENT OF STRUCTURED SENTENCING 16 (Aug. 2011), https://www.nccourts.gov/assets/documents/publications/commission_history_aug2011.pdf?n_GVsG20p_AUAfEN (discussing that addition of sentencing flexibility to the North Carolina sentencing guidelines structure by allowing judges to consider aggravating and mitigating factors in "exceptional cases"); MD. STATE COMM'N ON CRIM. SENT'G POL'Y, MARYLAND SENTENCING GUIDELINES MANUAL, at III (July 2022), https://msccsp.org/Files/Guidelines/MSGM/guidelinesmanual.pdf (recommending that Maryland state judges consider the defendant's "specific risks and needs" when considering sentencing and the appropriateness of alternatives); *Guidelines & Statutes*, PA. COMM'N ON SENT'G, https://pcs.la.psu.edu/guidelines-statutes/sentencing/ (last visited Jan. 5, 2022) (explaining that the Pennsylvania state sentencing guidelines recommend three ranges—standard, aggravated, and mitigated—for use after the judge considers the relevant factors surrounding the offense and offender).

Congress enacted the SRA in 1984 to respond to an epidemic of vast sentencing disparities occurring at the federal level.[179] The SRA's creation of a sentencing commission and the promulgation of federal sentencing guidelines spawned "a new era of federal sentencing."[180] Prior to the enactment of the SRA, federal judges had virtually "unlimited and unguided authority" when it came to devising appropriate sentences for convicted felons,[181] which resulted in a broad spectrum of judges with starkly conflicting views on the purposes and goals of sentencing.[182] Because of this, the federal sentencing system presented an egregiously vast range of sentences applied to offenders convicted of very similar crimes.[183] Sentencing practices pre-SRA "also lacked transparency and certainty"[184] and prohibited the public's access to courts' rationales for sentencing or parole.[185] The SRA established specific purposes for sentencing[186] and tasked the commission with the responsibility of promulgating "sentencing guidelines that provided certainty, fairness, national uniformity, and avoided unwarranted disparities among defendants with similar criminal records who were found guilty of similar conduct."[187] Concurrently, the sentencing guidelines were intended to sustain enough flexibility to allow for individualized sentences outside the bounds of the guidelines when justified by a consideration of aggravating or mitigating factors.[188]

In 2005, to correct Sixth Amendment violations within the SRA,[189] the Supreme Court's holding in *United States v. Booker* rendered the federal

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[179] U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 10 (2012).

[180] *Id.*

[181] *Id.* at 12. Leading up to 1984, most criminal statutes only outlined broad spectrums containing minimum and maximum sentences. *Id*. Because no criminal statute identified sentencing goals, each judge held authority "to decide the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which those factors would be combined in determining a specific sentence." *Id*.

[182] *Id.* At one end of this spectrum, judges focused on rehabilitation as the primary goal of sentencing, and at the other end of the spectrum, judges honed in on retributive ideologies. *Id*.

[183] *Id.*

[184] *Id.* Judges were not required to justify their rationales and motivations for determining specific sentences, and actual sentences were not announced in open court. *Id*.

[185] *Id.*

[186] 18 U.S.C. § 3553(a)(2).

[187] U.S. SENT'G COMM'N, *supra* note 179, at 15; *see also* 28 U.S.C. § 991(b)(1)(A).

[188] 28 U.S.C. § 991(b)(1)(B).

[189] United States v. Booker, 543 U.S. 220, 226–27 (2005). Two provisions of the SRA were found to have violated the Sixth Amendment because the guidelines mandated a judge impose a sentence exceeding the maximum authorized by the facts even though the facts were not proved to a jury beyond a reasonable doubt. *Id.* at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the

sentencing guidelines "effectively advisory."[190] However, regarding the role of the Sentencing Commission, the *Booker* Court explained that the Commission would continue to promote uniformity in sentencing practices by "continu[ing] to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."[191] In *Gall v. United States*, the Court explained that the correct procedure for determining post-*Booker* sentencing required a sentencing court first to determine the appropriate guideline range,[192] next to consider the application of any guideline departure policy statements,[193] and finally to consider the 18 U.S.C. § 3553(a) factors to determine whether any aggravating or mitigating circumstances warrant a variance.[194] 18 U.S.C. § 3553 instructs the court to consider factors specific to the offender and offense prior to imposing criminal sentences including the nature and circumstances of the offense, the history and characteristics of the offender, the need to provide adequate deterrence and promote respect for the law, and the need to provide remedies to victims.[195] The federal sentencing guidelines now incorporate that three-step process from *Gall*.

The proposed Prosecutorial Misconduct Reform Act essentially takes the SRA's goals of sentencing for convictions and applies them to the context of responding to prosecutor misconduct. The subjectivity that manifests as vast sentencing disparities in the context of the SRA similarly manifests as governmental inaction in the context of prosecutor misconduct. The need for uniformity and certainty outlined in the SRA is equally necessary to ensure the identification of misconduct and enforcement of sanctions against offending

maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

[190] 543 U.S. 220, 245 (2005) ("So modified, the federal sentencing statute makes the Guidelines effectively advisory." (citations omitted)); U.S. SENT'G COMM'N, *supra* note 179, at 10.

[191] *Booker*, 543 U.S. at 263 ("The Sentencing Commission will continue to collect and study appellate court decisionmaking [sic]. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.").

