May 3, 2021

State of New York Grievance Committee for the
Tenth Judicial District
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Re: Grievance Complaint Regarding Attorney Charles Testagrossa, State Bar No. 1129485.

To the Grievance Committee,

Charles Testagrossa,[1] who recently resigned his position as Nassau District Attorney's Office Chief of Investigations,[2] must be disciplined for his egregious misconduct in the prosecutions of George Bell, Rohan Bolt, and Gary Johnson. In *People v. Bell*,[3] Testagrossa (and his colleague, Brad Leventhal) suppressed exculpatory evidence and misled the trial court and other parties. The Queens Supreme Court found that the "extensive" record "ma[de] clear" that the prosecution "deliberately withheld" crucial exculpatory evidence from the defense.[4] "The prosecution"—that is, Leventhal and Testagrossa—"completely abdicated [their] truth-seeking role,"[5] leaving the court with the "distinct impression… [of a] pattern of behavior that was calculated to deprive the defendants of fair trials."[6]

Testagrossa's misconduct led to the wrongful conviction and imprisonment of the three men for 24 years. After the reversals of their convictions and in light of the public outcry that followed, Testagrossa resigned from the Nassau District Attorney's Office. Leventhal was quick to follow.

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[1] Charles A. Testagrossa, State Bar No. 1129485. The Unified Court System website does not list a number, email address or physical address for Testagrossa. He was last employed by the Nassau District Attorney's Office. We do not have personal knowledge of any of the facts or circumstances of Testagrossa or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] David Bland, Top prosecutor quits after Queens judge accuses him of lying in death penalty case, Queens Daily Eagle (March 11, 2021), https://queenseagle.com/all/charles-testagrossa-quits-nassau-county-queens-da.

[3] Exhibit A, *People v. Bell,* 2021 WL 865420 (Queens Sup. Ct. March 2021). This grievance uses "*People v. Bell*" for brevity, but the case addressed and vacated the convictions of all three men. *See also* Exhibit A1, Prosecution Affirmation In Support of Motion to Vacate Convictions and Sentence Pursuant to C.P.L. §440.10 (hereinafter "QDAO Brief"), and Exhibit A2, Memorandum of Law of George Bell, Rohan Bolt, and Gary Johnson in Support of Motion to Vacate Their Convictions (hereinafter "Defense Brief").

[4] Ex. A, *Bell* at *9.

[5] *Id.*

[6] *Id.* at *12.

Given Testagrossa's senior position in the Queens District Attorney's Office ("QDAO") during the time in question, his earlier professional misconduct is of extreme gravity and importance to the public. Serious misconduct at the Queens District Attorney's Office has been regularly reported for years. For example, beginning in 2007, Queens prosecutors utilized interviewing practices that undermined suspects' *Miranda* rights, according to the Appellate Division and the Court of Appeals.[7] Another QDAO policy established a wall between different units in the office, leading to trial prosecutors failing to disclose exculpatory material in the hands of another unit.[8] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.[9] There are numerous court decisions finding that QDAO prosecutors acted improperly—a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.[10] Testagrossa's misconduct appears to fall within this appalling and largely-unaddressed pattern of improper conduct.

Just as prosecutors hold individuals accountable for crimes, so should prosecutors be held accountable for their misconduct. Despite the findings of serious misconduct noted in this grievance, as of the writing of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Testagrossa.[11]

The Grievance Committee must disbar Testagrossa for his serious misconduct in *Bell*.

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[7] *People v. Dunbar*, 104 A.D.3d 198 (2d Dep't 2013), *aff'd*, 24 N.Y.3d 304 (2014). *See also People v. Perez*, 37 Misc. 3d 272 (Queens Sup. Ct. 2012) (deeming QDAO's *Miranda* interview practice an ethical violation of Rule 8.4(c)); Russ Buettner, *Script Read to Suspects Is Leading to New Trials*, New York Times (January 30, 2013) https://www.nytimes.com/2013/01/31/nyregion/appellate-panel-overturns-3-queens-convictions-based-on-rights-preamble.html.

[8] Sarah Maslin Nir, *Murder Conviction Tossed Out in Queens*, New York Times (March 18, 2013) https://www.nytimes.com/2013/03/19/nyregion/murder-conviction-reversed-over-withheld-information.html. *See also People v. Petros Bedi*, Ind. No. 4107/96, NYLJ 1202592836531 (Queens Sup. Ct. March 13, 2013) (Witness Security Program documents, which were not made part of prosecutor's file "as matter of custom," were *Rosario* and *Brady* materials; failure to disclose required vacating murder conviction).

[9] *See, e.g.*, *People v. Velez*, 2014-09698, Oral Argument, Appellate Division, 48:30-50:15 (March 16, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1521208616.External_(PubliP).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1521208616.External_(Public).mp4; *People v. Cherry,* 2014-10909*,* Oral Argument, Appellate Division, 26:34-29:31 (March 13, 2018) http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1520949280.External_(Public).mp4 or http://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad2&video=VGA.1520949280.External_(Public).mp4.

[10] Amended Complaint, *Julio Negron v. The City of New York et al.*, No.18-cv-6645 (DG) (RLM) (filed March 10, 2021).

[11] *See Attorney Detail Report*, Attorney Online Services -- Search, New York Unified Court System, available at https://iapps.courts.state.ny.us/attorneyservices.

