

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
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Re: Grievance Complaint Regarding Attorney John Theodorellis, State Bar No. 2592228.

To the Grievance Committee,

We write to complain about the serious misconduct committed by attorney John Theodorellis¹ in *People v. Calabria*.² Theodorellis was an Assistant District Attorney in the Kings County District Attorney's Office when he prosecuted Michael Calabria. The Court of Appeals held that Theodorellis's misconduct during the trial was so egregious that it violated Calabria's right to a fair trial, necessitating a reversal of the conviction.³

The Court of Appeals found that Theodorellis "completely disregarded" the trial judge's pre-trial ruling when he asked the defense for lineup photos in front of the jury.⁴ Theodorellis continued to act improperly during summation, suggesting that the defense had tried to hide the photos from the jury and claiming he had revealed them.⁵ Theodorellis further prejudiced Calabria's right to testify by implying Calabria had no choice but to testify in his own defense.⁶ Finally, Theodorellis prejudiced Calabria by "deliberately" commenting on Calabria's parents' appearance in a *New York Post* article because of their alleged drug dealing, and flashed a copy of the paper to the jury, an act that the trial judge found "absolutely contemptuous."⁷

The trial judge repeatedly admonished Theodorellis for his improper behavior⁸ and the Court of Appeals reversed the conviction. Despite this judicial finding of misconduct, Theodorellis is now in private practice and has advertised his prosecutorial experience to potential clients on his

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² Exhibit A, *People v. Calabria*, 94 NY2d 519 (2000). The decision does not name Theodorellis. However, he is named, by his last name, in Calabria's appellate brief and John Theodorellis is the only person with that last name listed in the New York Attorney Registration Search. Exhibit B, Brief for Defendant-Appellant at *22, in *People v. Calabria*, 94 NY2d 519 (2000), available at 2000 WL 34065186. These writers do not have personal knowledge of any of the facts or circumstances of Theodorellis or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

³ *Calabria*, 94 NY2d at 523.

⁴ *Id.* at 522.

⁵ *Id.*

⁶ *Id.* at 522-23

⁷ *Id.*

⁸ *Id.* at 522.

firm website—while the New York Attorney Detail Report lists “Disciplinary History: No record of public discipline” for Theodorellis.⁹ Theodorellis must be sanctioned for his egregious professional misconduct.

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.¹⁰ When any attorney errs, it can cause harm, typically to an individual person. But a prosecutor’s misconduct can not only destroy a person’s life, and that of their family, but also derail the legal system’s promises of fairness and equality for all. When state actors harness the punitive power of the state in a manner that violates the state’s own rules, it sends the message that power—not justice—is the driving force behind legal actions. A single prosecutor’s misconduct can damage “the reputation and public confidence placed” in all prosecutors and the justice system itself.¹¹

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.”¹² 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.”¹³

But misconduct by prosecutors remains widespread and unchecked in the New York criminal legal system. A 2013 study of ten years of state and federal decisions revealed more than two dozen instances in which judges reversed convictions explicitly because of prosecutorial misconduct.¹⁴ Yet these appellate courts “did not routinely refer prosecutors for investigation by the state disciplinary committees,” and the disciplinary committees otherwise “almost never took serious action against prosecutors.”¹⁵ Indeed, among these numerous cases in which judges

⁹ See New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney John Theodorellis, click on Name hyperlink].

¹⁰ *Matter of Rain*, 162 AD3d 1458, 1462 (3d Dept 2018) (“[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.”); see also ABA Criminal Justice Standards: Prosecution Function Standard 3-1.4(a) (“In light of the prosecutor’s public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations.”).

¹¹ *Rain*, 162 AD3d at 1462.

¹² *Berger v United States*, 295 US 78, 88 (1935) (emphasis added); see also *People v Jones*, 44 NY2d 76, 80 (1978) (quoting *Berger*, 295 US at 88); *People v Calabria*, 94 NY2d 519, 523 (2000) (“Evenhanded justice and respect for the fundamentals of a fair trial mandate the presentation of legal evidence unimpaired by intemperate conduct aimed at sidetracking the jury from its ultimate responsibility—determining facts relevant to guilt or innocence.”); *People v Levan*, 295 NY 26, 36 (1945).