[192] 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." (citation omitted)); 18 U.S.C. § 3553(a)(4).

[193] 18 U.S.C. § 3553(a)(5).

[194] *Gall*, 552 U.S. at 49–50 ("[T]he district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable." (footnote omitted)); U.S. SENT'G COMM'N, *supra* note 179, at 28.

[195] *See* 18 U.S.C. § 3553(a)(1)–(7). The section 3553 factors allow the judge to consider facts that the Sentencing Guidelines might not fully encapsulate prior to imposing a sentence. Consideration of the section 3553 factors not only promotes fairness and consistency in sentencing, but also allows for judicial discretion when aggravating or mitigating circumstances compel either a milder or more severe sentence.

prosecutors. This proposed Act establishes a system of consistent and fair disciplinary measures for similar offenses, creating predictability in government responses to misconduct, ultimately leading to long-term deterrence. Consideration of the Misconduct Guidelines and additional aggravating and mitigating factors will ensure fair and predictable discipline, provide structure for government response to misconduct, and create accountability for prosecutors, state judges, and the Commission alike.

New York is currently the only state to have established a prosecutorial conduct commission,[196] and New York structured its commission after the state's Commission on Judicial Conduct.[197] While New York's legislation therefore has a similar function to this proposed Act,[198] that legislation ultimately fails to address the nuance in the severity of specific occurrences of prosecutorial misconduct[199] or provide a clear structure for the government's response to prosecutorial misconduct.[200] This proposed Act recognizes, however, that circumstances that may not necessarily be pertinent to classifying the actual misconduct itself contribute to the severity of the misconduct and the consequences it has on the criminal defendant and case when the misconduct goes unaddressed. By structuring the proposed Commission more similarly to the SRA, this proposed Act enables the Commission to consider ancillary factors prior to imposing punishments on offending prosecutors and requires state judges to consider those same factors prior to imposing remedies for the case.[201] This Act will not affect the Supreme Court's jurisprudence defining what conduct specifically constitutes *Batson* or *Brady* violations. Rather, these

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[196] Clyde Rastetter, *The New York Prosecutorial Conduct Commission and the Dawn of a New Era of Reform for Prosecutors*, 2020 CARDOZO L. REV. DE NOVO 55, 82 (2020). *See generally* S.B. 3934, 2021 Gen. Assemb., Reg. Sess. (N.Y. 2021).

[197] Rastetter, *supra* note 196, at 82–83.

[198] N.Y. S.B. 3934 ("There is hereby created within the executive department a state commission of prosecutorial conduct. The commission shall have the authority to review and investigate . . . whether a prosecutor or prosecutors has committed conduct . . . potentially violative of statutes, the legal rights of private persons, whether statutory, constitutional or otherwise . . . .").

[199] *See id.* Although the statute vests the commission with the responsibility to investigate complaints, it fails to provide a framework guiding how the commission should determine the severity of misconduct or the extent that misconduct is deserving of specific sanctions.

[200] Rastetter, *supra* note 196, at 83 ("Although the Commission will not be able to directly punish prosecutors it finds to have violated their legal and ethical obligations, it will have the power to . . . suggest sanctions against them . . . ."); N.Y. S.B. 3934 ("The attorney grievance committee of the appellate division that receives the commission's report may accept or reject the recommended sanction; impose a different sanction; or impose no sanction.").

[201] *Cf.* 18 U.S.C. § 3553(a).

guidelines become relevant after the proposed Commission identifies and investigates a claim of misconduct.

B. Proposed Text of the Prosecutorial Misconduct Reform Act

This Comment proposes that states include in their current statutes on prosecutorial misconduct, and if not in existence, then to create, the following Prosecutorial Misconduct Reform Act. This proposed Act (1) creates a state commission for prosecutorial misconduct, (2) charges the commission with the responsibility of drafting advisory standards for identifying and classifying prosecutorial misconduct, (3) charges the commission with considering the advisory standards prior to imposing sanctions on prosecutors found to have committed misconduct, and (4) charges state judges with considering the advisory standards prior to imposing remedies for criminal defendants victim to prosecutorial misconduct.

The Prosecutorial Misconduct Reform Act

a. Establishment of a State Commission for Prosecutorial Misconduct

1. There is hereby created a State Commission for Prosecutorial Misconduct. The Commission shall authorize disciplinary policies and practices for prosecutorial misconduct, review and investigate the conduct of prosecutors, and sanction and remove appointed or elected prosecutors.

2. The Commission shall develop Misconduct Guidelines and propose the following recommendations:

   A. Standards for defining and identifying prosecutorial misconduct;

   B. Appropriate policies that reduce misconduct rates and ensure criminal defendants receive a fair trial; and

   C. Sanctions for prosecutors whose conduct gives rise to disciplinary action.

3. The Commission shall investigate alleged misconduct, adjudicate formal charges filed by the Commission, and issue disciplinary orders.

4. The Commission shall promulgate its Guidelines comporting with due process and enforce the provisions of this section.

b. The Role of the Misconduct Guidelines for the Commission

1. The Misconduct Guidelines shall provide the Commission with aggravating and mitigating factors relevant to the misconduct and a range of disciplinary recommendations for offending prosecutors.