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

A. Prosecutorial Misconduct is Pervasive and Unchecked.

Our legal system holds prosecutors to the highest standards of all attorneys.[12] When any attorney missteps, it can cause harm, typically to an individual client. But a prosecutor's misconduct can destroy a person's life—and that of their family. Moreover, a prosecutor's misconduct negatively affects both law and society. A single prosecutor's misconduct can damage "the reputation and public confidence placed" in all prosecutors and the justice system itself.[13]

As the United States Supreme Court and the New York Court of Appeals have stated, a prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. *It is as much* his duty to refrain from improper methods calculated to produce a wrongful conviction *as it is* to use every legitimate means to bring about a just one."[14] Hal Lieberman, former Chief Counsel for the Departmental Disciplinary Committee in New York's First Department, has noted how unchecked prosecutorial misconduct "undermines the integrity of the entire system."[15]

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 analysis of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.[16] Yet these appellate courts "did not routinely refer prosecutors for investigation by the state disciplinary committees," and the disciplinary committees "almost never took serious action against prosecutors."[17] In the 30 cases where judges overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York

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[12] *Matter of Rain*, 162 A.D.3d 1458, 1462 (3d Dep't 2018) ("prosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice"); *see also* 2017 ABA Prosecution Function Standards, Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.").

[13] *Rain*, 162 A.D.3d at 1462.

[14] *Berger v. United States,* 295 U.S. 78, 88 (1935) (emphasis added); *People v. Jones*, 44 N.Y.2d 76, 80 (1978) (quoting *Berger*, 295 U.S. at 88). *See also People v. Calabria*, 94 N.Y.2d 519, 523 (2000) ("Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility--determining facts relevant to guilt or innocence.") (citation omitted); *People v. Levan*, 295 N.Y. 26, 36 (1945).

[15] Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody,* ProPublica (April 3, 2013), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[16] *Id.*

[17] *Id.*

disciplinary committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured and, according to personnel records gathered by ProPublica, several prosecutors were promoted and given raises soon after courts cited them for abuses.[18] As the *New York Times* Editorial Board wrote in 2018, "there's no reliable system for holding prosecutors accountable for their misconduct, and they certainly can't be entrusted with policing themselves."[19]

B. The *Brady* Rule and State Discovery Laws are Fundamental to the Constitutional Rights to a Fair Trial and Due Process, Yet Prosecutors Often Fail to Provide Favorable Evidence to the Defense.

One of the most damaging forms of prosecutorial misconduct is the *Brady* violation—when a prosecutor suppresses exculpatory or impeachment evidence.[20] A prosecutor's duty to disclose *Brady* evidence is indispensable to the rights to due process and a fair trial.[21] In our legal system, *Brady* disclosures permit the defense to investigate and litigate different leads and to protect the defendant from wrongful convictions. It is unsurprising, then, that suppression of favorable evidence has played a role in over 30% of known wrongful convictions and 44% of known wrongful convictions for murder.[22]

A prosecutor has an affirmative duty to search for favorable material in their own records and those of related agencies—and to turn these over to the defense.[23]

The New York legislature and the New York judiciary have emphasized the importance of the *Brady* rule by codifying it in statutes and court orders. Even before the 2020 discovery reform, New York State's discovery statute required prosecutors to disclose all evidence that must be disclosed per the United States and New York constitutions—including any *Brady* evidence.[24] Other New York criminal procedure law sections obligated the prosecutor to disclose types of evidence that commonly contain *Brady* information.[25] The 2020 discovery reform preserved the statutory codification of *Brady* and further expanded a prosecutor's discovery

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[18] *Id.*

[19] New York Times Editorial Board, *Prosecutors Need a Watchdog*, N.Y. Times, (August 14, 2018), https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html.

[20] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

[21] *Brady*, 373 U.S. at 87.

[22] *Government Misconduct and Convicting the Innocent*, National Registry of Exonerations (September 1, 2020): https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[23] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Strickler v. Green,* 527 U.S. 263, 280-81 (1999).

[24] C.P.L. § 240.20(1)(h) (McKinney) (repealed); *Doorley v. Castro*, 160 A.D.3d 1381, 1383 (4th Dep't 2018).

[25] C.P.L. § 240.20 (McKinney) (repealed).

obligations.[26] Additionally, under federal law, a prosecutor who commits an intentional *Brady* violation can be charged with a felony.[27]

Indeed, the *Brady* rule is of such import that it has been codified into its own subsection in New York Rule of Professional Conduct 3.8(b):

> A prosecutor…shall make timely disclosure…of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence….[28]

Rule 3.8 makes clear that the professional rule is broader than the *Brady* obligation: all evidence that tends to exculpate the defendant must be turned over, rather than just *materially* exculpatory evidence. As a consequence, more conduct will violate Rule 3.8 than the constitutional rule.

Despite the significance of the *Brady* rule in the criminal legal system, New York prosecutors often violate it. The New York State Bar has acknowledged that "New York *Brady* violations occur at all phases of the criminal justice process and are often not discovered until after conviction."[29] The New York State Justice Task Force has pointed to "[d]ocumented instances of inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence."[30]

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and many prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[31] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a

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[26] C.P.L. § 245.20(1)(k).

[27] 18 U.S.C. § 242.

[28] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b). This Rule was previously codified in New York's Code of Professional Responsibility DR 7-103, 22 N.Y.C.R.R. § 1200.34 (repealed).

[29] N.Y. State Bar Ass'n, *Report of the Task Force on Criminal Discovery*, at 52 (Jan. 30, 2015) https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Criminal%20Discovery%20Final%20Report.pdf.

[30] N.Y. State Justice Task Force, *Report of the New York State Justice Task Force of Its Recommendations Regarding Criminal Discovery Reform*, at 2 (July 2014), http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf.

[31] *See, e.g., Miller v. Pate*, 386 U.S. 1 (1967).

prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[32] Prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[33]

D. The Grievance Committee, as the Only Body Entrusted with Checking Prosecutorial Misconduct, has an Important Duty to Hold Prosecutors Accountable.