¹³ Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (Apr. 3, 2013), <https://tinyurl.com/t2ryucec>.

¹⁴ *Id.*

¹⁵ *Id.*

overturned convictions based on prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York disciplinary committee.¹⁶ 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.¹⁷ 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.”¹⁸

B. 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.¹⁹ 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.²⁰

Unfortunately, the U.S. Supreme Court’s assumption—that professional disciplinary actions would “provide an antidote to prosecutorial misconduct”—has not been borne out.²¹ A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than two percent—were ever publicly disciplined.²²

¹⁶ *Id.*; see also *In re Stuart*, 22 AD3d 131, 133 (2d Dept 2005) (holding, following a Grievance Committee disciplinary proceeding, that a prosecutor’s misconduct warranted a three-year suspension from the practice of law).

¹⁷ See *Sapient & Hernandez*, *supra* n. 5.

¹⁸ Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), <https://tinyurl.com/4ntvsv85>.

¹⁹ See e.g. *Imbler v Pachtman*, 424 US 409, 427 (1976); *Shmueli v City of New York*, 424 F3d 231, 237 (2d Cir 2005) (noting that prosecutors have “absolute immunity” for the “conduct of a prosecution”); *Dann v Auburn Police Dept*, 138 AD3d 1468, 1469 (4th Dept 2016) (“The law provides absolute immunity for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process.” (internal quotation marks omitted)); see also *Ryan v. State*, 56 NY2d 561, 562 (1982) (holding that “the doctrine of prosecutorial immunity” precludes “recovery against the State” for “acts of prosecutorial misconduct”).

²⁰ *Imbler*, 424 US at 429; see also *Matter of Malone*, 105 AD2d 455, 459 (3d Dept 1984) (rejecting public official’s claim to prosecutorial immunity in a professional ethics proceeding).

²¹ See Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz L Rev 219, 242–243 (2012).

²² Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* at 8 (Dec. 2013) <https://tinyurl.com/rpxyadhb>; see also Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards* (Mar. 2014), <https://tinyurl.com/vjkr2eh>; 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*

In their 2016 article, “Prosecutorial Accountability 2.0,” ethics experts Professors Ellen Yaroshefsky and Bruce Green point out that prosecutors “were rarely disciplined for misconduct, and if so, not very seriously.”²³ 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.”²⁴ “It’s an insidious system,” said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to ProPublica.²⁵ “Prosecutors engage in misconduct because they know they can get away with it.”²⁶

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.²⁷ In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.²⁸ But even a short suspension like that received by Rain and Kurtzrock²⁹—indeed, public discipline of any kind—remains rare.

Prosecutors, the public officials tasked with holding the public accountable, are not being held accountable for their own misconduct. Absent strong, public discipline, misconduct like that of Theodorellis, will continue unabated and undeterred.

2. The Court of Appeals Found that Theodorellis Committed Serious Prosecutorial Misconduct, Which Violated Calabria’s Constitutional Right to a Fair Trial.

Theodorellis prosecuted Calabria for robbery and related charges arising from an incident in 1996.³⁰ The complainant, a teacher, encountered a gunman in the hallway outside her classroom.³¹ She observed the gunman for approximately 5-10 seconds before closing her eyes, as he instructed

Professional Discipline of Prosecutors, 79 NC L Rev 721, 725 (2001) (describing the “rarity of discipline” of prosecutors).

²³ Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L Rev 51, 65 (2017).

²⁴ *Id.* at 65 (citation omitted); see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 NC L Rev 693, 697 (1987).

²⁵ Sapien & Hernandez.

²⁶ *Id.*

²⁷ *Rain*, 162 AD3d at 1462.

²⁸ *In the Matter of Glenn Kurtzrock*, 192 AD3d 197 (2d Dept 2020).