2. The Commission shall consider the Misconduct Guidelines before imposing disciplinary sanctions for prosecutor misconduct.

c. The Role of the Misconduct Guidelines for State Judges

1. The Misconduct Guidelines shall provide state judges with aggravating and mitigating factors relevant to the misconduct and a range of disciplinary recommendations for offending prosecutors.

2. State judges shall consider the Misconduct Guidelines before imposing remedies for criminal defendants and cases impacted by the misconduct.[202]

The first key provision of this Act establishes a State Commission for Prosecutorial Misconduct ("the Misconduct Commission"). The primary role of the Misconduct Commission is to absorb the responsibilities that state judges, district attorneys' offices, and state bar associations currently have to identify, investigate, and discipline prosecutorial misconduct. The creation of the Misconduct Commission will serve several purposes by absorbing this responsibility into one entity. It will define responsibility in prosecutor conduct, create an avenue for accountability in prosecutor discipline, and provide certainty and fairness in the enforcement of sanctions against misconduct. The Misconduct Commission will achieve this purpose by removing any implicit or explicit conflicts of interest from state judges, district attorneys' offices, or state bar associations, who, up until now, essentially have been charged with either the self-policing of their own profession or accusing peers in the legal field of wrongdoing.[203] In removing this conflict of interest, this Act will enhance the

[202] This Model Act is a novel proposal, but its language is inspired by other state and federal statutes and legislative bills. *See generally* N.Y. S.B. 3934; 28 U.S.C. § 991; H.B. 411, 2021 Gen. Assemb., Reg. Sess. (Ga. 2021).

[203] *Cf.* Sullivan & Possley, *supra* note 88, at 905.

discretion of state judges to perform their duties to the fullest and most ethical extent while increasing equity in prosecutor discipline.

The creation of the Misconduct Commission will remove incentives for prosecutors and their offices to ignore or suppress allegations of misconduct because they no longer will have control over the reporting or investigation of that misconduct in the first place. In defining and investigating prosecutor misconduct, the Misconduct Commission will also be able to avoid unwarranted disparities in sanctions among similar offenses. Being a separate body, removed from the pressures and emotional charges of individual trials and cases, will allow the Misconduct Commission to approach each allegation of misconduct fairly and neutrally, while also maintaining sufficient flexibility to permit individualized sanctions when warranted by mitigating or aggravating factors. The Misconduct Commission will best serve its purpose when its policies and orders effectively reduce misconduct rates and ensure that criminal defendants receive a fair trial.

The second key provision of this Act charges the Misconduct Commission with the responsibility of developing Misconduct Guidelines that create (A) standards for defining and identifying prosecutor misconduct, (B) appropriate policies that effectively reduce misconduct and ensure criminal defendants receive a fair trial, and (C) enforceable sanctions for prosecutors found to have committed misconduct. Similar to the Sentencing Guidelines, the Misconduct Guidelines are intended to comprise the form of a matrix or table that assesses the specific elements of the relevant form of misconduct and relevant aggravating and mitigating factors related to the offending prosecutor, the victim-defendant, and the case in which the misconduct occurred.[204] Relevant factors may include, for example, the severity of the misconduct in relation to the case being tried, the prosecutor's history of misconduct, whether the prosecutor had previously been disciplined for misconduct, the crime for which the defendant is being tried, the existence of evidence suggesting discriminatory or malicious intent, etc. These factors, assessed through the worksheet or matrix form, would then recommend a punishment or range of punishments commensurate to the prosecutor's misconduct. The Misconduct Guidelines' recommended punishment would be advisory, promoting consistency and fairness in the enforcement of sanctions against prosecutors found to have

[204] *Cf.* 18 U.S.C. § 3553(a)(1)–(4); U.S. SENT'G COMM'N, SENTENCING GUIDELINES MANUAL § 5A (2021).

committed misconduct, while leaving flexibility to account for extraordinary aggravating or mitigating factors within a particular case.[205]

The third key provision of this Act requires the Misconduct Commission to consider the Misconduct Guidelines prior to enforcing disciplinary action against a prosecutor. While the specific recommendations within the Misconduct Guidelines would be advisory, the requirement of the Misconduct Commission at least to consider the Misconduct Guidelines would provide a method of accountability for the Misconduct Commission enforcing disciplinary measures against offending prosecutors.[206] This provision ensures that the Misconduct Commission is knowledgeable of the recommended appropriate sanctions for similar forms of misconduct without eliminating the flexibility necessary to tailor sanctions and disciplinary actions in the most appropriate manner as warranted on an ad-hoc basis.[207] The Misconduct Commission's consideration of the Misconduct Guidelines prior to imposing sanctions against prosecutors will create sufficient consistency and regularity with prosecutorial accountability to serve as a long-term deterrent to prosecutor misconduct at the state level.

The fourth and final key provision of this Act is the requirement that state judges consider the Misconduct Guidelines prior to providing a remedy to the criminal defendant or case impacted by a prosecutor's misconduct. This provision ensures that criminal defendants receive a fair trial, separate and apart from the severity of the discipline imposed on the prosecutor. Although the state judge would play no part in sanctioning the prosecutor, requiring the judge to consider the Misconduct Guidelines, at a minimum, will assist the judge in

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[205] *Cf.* United States v. Booker, 543 U.S. 220, 244 (2005). Until 2005, the Federal Sentencing Guidelines were mandatory for judges. *Id.* at 226. However, the Supreme Court found that mandate to be a violation of the Sixth Amendment because the Sentencing Guidelines facilitated more severe sentencing of defendants based on factors that were not admitted by the defendant or proved beyond a reasonable doubt to a jury. *Id.* at 244. Although the Misconduct Guidelines would likely only cross into Sixth Amendment territory if a prosecutor were facing criminal charges for misconduct, the advisory nature of the Misconduct Guidelines would allow the Commission the flexibility to impose sanctions tailored to each prosecutor, based on circumstances for which the Misconduct Guidelines may not account.