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[34] In 1976, the U.S. Supreme Court partly justified absolute immunity for prosecutors because it believed that prosecutorial misconduct would be regulated by the "checks" of "professional discipline" by state bar organizations.[35]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[36]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly sanctioned.[37]

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[32] *See People v. Waters*, 35 Misc.3d 855 (Bronx Sup. Ct. 2012) (violation of due process when prosecutor, "although not soliciting false evidence, allows it to go uncorrected when it appears") (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor failed to correct witness's false testimony that he had not received any promise in return for his testimony).

[33] *See, e.g.,* Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and its Impact on the Innocent*, 80-81 (2012); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). *See also* Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 Geo. J. Legal Ethics 309, 316 (2001) http://digitalcommons.pace.edu/lawfaculty/128/ ("The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.").

[34] *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (noting that prosecutors have "absolute immunity" for the "conduct of a prosecution"); *Dann v. Auburn Police Dep't*, 138 A.D.3d 1468, 1469 (4th Dep't 2016) ("The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.") (internal quotation marks omitted); *see also Ryan v. State*, 56 N.Y.2d 561, 562 (1982) (holding that "the doctrine of prosecutorial immunity" precludes "recovery against the State" for "acts of prosecutorial misconduct").

[35] *Imbler,* 424 U.S. at 429; *see also Matter of Malone*, 105 A.D.2d 455, 459 (3d Dep't 1984) (rejecting public official's claim to prosecutorial immunity in a professional ethics proceeding).

[36] Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 242–43 (2012).

[37] Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013) www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf; *see also Proj. On Gov't Oversight*, Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards (Mar. 12, 2014), http://pogoarchives.org/m/ga/opr-report-20140312.pdf; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors "were rarely disciplined for misconduct, and if so, not very seriously." Indeed, "neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly … [D]isciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes."[38] "It's an insidious system," said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to *ProPublica*. "Prosecutors engage in misconduct because they know they can get away with it."[39]

In 2018, the Appellate Division suspended New York prosecutor Mary Rain's law license for two years for a variety of misconduct, including summation misconduct.[40] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[41] But even a short suspension like that received by Rain and Kurtzrock[42]—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not held accountable themselves. Absent strong, public discipline by the Grievance Committee, misconduct like that of Testagrossa will continue unabated and undeterred.

L. Rev. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[38] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 65 (2017) (internal citations omitted); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697 (1987).

[39] *ProPublica Investigates Prosecutorial Misconduct in New York,* Innocence Project (April 3, 2013) https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody.

[40] *Rain*, 162 A.D.3d at 1462.

[41] *Matter of Kurtzrock*, 192 A.D.3d 197 (2d Dep't 2020). http://courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D65317.pdf

[42] In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court's sanction was surprisingly light. *See, e.g.*, Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State, HuffPost (September 20, 2017)*, https://www.huffpost.com/entry/the-most-dangerous-prosec_b_12085240; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (October 1, 2016), https://www.huffpost.com/entry/a-most-dangerous-prosecutor-a-sequel_b_57effb8fe4b095bd896a0fba; Nina Morrison, "What Happens When Prosecutors Break the Law?" *New York Times*, June 18, 2018 https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html. *See also* Nina Morrison's twitter thread following the *Kurtzrock* decision, available at https://twitter.com/Nina_R_Morr/status/1344413003903602688.

2. The Queens Supreme Court Held that Testagrossa Committed Multiple Forms of Serious Misconduct.

In a March 2021 decision that reverberated throughout New York, the Queens Supreme Court vacated the murder convictions of George Bell, Rohan Bolt, and Gary Johnson.[43] The decision found that the prosecutors who had handled the cases, Charles Testagrossa and Brad Leventhal, had committed prosecutorial misconduct, including suppressing evidence that someone else had committed the murders.[44] By the end of March, both of these career prosecutors had resigned from management positions at the Nassau and Queens District Attorney's Offices (QDAO), respectively.[45]

To understand the subsequent fallout, some background is essential. In 1996, several men tried to rob a check cashing business on Astoria Boulevard in Queens and ended up killing the owner and an off-duty police officer. The case sparked a "ferocious manhunt" that led to the arrest, prosecution and conviction of Bell, Bolt, and Johnson for the check cashing murder.[46] The defendants' motion to vacate the convictions described the context:[47]

> No physical evidence — none — connected any of the three men to the crime, not at the time of their arrests, and not at any time thereafter. But there was enormous pressure to "solve" the crime. According to a press report, detectives told Mayor Giuliani that they wanted to question Bell and Johnson more before any announcement was made. But Giuliani "could not be held back for long" and insisted that his Christmas Day press conference go forward. And so, at a televised press conference, at about the same time that Bolt was being arrested, Bell and Johnson were identified as Davis's and Epstein's murderers, Giuliani lauded the detectives for solving the crime so quickly, and Giuliani and police brass offered the view that Bell should face the death penalty. The press then proceeded to convict the three, with a full front-page *Daily News* story labeling Bell as the "CRYBABY COP KILLER" and a full front-page *New York Post* story labeling Bell's perp walk picture as "THE FACE OF EVIL."
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> It was all false. The notion that Bell, a 19-year-old stock boy at Old Navy with no criminal record, his friend, 22-year-old Gary Johnson, who worked as a store clerk and who also had no criminal record, and Rohan Bolt, the 35-year-old owner of a

[43] Ex. A, *People v. Bell*, 2021 WL 865420 (Queens Sup. Ct. 2021).

[44] *Id.*

[45] Brand, *Top prosecutor quits after Queens judge accuses him of lying in death penalty case*.

[46] George Joseph, *He Spent 24 Years Behind Bars Because Queens Prosecutors Broke the Rules. Was This Their Only Wrongful Conviction?* Gothamist (April 5, 2021), https://gothamist.com/news/he-spent-24-years-behind-bars-because-queens-prosecutors-broke-rules-was-their-only-wrongful-conviction. *See also* Troy Closson, *They Spent 24 Years Behind Bars. Then the Case Fell Apart*, New York Times (March 5, 2021), https://www.nytimes.com/2021/03/05/nyregion/queens-wrongful-convictions.html.