²⁹ In the context of the apparently rampant and egregious misconduct by Rain and Kurtzrock, the court’s sanction was surprisingly light. See e.g., Bennett L. Gershman, *The Most Dangerous Prosecutor In New York State*, HuffPost (Sept. 20, 2017), <https://tinyurl.com/yhvm43k>; Bennett L. Gershman, *A Most Dangerous Prosecutor: A Sequel*, HuffPost (Oct. 1, 2016), <https://tinyurl.com/fp9yfs8x>; Nina Morrison, *What Happens When Prosecutors Break the Law?*, NY Times (June 18, 2018), <https://tinyurl.com/52ar9tjx>.

³⁰ *Calabria*, 94 NY2d at 521.

³¹ *Id.*

her to.³² After calling the police, the complainant picked out Calabria from two photo arrays, and later from a line up.³³ After a trial, the jury convicted Calabria.³⁴

The Court of Appeals reversed Calabria’s conviction because of the “cumulative effect” of Theodorellis’s misconduct,³⁵ which involved several improper acts during trial. In a pre-trial hearing, the court ruled that evidence about the lineup was admissible.³⁶ Because the arresting officer in the case lost her file containing photos of the lineup, Theodorellis requested that the court order Calabria to turn over his copy of the lineup photos.³⁷ The judge denied Theodorellis’s request.³⁸

Undeterred by the court’s ruling, Theodorellis asked the defense—in the presence of the jury, in the middle of the trial—for the lineup photos.³⁹ Theodorellis’s move appears to be transparently calculated to be prejudicial: if defense counsel did not comply, it would appear as if the defense was hiding evidence from the jury.⁴⁰ In response, the trial judge “sternly admonished” Theodorellis and threatened sanctions but denied the defense’s motion for a mistrial.⁴¹ Calabria’s counsel told the court the defense was forced to admit the photos into evidence because of Theodorellis’s misconduct.⁴²

Even after the court’s stern admonishment, Theodorellis continued to commit egregious misconduct prejudicing Calabria’s right to a fair trial. While cross-examining Calabria, Theodorellis noted that Calabria’s parents had made “the cover of the [New York] Post” because of their alleged drug dealing, and even displayed the front page of the newspaper to the defendant in the presence of the jury.⁴³ The judge again admonished Theodorellis, stating: “That is absolutely contemptuous, what you just did in this courtroom here.”⁴⁴ Yet the trial judge again declined to grant a mistrial.⁴⁵

Still, Theodorellis persisted with his misconduct. In summation, Theodorellis “implied” that Calabria attempted to withhold the lineup photos from the jury.⁴⁶ He noted that “after [the People]

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 523.

³⁶ *Id.* at 521.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 521-22.

⁴¹ *Id.*

⁴² *Id.* at 522.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

knew about the photo, we got it. Oh, yeah, we got it....[The People] gave it to you...[and] published those photos to you so you got to see the photos.”⁴⁷

The Court of Appeals recognized the seriousness of Theodorellis’s misconduct and held that Theodorellis violated Calabria’s constitutional right to a fair trial.⁴⁸ Theodorellis “completely disregarded” the court’s pre-trial ruling.⁴⁹ Moreover, “despite” the trial judge’s “strong rebuke and threat of sanction,” Theodorellis continued, “over sustained objection,” to imply that the defense withheld the lineup photos and that he had to try to get the photos to the jury.⁵⁰ “Equally impermissible,” Theodorellis prejudiced Calabria’s right to testify by implying that Calabria had no choice but to testify in his defense.⁵¹ Finally, Theodorellis “impermissibly prejudiced” Calabria by “deliberately” referring to matters not in evidence: Calabria’s parents’ appearance in *The New York Post* for alleged drug dealing.⁵²

3. The Grievance Committee Must Seek Discipline 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.”⁵³ Professional misconduct occurs with a “violation of any of the Rules of Professional Conduct.”⁵⁴ Grievance Committees are “committed to...recommending discipline for lawyers who do not meet the high ethical standards of the profession.”⁵⁵

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.”⁵⁶

In handing ex-prosecutor Glenn Kurtzrock a two-year suspension for his past prosecutorial misconduct, the Appellate Division reminded us, “Prosecutors, in their role as advocates and

⁴⁷ *Id.* In addition, the court quoted Theodorellis telling the jury that Calabria did not have a choice in taking the stand “when good, nice people take the stand.” *Id.* The apparent implication of this summation comment is that Theodorellis told the jury that they should not credit Calabria’s decision to testify because Calabria only did so because he knew that good people—unlike him—testify in court.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 522-23.