[206] For more discussion about typical methods of enforcing sanctions against prosecutors for instances of misconduct, see *supra* notes 90–91 and accompanying text.

[207] Similar to the SRA's requirement that courts consider the section 3553 factors prior to imposing criminal sentences, the Act instructs the Commission to consider aggravating and mitigating factors in the same manner. Although not exhaustive, the Commission may consider the nature and circumstances of the prosecutor misconduct, the history and characteristics of the prosecutor, the nature and circumstances of the case being tried, the need for adequate deterrence and to promote due process, the kinds of sanctions available within the recommendation of the Misconduct Guidelines, etc. *See generally* 18 U.S.C. § 3553(a)(1)–(7).

viewing the misconduct within the fullest context of the trial. Viewing the aggravating and mitigating factors surrounding the misconduct may influence the extent to which the judge finds the misconduct prejudiced the defendant, violated the defendant's constitutional rights, misled the jury, or impaired just resolution of the case.[208] Ultimately, requiring the state judge to consider the Misconduct Guidelines would place him or her in the best position possible to provide an appropriate remedy for the injustice that occurred and focus on ensuring that due process is guaranteed and achieved within his or her court.

C. The Interplay Between the Commission, Misconduct Guidelines, and the Court

Structuring this proposed Act after the SRA and Federal Sentencing Guidelines is the most logical approach for effective state government response to *Batson* and *Brady* forms of prosecutorial misconduct. It creates a framework that establishes clear standards for identifying misconduct, provides an enforceable method for sanctioning offending prosecutors, and aids judges in the fashioning of appropriate remedies for criminal defendants. It further serves to ensure Black capital defendants receive due process and equal protection under the law, dramatically to deter the incidence of prosecutor misconduct, and significantly to reduce the disparate impact of racism in the criminal justice system. This section first will discuss how the proposed Act addresses both *Batson* and *Brady* violations, respectively, and then it will analyze how the proposed Act provides a necessary protection for Black capital defendants.

This proposed Act provides an effective government response to *Batson* violations primarily through the role of the Misconduct Commission and its creation of Misconduct Guidelines. When a defendant makes a *Batson* motion, the trial judge may refer to the Misconduct Guidelines for an organized compilation of the *Batson* factors to determine whether the defense established a prima facie *Batson* violation and to determine whether the prosecution's proffered explanation was merely a pretext. The judge will compare the listed factors with the specific facts of the case and consider the Misconduct Guidelines' recommendations prior to ruling on the motion. This does not alter the constitutional test imposed in *Batson*;[209] rather, it merely streamlines and organizes the process and factors the judge was already required to consider.

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[208] *See supra* note 207 and accompanying text. This rationale similarly applies to the judicial application of remedies for cases affected by prosecutorial misconduct.

[209] *See supra* notes 73–77 and accompanying text.

When an alleged *Batson* violation occurs, the criminal defendant may file a complaint with the Misconduct Commission regardless of whether the judge identifies the misconduct or grants the defendant's *Batson* motion. If, upon investigation, the Misconduct Commission determines that the prosecutor did in fact use his or her peremptory strikes during voir dire in a racially discriminatory manner, the Misconduct Commission will be able to impose appropriate sanctions on the prosecutor according to the Misconduct Guidelines. By assessing the Misconduct Guidelines, the Misconduct Commission will be equipped to impose an appropriate sanction; if the court found no *Batson* violation, but the Misconduct Commission did, the factors would likely recommend a more lenient sanction. If, for example, the prosecutor had a reputation for repeated misconduct, the Court identified the *Batson* violation, and the misconduct occurred in a capital case, the Misconduct Guidelines would consider those factors and recommend a more severe sanction. This will provide a much-needed check on the prosecutor's conduct, ultimately deterring the prosecutor from engaging in that unethical conduct in the future.

The court then would consider those same factors and recommendations from the Misconduct Guidelines prior to imposing a remedy for the misconduct.[210] In some cases, the most appropriate remedy for a *Batson* violation would simply be to seat the improperly stricken juror or restart the voir dire process. When more egregious factors are at play, the Misconduct Guidelines may instead recommend a mistrial.[211] In any result, the Model Act, if enacted, will equip the trial judge with the proper toolkit effectively to remedy the misconduct. In turn, the criminal defendant alleging the *Batson* violation receives a fair trial.

The creation of the Misconduct Commission and Misconduct Guidelines demands accountability from the state government in responding appropriately to *Brady* violations. Because *Brady* violations most often are not found until

[210] *Cf.* Danforth v. Minnesota, 552 U.S. 264, 288 (2008) ("Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.' They provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations." (citation omitted) (quoting American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 178–79 (1990) (plurality opinion))); Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613, 1626 (2012) ("For once *Batson* is read in light of more recent case law, state courts have considerable discretion to craft remedies beyond those that the *Batson* Court itself identified.").