[47] Ex. A2, Defense Brief at 4.

> Caribbean restaurant, who didn't even know Bell and Johnson, committed these heinous murders was always implausible. And indeed, in the days after the crime was committed, the NYPD flooded Queens with wanted posters seeking information about a gang that had committed multiple armed robberies in Queens, including the armed robbery of a Queens check cashing store when it opened at 7:00a.m. just two days before, on December 19, 1996.

Around the same time as the intense political pressure to solve these killings,[48] police and the Queens District Attorney's Office were investigating, arresting, and prosecuting members of the "Speedstick" crew, led by brothers Aaron and Ammon Boone, who were suspected in a string of other crimes, including murder and robbery. Heading these investigations and prosecutions at that point was Charles Testagrossa, the then-head of the QDAO's Career Criminals / Major Crimes Bureau.[49]

Both the press and defense attorneys for Bell, Bolt, and Johnson recognized "a connection" between the check cashing murder and the Speedstick crimes.[50] As outlined by the Queens Supreme Court decision, this connection "sparked a flurry of discovery demands" by the defendants regarding the Speedstick investigations;[51] they had recognized the exculpatory nature of these investigations.

In response to the numerous defense requests for exculpatory evidence, the QDAO, led by Leventhal and Testagrossa, denied outright any connection between the Speedstick investigations and the case against the three men. Leventhal claimed the attorneys' request for these materials amounted to a "fishing expedition."[52] Testagrossa "derisively" claimed that a Speedstick robbery was a "completely different case," with "no connection" to the check-cashing murder case.[53] Prosecutor Gary Fidel, responding to one such demand by Bell, affirmed that there was "no evidence" connecting anyone but Bell, Bolt, and Johnson to the check cashing murder.[54] After these unequivocal denials by the prosecutors, the trial court denied the defense's requests for these exculpatory materials.[55]

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[48] These circumstances invite clear parallels to another horrible miscarriage of justice in New York, when the 'Exonerated Five' were wrongfully imprisoned for attacking a jogger in Central Park. There, political pressures apparently encouraged a prosecutor to ignore inconsistent or exculpatory evidence for the sake of expediency, ruining the lives of the accused. *See* Monica Hesse, *The slippery moral calculus of Linda Fairstein*, The Washington Post (June 5, 2019), https://www.washingtonpost.com/lifestyle/style/the-slippery-moral-calculus-of-linda-fairstein/2019/06/05/f7ff1aac-86d4-11e9-98c1-e945ae5db8fb_story.html.

[49] Ex. A, *Bell* at *4.

[50] Ex. A, *Bell* at *5.

[51] *Id.*

[52] Ex. A, *Bell* at *5.

[53] *Id*.

[54] *Id*.

[55] *Id*.

Leventhal and Testagrossa tried Bell together in 1999 and sought the death sentence, and the jurors convicted but declined to impose this sentence; the judge sentenced Bell to life without parole.[56] Leventhal alone tried Johnson and Bolt in 1999 and 2000. Both men were sentenced to 50 years to life in prison.[57]

Though this grievance focuses on Testagrossa's misconduct, we ask the Grievance Committee to carefully review the relevant exhibits attached, which suggest the involvement of other prosecutors in denying defense discovery requests and other possible misconduct.

A. Testagrossa Suppressed Exculpatory Evidence, Including Evidence Showing that the Speedstick Crew Committed the Check-Cashing Murders.

Despite the fervent denials of Leventhal and Testagrossa at the time of the trials, there is no longer any dispute that the QDAO failed to disclose crucial exculpatory evidence to the defense. In the QDAO's brief from March 2021, the QDAO "concede[d]" that the Speedstick investigation, as well as information relating to a key prosecution witness, was suppressed.[58] Moreover, the QDAO conceded that this information was *Brady*, i.e., material and exculpatory.[59]

The Queens Supreme Court was much more devastating in its findings. The Court found that the "extensive" record in the proceeding to vacate the convictions "makes clear" that the QDAO "deliberately withheld" exculpatory evidence from the defense.[60] "The prosecution"—that is, Leventhal and Testagrossa—"completely abdicated [their] truth-seeking role."[61]

The Queens Supreme Court found that the prosecution had suppressed "a significant amount of material that implicated" the Speedstick crew in the check-cashing shooting,[62] including police reports tying the Speedstick crew to the check-cashing shooting.[63] As the QDAO conceded, prosecutors had also failed to turn over the psychiatric records and initial cooperation agreement for one of their central witnesses in Johnson's and Bolt's trials.[64] Finally, the wrongfully convicted men argued—and the prosecution did "not really dispute"—that exculpatory

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[56] *Id*. at *6.

[57] *Id*. at *6-*7.

[58] *Id*. at *8.

[59] *Id*. (QDAO conceded that had prosecutors turned over such information, there would have been a "reasonable possibility" that Bell, Bolt, and Johnson would not have been convicted.). *See also* *11 (prosecution's "concession of a material *Brady* violation").

[60] *Id.* at *9.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*. at *8, *12. The decision does not note the prosecution's concession that the cooperation agreement was suppressed; however, the decision notes that it was not disclosed.

interviews with five eyewitnesses, unrelated to the Speedstick evidence, were never provided to the defense.[65]

The Queens Supreme Court found that Testagrossa knowingly suppressed the exculpatory evidence related to the Speedstick investigation. Testagrossa had been the chief of the bureau that investigated the Speedstick crew *and* Testagrossa personally prosecuted Bell, along with Leventhal.[66] Indeed, Testagrossa had personally "investigated, and documented in handwritten notes" information that tied the Speedstick crew to the check-cashing shooting.[67] He was also "apparently briefed" about such a connection by detectives.[68] It was thus "clear….that Testagrossa had knowledge of this information."[69] The Court found that Testagrossa "unquestionably knew" about the connection between Speedstick and the prosecuted cases.[70]

Testagrossa's notes were dated May 27, 1997, but were not provided to the defense *until two months ago—24 years later*.[71] But the QDAO nonetheless claims that Testagrossa acted in "good faith," "does not recall the contents of those notes," and "would not have intentionally misrepresented the evidence to the court,"[72] relying on the two years that passed between Testagrossa's notes and his prosecution of Bell at trial.