⁵² *Id.* at 523.

⁵³ Attorney Grievance Committee of the First Judicial Department, *How to File a Complaint*, <https://tinyurl.com/39axvffr>.

⁵⁴ Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.2(a).

⁵⁵ *How to File a Complaint*.

⁵⁶ *Connick v Thompson*, 563 US 51, 65-66 (2011) (quotation marks omitted).

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.”⁵⁷

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.”⁵⁸ 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.⁵⁹ The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.⁶⁰ 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.

A. Theodorellis’s Misconduct Violated Rules of the New York Code of Professional Responsibility.⁶¹

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.⁶² As the Court of Appeals explained, “the privilege to practice law is not a personal or liberty interest, but is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.”⁶³

The Code of Professional Responsibility (“Code”) was the applicable professional set of rules in 2000 when Theodorellis prosecuted Calabria. Theodorellis violated the Code by prejudicing the administration of justice and conducting himself in a manner not befitting a lawyer. 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.⁶⁴

Moreover, Theodorellis violated the trial judge’s explicit order on lineup photos by requesting the photos from the defense in front of the jury. He continued to violate the judge’s order when, on summation, he implied that the defense tried to hide the evidence, and he uncovered it. He seems to have committed these acts in complete disregard not only of the judge’s pre-trial order,

⁵⁷ *Kurtzrock*, 192 AD3d 197, 219.

⁵⁸ Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b) Comment [1].

⁵⁹ ABA Criminal Justice Standards: Prosecution Function Standard 3-1.2 (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

⁶⁰ *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.8(b).

⁶¹ The applicable professional set of rules in 1997, at the time that Theodorellis tried Griffin, was the Code of Professional Responsibility. The Rules of Professional Conduct, the set of rules in effect today, replaced the Code in 2009.

⁶² *See e.g. Matter of Capoccia*, 59 NY2d 549, 551 (1983).

⁶³ *Matter of Seiffert*, 65 NY2d 278, 280 (1985) (quotation marks omitted); *see also Matter of Scudieri*, 174 AD3d 168, 173 (2019).

⁶⁴ Code of Professional Responsibility DR 1-102 (22 NYCRR 1200.3 (repealed)). This rule was in effect when the misconduct, as outlined above, occurred. However, Rules 8.4(d) and (h) of the Rules of Professional Conduct replaced it in 2009.

but repeated admonishments, threats of sanctions, and objections from the defense. In addition, Theodorellis prejudiced Calabria's right to testify and brought in irrelevant facts not in evidence: Calabria's parents' alleged drug dealing covered in *The New York Post*.

B. For His Misconduct, Theodorellis Must Receive Public Discipline.

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.”⁶⁵ The ABA’s Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline “exempt from all statutes of limitations.”⁶⁶

In considering discipline, the Appellate Division has considered the role of prosecutor as a “substantial factor in aggravation.”⁶⁷ 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.”⁶⁸ Similarly, extensive prosecutorial experience weights towards a more serious sanction.⁶⁹

Theodorellis entered the legal profession in 1994, meaning that by the time of this serious misconduct, he was already an experienced attorney. This was not the work of a novice; rather, this was the strategy of a skilled practitioner trying to achieve a conviction. This is also evident by Theodorellis’ handling of Calabria’s case—a B felony, one of the most serious offense levels in New York’s Penal Code.

Regardless, one does not to be an experienced attorney to obey a judge’s order. Here, the Court of Appeals found that Theodorellis disregarded the trial court’s order, deliberately referred to prejudicial facts not in evidence, and prejudiced a defendant’s right to testify—a right that is taught in every introductory criminal law class.