[211] *See* Mazzone, *supra* note 210, at 1630 ("There are a variety of benefits to recognizing the authority of state courts to select the appropriate remedy for a constitutional violation. Constitutional violations are more likely to be cured when a state court is free to implement a remedy that best matches the offense.").

after the trial is complete,[212] the defendant's ability to file a complaint with the Misconduct Commission while simultaneously pursuing appellate litigation will promote speed and efficiency within the investigation process. The Misconduct Guidelines will establish a reliable reference point for the Misconduct Commission's determination of whether the prosecution actually withheld exculpatory evidence from the defense, and it will likewise provide clarity for the court making that determination as well. Appropriately referring to the Misconduct Guidelines to identify *Brady* misconduct will guarantee the government responds promptly to address the prosecutor's conduct and construct a remedy for the criminal defendant.

Similar to the Misconduct Commission's response to *Batson* violations, the Misconduct Guidelines will equip the Misconduct Commission to craft effective and appropriate sanctions for individual prosecutors found to have engaged in *Brady* misconduct. Reference to the Misconduct Guidelines will provide the Misconduct Commission with a recommendation range for sanctions, which, in turn, creates a system of accountability for prosecutorial conduct. The continued imposition of sanctions that match the various levels of severity of *Brady* violations will have a long-term deterrent effect, ultimately pushing the prosecutorial system towards a culture of disclosure rather than suppression.[213] As with *Batson* violations, the Model Act will achieve this deterrence result for *Brady* violations, separate and unrelated to the remedy the court provides for the criminal defendant or case.

The Misconduct Guidelines will prove essential to the court's role in crafting remedies for criminal defendants whose trials were impacted by *Brady* violations. Because judges cannot impose remedies for *Brady* violations unless the suppressed evidence satisfies the materiality requirement,[214] the Misconduct Guidelines will assist judges in determining whether the misconduct involved sufficiently material evidence. Judges are required to consider the totality of the

[212] Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1359 (2020). For example, with *Brady* claims, the prosecutorial misconduct occurs during the trial phase of litigation but is virtually "undetectable by the defense." *Id.* It is often long after the trial and direct review that capital defendants discover *Brady* violations, and the timing of those disclosures and the related litigation is typically far beyond those defendants' discretion. *Id.*

[213] *See* Sullivan & Possley, *supra* note 88, at 906 ("If the disciplinary system operates promptly and fairly, it will provide a far greater deterrent than reversal of a conviction . . . . The example set by disciplinary proceedings also carries a powerful ripple effect, a shot across the bow to others who may be tempted to stray from a righteous path." (footnote omitted)).

[214] *See supra* note 148 and accompanying text.

circumstances in their materiality assessments,[215] and the factors and recommendations included in the Misconduct Guidelines will provide necessary context and instruct the judge in determining the materiality of the evidence.[216] Suppressed evidence in a capital case would be more likely to meet the materiality threshold,[217] and evidence of racial animus or discriminatory intent in the suppression of evidence could magnify the material importance of the evidence. Requiring judges to consider the proposed Act and Misconduct Guidelines prior to assessing *Brady* violations would guarantee judges properly assess the totality of the circumstances and insert some consistency and predictability into a process that has required judges to determine the impossible.

D. Reducing the Impact of Prosecutorial Misconduct Against Black Capital Defendants

The Prosecutorial Misconduct Reform Act seeks to reduce the disparate impact of prosecutorial misconduct against Black capital defendants in three ways. First, the Act provides for the creation of Misconduct Guidelines that will clearly define the elements that constitute different variations of prosecutorial misconduct and create a system of accountability mandating both the court and the Misconduct Commission to recognize and respond to misconduct. It removes the responsibility of self-policing from prosecuting offices and provides criminal defendants an additional avenue for seeking recourse for misconduct litigation efforts that appear futile. Because Black capital defendants have experienced such a disparate impact of prosecutor misconduct, the proposed Act's creation of Misconduct Guidelines will provide the first line of protection against rogue state actors motivated more by achieving a conviction than by achieving justice.

Second, the creation of a Misconduct Commission and, by extension, the Misconduct Guidelines will better hold the criminal justice system accountable to Black capital defendants affected by prosecutor misconduct. This removes the disciplinary role from state bar associations and state judges, eliminating the potential conflict of interest that occurs by holding these groups responsible for accusing one of their peers in the profession of an ethics violation.[218] Removing the burden of sanctioning misconduct from judges will alleviate the pressure

[215] United States v. Bagley, 473 U.S. 667, 683 (1985).

[216] *See supra* text accompanying notes 148–59.

[217] *But cf. supra* text accompanying note 159.

[218] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

associated with recognizing misconduct and increase the likelihood that judges identify abuses against Black capital defendants when it occurs. Appropriate identification of misconduct creates an avenue for appropriate sanctions against the prosecutor and appropriate remedies for the criminal defendant. Leaving the investigatory and disciplinary role to the Misconduct Commission, state judges can focus on remedying the misconduct as it applies to the specific case without being caught between the dual government interests of deterrence and due process. The Misconduct Guidelines, along with its investigatory and disciplinary responsibilities, will also enhance the Misconduct Commission's ability to fashion appropriate sanctions for individual occurrences of prosecutorial misconduct. The requirement of the Commission to consider potentially aggravating factors surrounding the misconduct—the defendant's race, the specific crime being tried, the prosecutor's history of misconduct, etc.—will promote fairness and consistency in disciplining misconduct against Black capital defendants.