The Queens Supreme Court squarely rejected this notion: "But even if that sort of memory lapse had occurred—*and the Court does not believe that it did*—good faith would have required much more than making sweeping assertions about the absence of any connection between the perpetrators of the armored car robbery (*i.e.*, the Speedstick gang) and this crime, without first making a diligent effort to ensure that nothing in the District Attorney's Office's files related to the Speedstick investigation contradicted that position. *And all that effort would have entailed was reviewing files of cases handled by Testagrossa's own bureau*."[73]

Testagrossa's lies about the Speedstick connection were lambasted by the court:

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[65] *Id*. at *12. The prosecution's theory at trial appears to have been that the defendants used Bolt's red vehicle in the robbery/murder. According to the defense brief, the prosecution had, in its possession, the statements of five eyewitnesses who were interviewed within days of the robbery who described a *different* vehicle. *See* Ex. A1, QDAO Brief at 17 and Ex. A2, Defense Brief. According to the Defense 440.10 Motion, the prosecution never provided these records to the defense until the FOIL (Freedom of Information Law) request 20 years later.

[66] Ex. A, *Bell* at *4, *6.

[67] *Id.* at *9.

[68] *Id.*

[69] *Id*.

[70] *Id*. at *10. *See also* *11 ("But ADA Testagrossa's handwritten notes show beyond any doubt that he was aware of the essence of the information in those reports.").

[71] Ex. A2, Defense Brief at 89-90.

[72] Ex. A1, QDAO Brief at 38.

[73] Ex. A, *Bell* at *11 n. 11 (emphasis added).

> [The prosecutors'] repeated denial of any connection between the perpetrators of the [Speedstick crimes] and [the check-cashing murder] was a complete misrepresentation. Most troublingly, it was a misrepresentation made by a prosecutor, ADA Testagrossa, whose own handwritten notes refuted it. This was, in short, not a good-faith misstatement; it was a deliberate falsehood.[74]

The defense 440.10 motion details several other compelling reasons for why "[i]t is hard to believe that the failure to turn over this large volume of exculpatory evidence in a death penalty case was the result of inexcusable sloppiness."[75] These reasons include law enforcement cooperation around the Speedstick and check cashing homicide investigations; media coverage alleging Speedstick involvement in the check cashing homicides; and repeated requests to the prosecution from the Bell, Bolt, and Johnson attorneys for information about Speedstick involvement.[76] Indeed, before the trials, the defense became aware that law enforcement had compared ballistic evidence between Speedstick and the check-cashing murders; it is unimaginable that Testagrossa would have continued to "forget" any such connection.

It is striking, then, that Leventhal and Testagrossa did not submit affirmations to the court explaining their conduct or suggesting that they were unaware of the exculpatory evidence. The Queens Supreme Court noted that since the prosecutors did not submit such affirmations, "there is no explanation for why this information was not disclosed, let alone an explanation that would support the conclusion that the nondisclosure was fairly attributable to negligence, inadvertence, or anything else short of *deliberate suppression*."[77]

B. Testagrossa Misled the Court and Defense Counsel.

Testagrossa's personal knowledge that evidence tied Speedstick to the check-cashing murders rendered his statements to the trial court and defense counsels about such evidence false and misleading.

As noted above, Testagrossa denied any connection between the Speedstick crew and the check-cashing murders. In one instance of a misrepresentation in open court, Leventhal and Testagrossa "disclaimed any insight" as to why the ballistics evidence in a Speedstick investigation was compared to the ballistics from the check-cashing murders.[78] Additionally and "more troubling[]," Leventhal and Testagrossa "accused" Bell's attorneys of embarking on a "fishing expedition" and expressed "annoyance" over their repeated questions regarding a possible connection to the Speedstick investigation.[79]

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[74] Ex. A, *Bell* at *11.

[75] Ex. B, Defense Brief at 10-11.

[76] *Id*.

[77] Ex. A, *Bell* at *11 (emphasis added).

[78] *Id.* at *9.

[79] *Id.*

Testagrossa's misleading statements did not end there. Testagrossa had "derisively" claimed that a Speedstick robbery was a "completely different case," with "no connection" to the defendants' case[80] — a claim that the court found to be "mindboggling."[81] As the Queens Supreme Court summarized:

> These performances by [Leventhal and Testagrossa] were clearly delivered with aplomb; they certainly convinced [the trial judge] that the defense's refusal to drop the issue was an utter waste of everyone's time. Testagrossa's and Leventhal's vociferous denials, however, *were completely false*.[82]

Moreover, the Court made it clear that Testagrossa's statements misleading the court and the defense were deliberate:

> [The prosecutors'] repeated denial of any connection between the perpetrators of the [Speedstick crimes] and [the check-cashing shooting] was a *complete misrepresentation.* Most troublingly, it was a *misrepresentation* made by a prosecutor, ADA Testagrossa, whose own handwritten notes refuted it. This was, in short, not a good-faith misstatement; it was a *deliberate falsehood*.[83]

Based on these misrepresentations and *Brady* violations, the Queens Supreme Court noted its "significant doubt" that Testagrossa and Leventhal prosecuted the defendants in "good faith."[84] Instead, their actions left the Court—and these readers—with the "distinct impression" of a "larger pattern of behavior calculated to deprive the defendants of fair trials."[85] Such behavior is never acceptable, much less so in murder prosecutions—or, as here, where Leventhal and Testagrossa sought to impose the death sentence on the 19-year-old Bell.