Despite the judicial finding of misconduct discussed above, Theodorellis is now in private practice and advertises his prosecutorial experience to potential clients on his firm website—while the New York Attorney Detail Report lists “Disciplinary History: No record of public discipline” for Theodorellis.⁷⁰ For his disobedience of a court order and the resulting prejudice to Calabria’s constitutional right to a fair trial, the Grievance Committee must seek to seek to suspend Theodorellis’s license.

⁶⁵ ABA Model Rules for Lawyer Disciplinary Enforcement rule 32 (Commentary 2020).

⁶⁶ *Id.*

⁶⁷ *Kurtzrock*, 192 AD3d at 219; *see also Rain*, 162 AD3d at 1462 (“[P]rosecutors carry an obligation to hold themselves to the highest standards based upon their role in our system of justice.”).

⁶⁸ *Kurtzrock*, 192 AD3d at 219.

⁶⁹ *Id.*

⁷⁰ *See* New York Unified Court System, Attorney Online Services – Search, <https://tinyurl.com/347srhpu> [search by attorney John Theodorellis, click on Name hyperlink].

Conclusion

The Court of Appeals found that Theodorellis' misconduct in violating a court order, referring to disparaging facts not in evidence, and prejudicing a defendant's right to testify, were so egregious as to require the reversal of a jury's verdict. Theodorellis' conduct constituted violations of New York's Code of Professional Responsibility. To these writers' knowledge, Theodorellis has faced no public discipline for the above-described misconduct. The suspension of Theodorellis' law license is the only appropriate sanction for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."⁷¹ 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."⁷² The judicial finding identified in this grievance provides far more evidence than necessary to meet the "fair preponderance of the evidence" standard to discipline the prosecutor at issue, but we call upon the Grievance Committee to go further and investigate far beyond the court finding identified in this grievance. For the legitimacy of and public trust in the criminal system, and the bar, the investigation should be public at every stage possible.

Below are some essential aspects of such an investigation:

1. The Committee should begin by investigating the many other cases prosecuted by Theodorellis. 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."⁷³ 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 Theodorellis's other cases where the issue of misconduct was raised in the courts before trial, at trial, or on appeal, or was the subject of other ethical grievances, mentioned in the media, or identified in any other source.

This type of comprehensive investigation may seem onerous, but the recent investigation into former Suffolk County Assistant District Attorney Glenn Kurtzrock demonstrates both the viability and overwhelming necessity of a systematic investigation. In a 2017 murder trial, *People v. Booker*, Kurtzrock committed a wide range of egregious discovery violations, leading to his resignation and the Appellate Division's December 2020 ruling suspending his law license for two years.⁷⁴ In imposing this sanction, the Appellate Division highlighted as a mitigating factor that "there was no showing that [Kurtzrock] engaged in any similar conduct in any other cases."⁷⁵

⁷¹ NY St Bar Assn Comm on Prof Discipline, Guide to Attorney Discipline, <https://tinyurl.com/47scv4pb>.

⁷² *Id.*

⁷³ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁷⁴ *Kurtzrock*, 192 AD3d 197.

⁷⁵ *Id.* at 220.

But at the time of the December 2020 Appellate Division ruling, there was in fact already significant evidence of similar misconduct by Kurtzrock in other cases, which would have been easily identified if a systematic investigation had been undertaken.⁷⁶ To start, after Kurtzrock's *Brady* violation was revealed during the 2017 *Booker* trial, defense counsel for a different murder case in which Kurtzrock had obtained a conviction, *People v. Lawrence*, then pending on appeal, requested a reexamination of the discovery in that case. The District Attorney's Office agreed, and the investigation revealed that Kurtzrock had failed to disclose more than 40 items of *Brady* and/or *Rosario* evidence in *Lawrence* as well, including a payment to a witness and exculpatory witness statements. Consequently, the judge dismissed the indictment in 2018, and Shawn Lawrence, who had served six years of incarceration of his 75-years-to-life sentence, was released.⁷⁷ The judge concluded that the suppression constituted "more than exceptionally serious misconduct."⁷⁸

