



IT COULD HAPPEN TO YOU!

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October 15, 2024

Susan Friedman
Administrator
New York State Commission On Prosecutorial Conduct
P.O. Box 90398
Brooklyn, NY 11209

Dear Administrator Friedman:

It Could Happen To You writes in response to the Commission’s posting of its revised Operating Rules and Procedures and the accompanying Comments. We previously called upon the Commission to clarify in its Rules that the Commission’s jurisdiction includes the investigation of misconduct by district attorneys and assistant district attorneys who are no longer employed in a district attorney’s office. In response to this request by ITCHY and others, the Commission wrote, in Comment 3, “The Comment was reviewed by the Commission and no amendment was determined to be necessary.”

We understand this is not and has never been a controversial issue; the Commission’s jurisdiction over prosecutorial misconduct committed by former prosecutors is clear. Jurisdiction clearly does not hinge on whether the prosecutor changed jobs after the misconduct, which would produce unintended absurd results, such as the hypothetical following examples:

Hypothetical Scenario	CPC jurisdiction? (if restricted to current prosecutors)
Prosecutor A committed an egregious <i>Brady</i> violation, hiding evidence of innocence. The evidence was not discovered until 20 years later, so could not be raised on appeal. The evidence was discovered and the accused’s conviction reversed. A complaint was filed with the Commission on Prosecutorial Conduct. As so much time had passed, Prosecutor A had moved on to a fancy law firm.	No
Same scenario as above but instead, Prosecutor A returned from the law firm to the DA’s office just before the exoneration occurred.	Yes
Prosecutor B let a witness lie to the jury without correcting the witness, though the prosecutor knew the witness’ testimony was false. The misconduct was discovered years later, following the accused’s repeated FOIL requests to the DA’s office. A complaint was filed with the Commission on Prosecutorial Conduct. By then, prosecutor B had become a federal prosecutor.	No



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<p>Prosecutor C concealed exculpatory evidence related to the police investigation. It was discovered mid-trial. The judge sanctioned the prosecution for the discovery violation and after the trial, the DA’s Office itself fired the prosecutor and filed a complaint with the Commission on Prosecutorial Conduct.</p>	<p>No</p>
<p>Prosecutor D committed misconduct in closing argument but the defense’s objections was overruled by the trial judge and the accused was convicted. Prosecutor D left the DA’s office after the trial. Two years, the Court of Appeals ruled that the conduct constituted misconduct and reversed the conviction, referring the matter to the Commission on Prosecutorial Conduct.</p>	<p>No</p>
<p>Prosecutor E committed misconduct by removing a prospective juror based on their race (a <i>Batson</i> violation). The court immediately ruled that the challenge was unlawful and the result of intentional racial discrimination by the prosecutor. After the trial ended in an acquittal, the defense attorney filed a complaint with the Commission on Prosecutorial Conduct. The prosecutor got notice of the complaint and quit, arguing that the Commission lost jurisdiction.</p>	<p>No</p>
<p>Prosecutor F committed misconduct in a trial. Two years later, the Court of Appeals found that the prosecutor committed misconduct on appeal and reversed the conviction. The Commission on Prosecutorial Conduct investigated but found out that the prosecutor had left the DA’s office to become a private criminal defense attorney. The Commission passed the matter back to the Grievance Committee, which dismissed the case without an investigation. A few months later, the prosecutor returned to the DA’s office.</p>	<p>No</p>

We are well aware, as the Commission must be, that during the entire lengthy period of the Commission’s gestation in the legislature, the courts and the governor’s office to sign repeated chapter amendments, there was never any argument made by anyone (for or against the Commission’s creation) that former prosecutors would be outside the Commission’s purview. To the contrary, an examination of the recordings¹ of the joint legislative hearing, the debates in both the Assembly and the Senate as well as the vote in the Assembly and Senate indicate the clear legislative intent to include former prosecutors.