[80] *Id.* at *5.

[81] *Id.* at *10.

[82] *Id.* at *9.

[83] *Id.* at *11 (emphasis added).

[84] *Id.* at *12.

[85] *Id.*

3. The Grievance Committee Must Discipline Testagrossa for the Serious Professional Misconduct That Occurred Here.

As noted by one Grievance Committee, "[t]he legal profession expects all lawyers to conduct themselves in an honest and ethical manner in accordance with the Rules of Professional Conduct."[86] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[87] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[88]

Our laws and profession hold prosecutors to an even higher standard. Prosecutors wield immense power—the power to punish on behalf of the state. Such immense power, when left unchecked, can cause indelible harm. The United States Supreme Court has stated unequivocally that prosecutors "have a special duty to seek justice, not merely to convict."[89]

In handing former prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, "Prosecutors, in their role as advocates and public officers, are charged with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[90]

Therefore, a prosecutor is not merely an advocate for a victim, a complainant, or society as a whole. Instead, a prosecutor is a "minister of justice," responsible to guarantee "procedural justice and that guilt is decided upon the basis of sufficient evidence."[91] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving the maximum number of convictions.[92] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[93] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

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[86] *How to File a Complaint*, Attorney Grievance Committee — First Department (July 30, 2020), https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/How%20to%20File%20a%20Complaint%2007.30.2020.pdf.

[87] 22 N.Y.C.R.R. Part 1240.

[88] *How to File a Complaint*, Attorney Grievance Committee — First Department.

[89] *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quotation marks omitted).

[90] *Kurtzrock*, 192 A.D.3d 197.

[91] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[92] 2017 ABA Functions and Duties of the Prosecutor, Standard 3-1.2 ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

[93] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

A. Testagrossa's Misconduct Violated Rules of the New York Code of Professional Responsibility.[94]

The standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence—not a higher standard, such as clear and convincing or beyond a reasonable doubt.[95] The Court of Appeals explained, "[T]he privilege to practice law is *not a personal or liberty interest, but 'is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.*'"[96]

Testagrossa violated the professional rules in the *Bell*, *Bolt*, and *Johnson* prosecutions by knowingly suppressing exculpatory evidence. The then-applicable Rule DR 7-103(b) required the prosecutor to make "timely disclosure…of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."[97] A prosecutor's duty to disclose under DR 7-103(b) applied even if the evidence was not material under a *Brady* analysis.[98] Two other rules, DR 7-102(a)(3) and DR 7-109(a), similarly required disclosure, and prohibited knowing concealment, of evidence.[99] A prosecutor's "deliberate pattern of avoidance, or willful

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[94] The applicable professional set of rules when Testagrossa committed misconduct in prosecuting Bell, Bolt, Johnson, was the Code of Professional Responsibility.

[95] *See, e.g., Matter of Capoccia*, 59 N.Y.2d 549 (1983).

[96] *Matter of Scudieri*, 174 A.D.3d 168, 173 (2019) (emphasis added) (quoting *Matter of Seiffert,* 65 N.Y.2d 278, 280 (1985)).

[97] Code of Prof. Resp., DR 7-103(b) (22 N.Y.C.R.R. § 1200.34) (repealed). This rule was in effect when the discussed misconduct occurred. However, Rule 3.8(b) of the Rules of Professional Conduct replaced it in 2009.

[98] In *Matter of Kurtzrock*, the Appellate Division both analyzed and found a violation of Rule 3.8(b), the contemporary successor to DR 7-103(b), as separate and distinct from a prosecutor's *Brady* violation. *Kurtzrock*, 192 A.D.3d 197. In finding a Rule 3.8(b) violation, the Appellate Division neither undertook a materiality analysis nor listed materiality as an element of the rule. *Id*. Thus, the Appellate Division implicitly recognized that a violation of Rule DR 7-103(b) does not depend on whether the evidence was material. *See Id. See also* NY City Bar Assn Comm on Prof Ethics Formal Op 2016–3 at 2 (2016) ("While *Brady* has been held to require a prosecutor to disclose only "material" evidence favorable to the accused, Rule 3.8 on its face is not subject to the same materiality limitation."); ABA Comm on Ethics and Prof Responsibility Formal Op 09–454 at 2 (2009) (review indicates that the model Rule 3.8 "does not implicitly include the materiality limitation recognized in the constitutional case law."); *In re Kline,* 113 A.3d 202, 213 (D.C. 2015) (holding the D.C. professional rule, modeled after ABA Rule 3.8, "requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirement"); *In re Disciplinary Action Against Feland*, 2012 ND 174, 14 (ND 2016) (no materiality requirement under professional conduct disclosure rule); *Matter of Larsen*, 2016 UT 26, 41 (Utah 2016); *People v. Waters*, 35 Misc.3D 855, 859-60 (Bronx Sup. Ct. 2012) (Rule 3.8(b) "[i]ndependent of *Brady*").