A systematic investigation of Kurtzrock ensued that uncovered even more suppressed evidence. Following the Appellate Division's December 2020 ruling, the Suffolk County District Attorney's Office ("SCDAO") worked with the New York Law School Post-Conviction Innocence Clinic to conduct a comprehensive review of Kurtzrock's trial cases and other cases where Kurtzrock's actions raised discovery issues.⁷⁹ The investigation and resulting public report identified that numerous prosecutions by Kurtzrock were infected by "practices similar to those criticized by the Appellate Division in the [2017] *Booker* case,"⁸⁰ which the report characterized as a "potential systemic issue."⁸¹

As a result of the investigation, the SCDAO provided new evidence to defendants in **100 percent of Kurtzrock's homicide cases and 76 percent of all trial cases reviewed.**⁸² These disclosures have already spurred applications to review convictions.⁸³ The SCDAO also sent its report to the Appellate Division and the Grievance Committee to determine if any additional action is appropriate,⁸⁴ an

⁷⁶ Letter to Second Department (unfiled), Nina Morrison of the Innocence Project and Paul Shechtman of Bracewell LLP, January 20, 2021; see also Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, <https://tinyurl.com/52ar9tjx>.

⁷⁷ Morrison, *What Happens When Prosecutors Break the Law?*, NY Times, <https://tinyurl.com/52ar9tjx>.

⁷⁸ County of Suffolk Office of District Attorney, Review of the Disclosure Practices of Assistant District Attorney Glenn Kurtzrock, <https://tinyurl.com/2a7ba9cd> (hereafter "Kurtzrock report") at 11 (discussing case of *People v. Shawn Lawrence*) (internal quotation marks omitted).

⁷⁹ The SCDAO "attempted to identify and examine for *Brady/Giglio* and *Rosario* compliance all cases Kurtzrock tried while serving as an ADA with the SCDAO, both as a homicide prosecutor and while serving in a bureau that prosecutes non-fatal violent crimes and other felony offenses. The CIB also examined additional cases... that Kurtzrock did not try himself but in which Kurtzrock's actions prior to trial were identified as raising *Brady/Giglio* and/or *Rosario* compliance concerns." *Id.* at 4.

⁸⁰ *Id.* at 5.

⁸¹ *Id.* at 4.

⁸² *Id.* at 6.

⁸³ *Id.*

⁸⁴ *Id.* at 7.

important step given that, in explaining the lenient two-year suspension for Kurtzrock's misconduct in *Booker*, the Appellate Division cited the ostensible lack of evidence of misconduct by him in other cases.

The Kurtzrock investigation thus demonstrates the sound logic behind the comment to Rule 8.3 that “[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover”⁸⁵ and the need for the Grievance Committee to systematically investigate this prosecutor's work.

2. The Committee should promptly investigate whether any supervising attorney at the Kings County District Attorney's Office is also culpable for the ethics violation cited in this grievance under Rule 5.1(d) of the New York Rules of Professional Conduct, which provides direct culpability for supervising attorneys under various 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.⁸⁶
3. The Grievance Committee should investigate whether the Kings County District Attorney's Office and its managing attorneys complied with its duties under Rule 5.1 of the New York Rules of Professional Conduct, requiring that law firms as a whole, and managing attorneys in particular, make efforts to ensure that all lawyers in the firm conform to the New York Rules of Professional Conduct.⁸⁷
4. The Committee should identify any prosecutors trained and/or supervised by Theodorellis 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 systematically investigate

⁸⁵ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁸⁶ Rules of Professional Conduct (22 NYCRR 1200.0) rule 5.1 (d) reads: A lawyer shall be responsible for a violation of these Rules by another lawyer if:

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

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

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

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

⁸⁷ District Attorney offices qualify as “law firms” under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0 (h). “‘Firm’ or ‘law firm’ includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.”

all cases identified in #1-4 above and advise the court if this investigation casts doubt on the integrity of any convictions. To be clear, we do not mean a closed-door, cloaked process inside a District Attorney's Office, but rather 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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