Third, the Misconduct Guidelines' assistance to state judges in fashioning appropriate remedies for misconduct will provide guaranteed protections for Black capital defendants. The Model Act's requirement that state judges consider the Misconduct Guidelines will equip judges with the tools necessary for crafting the most effective remedy to achieve justice. Judges will have consistent access to the Misconduct Guidelines' streamlined worksheet that contextualizes the severity of the misconduct on the case at hand, allowing them to consider potential aggravating and mitigating factors specifically relevant to cases with Black capital defendants. As a result, the remedy provided for the case will more closely cure the specific harm created by the misconduct while still providing similar sanctions for similar misconduct, regardless of the race of the defendant. This increases the likelihood that Black capital defendants receive a fair trial even after misconduct occurs.

In sum, this proposed Act creates a strong framework that demands the proper identification of misconduct against Black capital defendants, the enforcement of sanctions against offending prosecutors, and the imposition of appropriate remedies to guarantee due process of law in all cases. It cures the constitutional deficiencies of the *Batson* and *Brady* doctrines and deters future occurrences of prosecutor misconduct. And, as a result, this Act operates to eliminate the disparate impact racism has on Black capital defendants.

IV. THE PROSECUTORIAL MISCONDUCT REFORM ACT'S IMPLICATIONS ON THE CRIMINAL JUSTICE SYSTEM

This Part considers the potential constitutional and practical implications of the Act. Through a comparison with the New York legislation's procedural history, this Part first identifies potential constitutional concerns of the proposed Act and explains how the Act is flexible enough to be implemented within the bounds of any state constitution while still maintaining its structure and effectively accomplishing its purpose. This Part then provides a practical analysis of the implementation and enforcement of the Act illustrated through a reconsideration of the cases of Domineque Ray, Curtis Flowers, and Anthony Graves.

A. Constitutional Flexibility for Maximum Implementation

The Prosecutorial Misconduct Reform Act retains ample flexibility effectively to be implemented within the purview of state constitutions. A comparative analysis of New York's legislation will identify common constitutional issues this Act could face, explain how this Act avoids those constitutional issues, and further discuss additional practical steps states could take to enhance the implementation and enforceability of this Act.

New York is the only state that has passed legislation creating a commission for prosecutor misconduct;[219] however, passing this legislation was an elongated process with several constitutional obstacles.[220] After years of discussions, Governor Andrew Cuomo signed the bill into law in 2018,[221] with the stipulation that the legislature needed to amend the statute to address constitutional concerns.[222] The legislature amended it in 2019, but a New York Supreme Court Justice struck the entire statute in early 2020.[223] The legislature restructured the stricken statute to cure the state constitutional violations, and, in June 2021, Governor Cuomo again signed the updated bill into law.[224]

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[219] Rastetter, *supra* note 196, at 82. *See generally* S.B. 3934, 2021 Gen. Assemb., Reg. Sess. (N.Y. 2021).

[220] Jonathan Bandler, *Cuomo Signs New Bill Creating Commission to Review Complaints Against Prosecutors*, LOHUD (June 18, 2021, 11:39 AM), https://www.lohud.com/story/news/2021/06/18/cuomo-signs-bill-creating-commission-prosecutorial-conduct/7742264002/.

[221] *Id.*

[222] Jon Campbell, *New York Had a Law to Investigate Prosecutors. Why a Judge Just Tossed It*, LOHUD, https://www.lohud.com/story/news/politics/albany/2020/01/29/judge-throws-out-new-york-panel-review-district-attorney-misconduct/4608152002/ (June 17, 2021, 10:31 PM).

[223] Bandler, *supra* note 220; Campbell, *supra* note 222.

[224] Bandler, *supra* note 220.

The predominant constitutional issues with the initial statute related to separation of powers violations.[225] The New York State Constitution specifically granted the ability to discipline attorneys to the state's appellate court, but the 2018 legislation contained a provision that would have required the appellate court to create a new panel specifically for hearing appeals of the Commission's decision.[226] The state constitution ultimately did not allow the legislature to create a new judicial body and grant that body jurisdiction that was not provided for in the state constitution.[227] The recently passed 2021 legislation corrected those errors by vesting oversight of the Commission entirely within the executive branch.[228] It also vested appellate jurisdiction over the Commission's decisions within the state supreme court (New York's trial court), which already contained a grievance committee for complaints against attorneys.[229] This change created a direct pathway for appeals to a preexisting jurisdiction.[230]

This Act allows for full implementation by states while maintaining sufficient flexibility for states to enact the Act within the boundaries of their differing state constitutions. Circumventing the constitutional obstacles New York's legislation faced, this Act intentionally left open necessary questions that may require different statutory solutions to align with different state constitutions.[231] Still, this Act also maintains flexibility for individual states to implement additional measures that would strengthen the effectiveness and enforceability of the Act. To make an example out of New York's legislation,[232] it contained provisions that mandated that its commission be composed "of experienced practitioners from all sides of the [state] criminal justice system";[233] provided its commission subpoena power to compel prosecutors under investigation to produce requested documents and appear at hearings;[234] required that records of the commission's investigations, hearings, and decisions be made publicly available;[235] and imposed additional duties upon its