[99] Code of Prof. Resp., DR 7-102(a)(3) (22 N.Y.C.R.R. § 1200.33**)** (repealed); Code of Prof. Resp., DR 7-109(a) (22 N.Y.C.R.R. § 1200.40) (repealed). These two rule were replaced in 2009 by 22 N.Y.C.R.R. Part 1200, Rules 3.4(a)(1), (3) (a lawyer shall not "suppress any evidence that the lawyer or the client has

blindness," to the existence of such evidence—including failure to conduct a *Brady* analysis of evidence, or delegation of this duty to law enforcement—constitutes knowledge under Rule 3.8(b), the successor to Rule DR 7-103(b).[100]

In *Bell*, Testagrossa violated these rules repeatedly, as he withheld numerous pieces of *Brady* evidence in the prosecution of Bell: the Speedstick investigation documents and other police records contradicting the prosecution's theory on a key aspect.[101] The Queens Supreme Court found that Testagrossa knew of this evidence—but still withheld it. Even were Testagrossa able to show that he had forgotten about the Speedstick connection, his actions appear to parallel the "deliberate pattern of avoidance, or willful blindness" to exculpatory evidence for which the Second Department Appellate Division disciplined ex-prosecutor Glenn Kurtzrock.[102]

Testagrossa also violated the ethical rules by making multiple misrepresentations to the court and defense counsels. The then-applicable Rule 7-102 prohibited attorneys from knowingly making a false statement to the court or use evidence they knew to be false.[103] Rule DR 1-102 prohibited attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."[104] Rule DR 7-102 prohibited attorneys from knowingly using perjured testimony or false evidence.[105]

In *Bell*, Testagrossa violated these rules by misleading the Court and defense counsels through multiple misrepresentations. Testagrossa made these misleading representations even though he knew—or willfully failed to learn—about the strong connection between defendants'

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a legal obligation to reveal or produce…[or] conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."). *See also Matter of Rain*, 162 A.D.3d 1458, 1460-61 (3d Dep't 2018) (suppression of exculpatory evidence violated Rule 3.4(a)(1)).

[100] *Kurtzrock*, 192 A.D.3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

[101] Testagrossa is also arguably responsible for the suppression of the evidence in Bolt's and Johnson's cases—the Speedstick investigation information; the initial cooperation agreement with the prosecution's key witness; the key witness's psychiatric records; and the other exculpatory police documents. As Testagrossa was the lead prosecutor on Bell's case, he would have known, or should have known, about the state of the prosecution in the other two cases, including the relevance of the Speedstick investigation information and the existence of key prosecutorial witnesses.

[102] *Kurtzrock*, 192 A.D.3d 197 (deliberate pattern of avoidance or willful blindness constitutes knowledge under Rule 3.8(b), the modern equivalent of Rule DR 7-103(b)).

[103] Code of Prof. Resp., DR 7-102 (22 N.Y.C.R.R. § 1200.33) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.3 of the Rules of Professional Conduct replaced it in 2009.

[104] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 8.4(c) of the Rules of Professional Conduct replaced it in 2009. *See also In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rule 8.4(c)).

[105] Code of Prof. Resp., DR 7-102(a)(4) (22 N.Y.C.R.R. § 1200.33) (repealed). This rule was in effect when the misconduct, as outlined above, occurred. However, Rule 3.4(a)(4) of the Rules of Professional Conduct replaced it in 2009.

cases and the Speedstick investigation. Indeed, the Queens Supreme Court found that Testagrossa's "vociferous denials [of a connection]….*were completely false*."[106] Testagrossa's own handwritten notes refuted these denials, leading the court to conclude: [t]his was, in short, not a good-faith misstatement; it was a deliberate falsehood."[107]

Testagrossa also violated the professional rules by prejudicing the administration of justice and acting in a manner not befitting an attorney. Rule DR 1-102 prohibited attorneys from engaging in conduct that was prejudicial to the administration of justice, or engaging in any other conduct that adversely reflected on their fitness to practice law.[108] A prosecutor's violation of Rule DR 7-103(b) also violated Rule DR 1-102.[109] An attorney's misrepresentation during legal proceeding prejudiced the administration of justice and reflected adversely on the lawyer's fitness, in violation of Rule DR 1-102.[110]

In *Bell*, Testagrossa prejudiced the administration of justice: he withheld evidence and deliberately misled the Court and defense counsels. His actions were so egregious and injurious that they led to the wrongful conviction and imprisonment of three men for decades. Needless to say, such actions were also not befitting an attorney, another violation of the professional rules.

B. For His Misconduct, Testagrossa Must be Disbarred.

Though the misconduct discussed here occurred years ago, New York does not have a statute of limitation barring disciplinary action against an attorney—and rightfully so. As explained by the American Bar Association, "Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice."[111] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[112]

Testagrossa should be disbarred for his serious misconduct. In measuring the appropriate discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in

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[106] Ex. A, *Bell* at *9.

[107] *Id.* at *11.

[108] Code of Prof. Resp., DR 1-102 (22 N.Y.C.R.R. § 1200.3) (repealed). These rules were in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced them in 2009.

[109] *Kurtzrock*, 192 A.D.3d 197 (finding disclosure violation prejudiced the administration of justice and reflected adversely on the prosecutor in violation of Rules 8.4(d), (h), the successors to Rule DR 1-102); *Rain*, 162 A.D.3d at 1461 (same).

[110] *In re Muscatello*, 87 A.D.3d 156, 158-59 (2d Dep't 2011) (prosecutor misrepresentation of content of evidentiary document to the grand jury violated Rules 8.4(d), (h), the modern equivalents of DR 1-102).

[111] 2020 Model Rules for Lawyer Disciplinary Enforcement, Rule 32 and Commentary, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/.

[112] *Id.*

aggravation."[113] Simply being a prosecutor supports aggravated discipline because the law tasks prosecutors "with seeing that justice is done—to act impartially, to have fair dealing with the accused, to be candid with the courts, and to safeguard the rights of all."[114] Similarly, extensive prosecutorial experience weights towards an aggravated sanction.[115]

Testagrossa was a highly experienced prosecutor at the time of the *Bell*, *Bolt*, and *Johnson* prosecutions—this was not the mistake of a novice. According to his LinkedIn page, Testagrossa began his prosecutorial career in 1977 at the QDAO.[116] By 1983, he had already served as a Supervisor in the office's Grand Jury Bureau and a Bureau Chief of the Supreme Court Trial Bureau.[117] He later became the Chief of the Economic Crimes and Rackets Bureau, before assuming the role of Chief of the Career Criminal/Major Crimes Bureau, which he held at or around the same time he sought the death penalty for George Bell.[118] In 2000, Testagrossa became a QDAO Executive ADA and then later an executive role in Nassau's District Attorney's Office,[119] from which he resigned following the vacating of the *Bell*, *Bolt*, and *Johnson* convictions. Therefore, Testagrossa's experience as a prosecutor at the time of the misconduct supports his disbarment.