¹ The Assembly Debate <https://nystateassembly.granicus.com/player/clip/4747>; the Senate Debate https://youtu.be/juSuE483IGA?t=919&si=7miCzX0vGB_jHfiZ; Footage from when the bill was passed in the Assembly <https://www.youtube.com/watch?v=Uu2a-PSCCyQ&t=26s>; Overall legislative hearing [NYS Legislature Hearing on Commission on Prosecutor Conduct \(youtube.com\)](https://www.youtube.com/watch?v=C766rlfaf3E); Testimony at the legislative hearing <https://www.youtube.com/watch?v=C766rlfaf3E>.



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The outside experts who testified in support of the Commission's creation, the legislators who sponsored the bills, and many legislators who voted in favor referenced the cases of defendants whose convictions were overturned after spending decades in prison as among the most egregious cases of misconduct the Commission would address. Implicit in that was the common understanding that many, if not most, of the miscreant prosecutors involved in those acts of misconduct were no longer in the D.A.'s office. And beyond such implicit recognition, some Assembly members and Senators were explicit in supporting the Commission precisely because it would investigate former prosecutors. For example, Assembly Member Charles Barron of Brooklyn said he voted in favor because the Commission could investigate the former Brooklyn D.A., Charles Hynes.

"Prosecutor" is defined in the statute in 499-b: "Prosecutor" means a district attorney or any assistant district attorney of any county of the state in an action to exact any criminal penalty, fine, sanction or forfeiture." It limited the jurisdiction of the Commission to exclude the other categories of attorneys in New York who prosecute crimes: those in the State Attorney General's office, the U.S. attorneys' offices, the NYC Corporation Counsel, and the various other local counsels' offices. It also excluded the acts of prosecutors whose misconduct lies outside of their official duties. But it obviously did not, and was never meant to, exclude D.A.s and assistant D.A.s whose misconduct occurred during the course of their official duties, simply because they had left the office.

We nevertheless ask the Commission to include in its rules a statement of jurisdiction in this area, to make explicit that it does have jurisdiction to investigate prosecutorial misconduct whether or not the attorney is currently a prosecutor. We think this clarification would avoid baseless legal challenges and time-wasting motions to dismiss by prosecutors trying to forum-shop to avoid accountability.

Any alternative interpretation would signify the Commission giving a pass to some of the most damaging and reprehensible misconduct in modern New York history. As noted in our past submission, Accountability NY has filed 50 grievances with NY grievance committees, nearly all based on judicial findings of misconduct, but none of which have resulted in any public discipline. Many of these concerned failures to disclose *Brady* material, items constitutionally and statutorily required to be disclosed because they would have helped the defendant's case (i.e. a key witness's recantation). By its very nature, the gravamen of a *Brady* violation is that it is hidden, regularly resulting in defendants spending decades in prison before their convictions are reversed. In the overwhelming majority of those cases, the responsible prosecutors are no longer in a DA's office.

Salient examples of such reversals include Jabbar Washington (Kings Co. Ind. No. 2585/1996), who was incarcerated for 21 years prior to his 2017 release; Andre Hatchett spent 24 years and 350 days imprisoned before his conviction was overturned (see *Hatchett v. State of New York*, Court of Claims, NY Co., claim No. 128658(2016)); Emmanuel Cooper was incarcerated for 27 years before his 2020 release (Kings Co. Ind.



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No. 427/1993); Danny Colon and Anthony Ortiz each spent 16 years behind bars before their convictions were overturned (*People v. Colon*, 13NY3d 343 (2009)); and George Bell, Rohan Bolt, and Gary Johnson were each incarcerated for 22 years prior to being released (*People v. Bell, Bolt and Johnson*, 71 Misc., 3d 646 (S.C. Qns. Co., 2021)). None of the prosecutors in these cases have been publicly disciplined and none are still employed in a district attorney's office. All the complaints based on these cases can be found at AccountabilityNY.org.

Sincerely yours,

Bill Bastuk
National Chair, It Could Happen To You
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CC: ITCHY CPC Legal Team