[225] Campbell, *supra* note 222.
[226] *Id.*
[227] *Id.*
[228] Rastetter, *supra* note 196, at 84.
[229] *Id.* at 85.
[230] *Id.*
[231] For example, this includes questions regarding the specific makeup of the Commission, who holds authority to appoint members to the Commission, length of terms for Commission members, and specific additional responsibilities for Commission members, to name a few.
[232] Rastetter, *supra* note 196, at 86. The New York statute was backed by significant bipartisan support. *Id.*
[233] *Id.* at 87.
[234] S.B. 3934, Gen. Assemb., Reg. Sess. (N.Y. 2021); Rastetter, *supra* note 196, at 87.
[235] N.Y. S.B. 3934; Rastetter, *supra* note 196, at 87.

commission to publish annual reports containing "legislative and administrative recommendations based on problems it has identified."[236] These provisions, while not mandatory, would enhance the effectiveness of the Act achieving its purpose when permitted by individual state constitutions.

Through careful analysis of the newly enacted New York legislation's procedural history, this Act avoids overstepping constitutional boundaries while leaving ample space for states fully to effectuate the Act's mandates within the purview of their respective constitutions. Yet, individual states can look to the example of New York's legislation for further inspiration, take advantage of the Act's flexibility, and include additional provisions that strengthen the Act's enforceability.

B. Practical Impacts and Enhanced Protections for Black Capital Defendants

To best understand the practical implications of the proposed Prosecutorial Misconduct Reform Act, it logically follows to consider the cases of Domineque Ray, Curtis Flowers, and Anthony Graves.[237] It is important, however, to remember that this Act seeks to respond to dual government interests, namely those in eliminating occurrences of prosecutor misconduct in the future while ensuring criminal defendants receive a fair trial in the present. In evaluating the cases of Mr. Ray, Mr. Flowers, and Mr. Graves, this section considers the various ways the proposed Act strikes a balance between those two interests.

Domineque Ray's case involved an occurrence of *Brady* misconduct.[238] The prosecution obtained evidence of Ray's accuser's history of psychosis and schizophrenia at the time of the accusation[239] and not only withheld that evidence from Ray's defense attorneys but also expressly asserted to the jury that Ray's accuser had no mental illness.[240] Although the prosecution obtained this evidence as early as 1998,[241] Ray's defense did not discover this evidence until 2017, nineteen years later.[242] Seemingly, procedural defaults sealed Ray's capital sentence in the post-conviction litigation,[243] but it is conceivable to

[236] Rastetter, *supra* note 196, at 87.
[237] *See supra* pp. 1531–37.
[238] *See supra* note 10 and accompanying text.
[239] *Executed but Possibly Innocent*, *supra* note 1; Petition for Writ of Certiorari, *supra* note 5, at 4–5.
[240] Petition for Writ of Certiorari, *supra* note 5, at 5; *Executed but Possibly Innocent*, *supra* note 1.
[241] *Executed but Possibly Innocent*, *supra* note 1; Petition for Writ of Certiorari, *supra* note 5, at 4–5.
[242] *See supra* note 9 and accompanying text.
[243] *Executed but Possibly Innocent*, *supra* note 1; Order, *Ray v. Thomas*, Civil Action 11-0543-WS-N, ECF No. 37 at 16, 17–20, 81–84, 88, 90–97, 95, 98, 100.

imagine the existence of an acting Prosecutorial Misconduct Reform Act having a positive impact on Ray's case.

If Ray's attorneys filed a complaint with the Commission upon discovering the evidence of Ray's accuser's mental illness, the Commission would have begun an investigation into the alleged *Brady* misconduct. The investigation would have revealed the exculpatory nature of the suppressed evidence, notwithstanding a pending materiality assessment.[244] The Commission then would refer to the Misconduct Guidelines to review and consider recommendations as to the severity of the prosecutor's misconduct in Ray's case. The Commission would also consider additional factors that may aggravate or mitigate the severity of the misconduct against Ray.[245] The Commission likely would impose a sanction similar to, or even more severe than, what the Guidelines recommended, holding the prosecutor accountable for his unethical actions. While it is unlikely that the Act would have changed any of the Alabama procedural default holdings,[246] the Commission's imposition of sanctions against the prosecution may have slowed or even prevented the prosecution from petitioning the State of Alabama to schedule Ray's execution when it did. Although it is hard to argue that justice would have been achieved without a court reviewing Ray's claims on the merits and granting remedies for the misconduct, the enforcement of disciplinary measures against the prosecutor could play a role in preventing that misconduct from occurring again.

Curtis Flowers's case involved a *Batson* violation.[247] In six trials, the court overturned four convictions due to misconduct by the same lead prosecutor,[248] and in multiple trials, the misconduct involved the prosecutor's discriminatory use of peremptory strikes against a Black potential juror.[249] Flowers spent over twenty-two years on death row before being released on bond,[250] and it is possible that the Act could have contributed significantly to reducing that time.

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[244] *See supra* note 81 and accompanying text.

[245] Some relevant factors would be the mere fact that Ray's case involved the death penalty, the materiality of the evidence suppressed, the length of time the evidence remained undiscovered by the defense, the prosecutor's history of misconduct or prior allegations against the prosecutor of misconduct, the severity of the crime for which Ray was accused, and the extent that the misconduct affected the jury.