Testagrossa's failure to rectify his misconduct, and his continued denial of his knowing misconduct, further support his disbarment. The Appellate Division has demonstrated that misconduct that affects the credibility of a prosecutor should not be taken lightly. It suspended a prosecutor for three years for making a false statement to a trial court, and explained that, "such [mis]conduct strikes at the heart of [the prosecutor's] credibility as a prosecutor and an officer of the court."[120] In that same case, the Appellate Division demonstrated that a prosecutor's "ample opportunity" to correct or clarify the misrepresentation—and failure to do so—counts against him in evaluating proper disciplinary measures.[121]

Given the near-miraculous method that Bell, Bolt, and Johnson learned of the Speedstick evidence, it seems clear that Testagrossa never changed course over the last 24 years to correct his misleading remarks or provide his notes. He did not submit an affirmation to the Queens Supreme Court to offer any explanation of what had occurred. Testagrossa had years upon years to correct his misconduct—while Bell, Bolt and Johnson were wrongfully imprisoned—but he never did so.

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[113] *Kurtzrock*, 192 A.D.3d 197; *see also Rain*, 162 A.D.3d at 1462 ("[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.").

[114] *Kurtzrock*, 192 A.D.3d 197.

[115] *Id*. *See also Rain*, 162 A.D.3d at 1461 (prosecutor's experience an aggravating factor).

[116] Exhibit B, Charles Testagrossa LinkedIn Profile Page.

[117] *Id*.

[118] *Id*.

[119] *Id*.

[120] *See In re Stuart*, 22 A.D.3d 131, 133 (2d Dep't 2005).

[121] *Id.*

Finally, Testagrossa's supervisory role in the Nassau and Queens District Attorney's Offices further supports disbarment in this case. As discussed, Testagrossa has held multiple supervisory and executive roles across both offices. In his leadership positions, Testagrossa undoubtedly supervised and trained dozens of prosecutors, who presumably viewed him as a mentor and a role model. Thus, the Grievance Committee must send these prosecutors a clear message: that prosecutors, whether high ranking or not, will be held accountable for misconduct.

Disbarment is the only appropriate sanction for the misconduct described in this grievance. As prosecutorial misconduct becomes increasingly identified as a stain on our legal system's promise of justice and fairness, some state courts have taken decisive action, disbarring prosecutors for egregious misconduct. While several states — including Texas, Minnesota, Pennsylvania, North Carolina, and Arizona — have disbarred prosecutors for on-the-job misconduct, we have not found a single example of such discipline in New York.

If disbarment is *never* applied as a sanction for prosecutorial misconduct, prosecutors can rest assured that, even if they are caught committing the most severe misconduct, they will face at most a short suspension of their law license. Career advancement by developing a reputation for winning cases at all costs is an obvious incentive for prosecutors to bend and break rules. If the Grievance Committee and courts do not apply an actual—rather than theoretical—disincentive, prosecutorial misconduct will continue unabated.

For all of these reasons, Testagrossa must be disbarred.

Conclusion

The murder convictions of the George Bell, Rohan Bolt, and Gary Johnson were vacated last month because Leventhal and Testagrossa "deliberately withheld" crucial exculpatory evidence for more than 20 years.[122] As the defense brief noted, "George Bell entered prison at the age of 19. He escaped the death penalty and is now 44. Rohan Bolt entered prison when he was [a father of young children and] 35. He is now 59. Gary Johnson entered prison when he was 22. He is now 46."[123] Their right for a fair trial was denied by Testagrossa and others, and their lives consequently ruined.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[124] To that end, "the grievance process exists to protect the public…. By bringing a complaint to a committee's attention, the public helps the legal profession achieve its goal."[125] The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding

[122] Ex. A, *Bell* at *9.

[123] Ex. A2, Defense Brief at 22.

[124] NYSBA Committee on Professional Discipline, *Guide to Attorney Discipline,* https://nysba.org/public-resources/guide-to-attorney-discipline/.

[125] *Id.*

identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Testagrossa. As the comment to Rule 8.3 of the New York Rules of Professional Conduct reminds us, "An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."[126] Using its power to investigate, including to issue subpoenas and interview witnesses, the Committee can and should obtain a list of all cases that this prosecutor worked on and contact the attorneys, witnesses, and accused persons (while protecting the accused's rights to privacy and counsel) in those cases. The Committee should also identify all of Testagrossa's other cases where the issue of misconduct was raised before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

2. The Committee should promptly investigate whether any supervising attorney at the Queens District Attorney's Office (QDAO) is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct. This rule provides direct culpability for supervising attorneys under various circumstances, including when a supervisor knowingly ratifies improper conduct or knows of the conduct when it could be prevented but fails to take remedial action.[127]

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

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[126] Rule 8.3, Comment [1].

[127] Rule 5.1 (d). A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

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

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

4. The Committee should identify any prosecutors trained and/or supervised by Testagrossa and determine whether instances of prosecutorial misconduct can also be found in their work as prosecutors.

We recognize that bar discipline provides a uniquely individual remedy that will not, on its own, remedy the systemic problems identified above in this letter. For this reason, we also call for the implementation of an independent public commission empowered to investigate all cases handled by this prosecutor and vacate convictions where appropriate. To be clear, we do not mean a closed-door, cloaked process at the Queens District Attorney's Office. Instead, we call for a commission that operates transparently and includes members of the public, including members of impacted communities of color, public defenders and other criminal defense attorneys, civil rights attorneys, and people who have been incarcerated and their loved ones.

Thank you for your careful consideration of this matter.

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