[246] *Executed but Possibly Innocent*, *supra* note 1; Order, *Ray v. Thomas*, Civil Action 11-0543-WS-N, ECF No. 37 at 16, 17–20, 81–84, 88, 90–97, 95, 98, 100.

[247] Flowers v. Mississippi, 139 S. Ct. 2228, 2235, 2251 (2019).

[248] *See supra* note 12 and accompanying text.

[249] *Flowers*, 139 S. Ct. at 2235.

[250] Hatfield, *supra* note 12, at 354.

Had Flowers's attorneys filed a complaint with the Commission at the earliest possibility, presumably when the *Batson* violations occurred during the first trial,[251] the Commission would have investigated the allegations. Since the court easily found *Batson* violations, it likely follows that the Commission would have come to the same conclusion. That finding along with reference to the Misconduct Guidelines would have empowered the judge to remedy the *Batson* violation to ensure Flowers received a fair trial; this likely would have resulted in the same reversed conviction. Most importantly, the finding of *Batson* misconduct would lead the Commission to impose sanctions on the prosecutor, and, depending on the Commission's assessment of the Guidelines and the various aggravating or mitigating factors, the sanctions could vary in severity. Based on the Court's recognition of the prosecutor's reputation for repeated misconduct,[252] the Court would likely have considered the prosecutor's history of misconduct a relevant aggravating factor when crafting an appropriate sanction. Such sanctions would have likely prevented that prosecutor from being reassigned to Flowers's subsequent trials, and one could only hope that, with another prosecutor leading the case well before 2019, Flowers would not still be waiting for a fair trial to this day.

The case of Anthony Graves, another capital case containing *Brady* misconduct,[253] exemplifies the modern, best-case scenario for a government response to the discovery of suppressed exculpatory evidence, and the Act would only further reinforce that result. Graves remained on death row for fourteen years before the Fifth Circuit overturned his conviction, and for twenty-four years after the trial, the lead prosecutor faced no consequences.[254] Had the proposed Act been enacted, it primarily would have served to speed up the timeline of achieving justice for Graves.

Notably, if Graves's defense had filed a complaint with the Commission concurrently with its motion for retrial in 1995,[255] the Commission would have begun its investigation separately from the court's ruling. Had it found the claim viable, it would have imposed sanctions on the lead prosecutor based on the Guidelines' recommendations at the earliest possibility, up to twenty-one years

[251] *See supra* note 12 and accompanying text.

[252] *Flowers*, 139 S. Ct. at 2235. The jury convicted Flowers in the first three trials, but the Mississippi Supreme Court reversed each conviction for "numerous instances of prosecutorial misconduct." *Id.* (quoting Flowers v. State, 773 So. 2d 309, 327 (Miss. 2000)).

[253] Graves v. Dretke, 442 F.3d 334, 336, 345 (5th Cir. 2006); Possley, *supra* note 16.

[254] *Graves*, 442 F.3d at 336, 345; Possley, *supra* note 16.

[255] Possley, *supra* note 16.

before the prosecutor ended up facing consequences for his actions. Further, the 1995 Court would have had access to the Guidelines to review and consider prior to ruling on the motion for mistrial and may have employed the statutorily-based factors to reach an alternative decision and grant the motion for mistrial. In the case that the court still denied the motion for mistrial and the Commission were investigating the *Brady* allegations concurrently with the Fifth Circuit in 2006, it would have likely been in the position to impose sanctions on the prosecutor in 2006. Had the Act been in place in Texas in the 1990s, it is not unreasonable to imagine a world in which Anthony Graves achieved justice without paying the price of eighteen years in prison.

To be sure, these cases were assessed through the hypothetical lens of a fully effective Prosecutorial Misconduct Reform Act. Even still, this practical analysis of "what could have been" provides a snapshot of how this Act could contribute to both government interests of preventing future misconduct and guaranteeing present fair trials. The flexibility of this Act is amenable to the nuances of individual state constitutions, yet it maintains its structure effectively to accomplish its purpose: to reduce the impact of prosecutorial misconduct against Black capital defendants.

CONCLUSION

Black defendants are executed at a disproportionately high rate, an injustice quietly persisting in the shadow of America's dark history of slavery and Jim Crow. While a variety of intersectional factors contribute to the continuance of this injustice, the role of prosecutors who engage in unethical conduct to secure a conviction is significant. The prosecutor is tasked with the duty to ensure the legal rights of the People—including the accused—are protected. When prosecutors abandon that duty and deny a fair trial from those to which one is certainly entitled, innocent people are convicted and even condemned to die. This Comment argues that the current Fourteenth Amendment jurisprudence safeguarding against prosecutor misconduct is cursory, failing both adequately to deter the incidence of prosecutor misconduct and effectively to guarantee that defendants—particularly Black capital defendants—receive a fair trial.

States should adopt the Prosecutorial Misconduct Reform Act, establish a Commission for Prosecutor Misconduct, and promulgate Misconduct Guidelines as a necessary check on the powers state prosecutors wield. These measures will serve to bridge the gap between the Fourteenth Amendment safeguards endorsed by the Supreme Court and the conviction and sentencing

disparities that Black capital defendants face to this day. By embracing a framework that will spur along the critical and consequential process of eradicating generations of systemic injustice, states will be equipped truly to guarantee their criminal defendants equal justice and protection under the law, both through present protections and future deterrence.

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