May 3, 2021

Grievance Committee for the Second, Eleventh and
Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Nicole Aloise, State Bar No. 4682571.

To the Grievance Committee:

We write to complain about the professional misconduct of attorney Nicole Aloise[1] in three cases: *People v. McCray, People v. Velez,*[2] and an unidentified case reported in the news.[3] These cases reveal that Aloise has engaged in systematic violation of the rules of summation, prejudicing defendants and violating their rights.

We write this Grievance in order to hold Aloise accountable for her repeated misconduct. In *McCray*, the Second Department Appellate Division found that Aloise made "patently improper" arguments when she impermissibly vouched for the credibility of the complainant and for the strength of her case, appealed to the jurors' sympathy, and denigrated both the defendant and the defense itself. In *Velez*, Aloise's summation comments drew explicit rebukes from the Appellate Division judges presiding over the case on appeal. Justice LaSalle, a former prosecutor, called the remarks "unprofessional" and wondered why Aloise did not try to win the case through the evidence, rather than being "glib."[4] Justice Miller, in turn, noted that he "could read this summation, and without knowing what office it's from, say it's from the Queens" because it was so improper.[5]

Finally, in an unidentified case reported in the New York Law Journal, Aloise apparently told the jurors in summation that defense counsel had "made things up"—while her father, Michael

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[1] Nicole Aloise, State Bar No. 4682571, Queens District Attorney's Office, 125-01 Queens Blvd, Kew Gardens, N.Y. 11415 (Queens County). Phone: (718) 286-6000. Aloise's registration page on the Unified Court System does not list an email. We do not have personal knowledge of any of the facts or circumstances of Aloise or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. McCray*, 140 A.D.3d 794 (2d Dep't 2016); Exhibit B, *People v. Velez*, 164 A.D.3d 622 (2d Dep't 2018)*, and rev'd sub nom. on other grounds People v. Tsintzelis*, 35 N.Y.3d 925 (2020).

[3] Exhibit C, Colby Hamilton, *Close Family Ties Between Queens Judges, Prosecutors, Raise Appearance Concerns*, New York Law Journal (August 7, 2018). This article is available online at: https://appellatesquawk.files.wordpress.com/2018/09/close-family-ties-between-queens-judges-prosecutors-raise-appearance-concerns-new-york-law-journ.pdf.

[4] *People v. Velez*, 2014-09698, Oral Argument at 46:55-48:00, available at 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

[5] *Id.* at 48:30-49:00.

Aloise—a Queens Supreme Court judge who presides over criminal cases in the same courthouse where his daughter practices—sat and watched her in the courtroom.[6]

Just as prosecutors hold individuals accountable for crimes, so should prosecutors be held accountable for their misconduct. Despite the findings of 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 Aloise.[7]

Aloise's misconduct in Queens was far from unique; serious misconduct at the Queens District Attorney's Office (QDAO) 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.[8] 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.[9] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial prosecutors.[10] 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.[11] Aloise's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

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[6] Ex. C, Colby Hamilton, *Close Family Ties Between Queens Judges, Prosecutors, Raise Appearance Concerns*.

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

[8] *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

[9] 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).

[10] *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

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

Aloise's improper summation remarks—in multiple cases, a reoccurring pattern—constitute professional misconduct in violation of Rule 8.4 of the New York Rules of Professional Conduct. For this misconduct, the Grievance Committee should suspend Aloise.

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

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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.*

prosecutorial misconduct, only one prosecutor was publicly disciplined by a New York 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. Summation Misconduct is Pernicious and Widespread.

In closing ("summation") arguments, the prosecutor's task is to explain how trial evidence applies to the legal elements of the charged offenses. Thus, prosecutors "must stay within the four corners of the evidence"[20] and are not permitted to make arguments that rely on facts that are not in evidence.[21] Prosecutors are not permitted to engage in prejudicial or misleading argumentation that are sometimes referred to as "cardinal sins."[22] These missteps include making "irrelevant and inflammatory comments;"[23] expressing "personal belief or opinion as to the truth or falsity of any testimony or evidence,"[24] also known as vouching; appealing to the jurors' sympathies or fears;[25] shifting the burden from the prosecution to the defense;[26] and denigrating the defense, defense counsel or the defendant.[27] Engaging in these prejudicial forms of arguments is improper and can violate the constitutional right to a fair trial.[28]

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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] *People v. Mehmood*, 112 A.D.3d 850, 853 (2d Dep't 2013) (internal quotation marks and citation omitted).

[21] *People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976). *See also People v. Wright*, 25 N.Y.3d 769, 779-780 (2015); *People v. Singh*, 128 A.D.3d 860, 863 (2d Dep't 2015).

[22] See Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent*, 103-118 (2012).

[23] *Mehmood*, 112 A.D.3d at 853.

[24] *People v. Bailey,* 58 N.Y.2d 272, 277 (1983) (citation omitted).

[25] *See, e.g., Ashwal,* 39 N.Y.2d at 110; *People v. Lindo*, 85 A.D.2d 643, 644 (2d Dep't 1981); *People v. Fernandez*, 82 A.D.2d 922, 923 (2d Dep't 1981); *People v. Fogarty*, 86 A.D.2d 617, 617 (2d Dep't 1982); *People v. Brown,* 26 A.D.3d 392, 393 (2d Dep't 2006).

[26] *People v. DeJesus*, 137 A.D.2d 761, 762 (2d Dep't 1988); *People v. Lothin*, 48 A.D.2d 932, 932 (2d Dep't 1975).

[27] *See, e.g., People v. Damon*, 24 N.Y.2d 256, 260 (1969); *People v. Lombardi*, 20 N.Y.2d 266, 272 (1967); *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); *Brown,* 26 A.D.3d at 393; *People v. LaPorte,* 306 A.D.2d 93, 95 (1st Dep't 2003).

[28] *DeJesus*, 137 A.D.2d at 762.

As far back as 1899, the New York Court of Appeals cautioned prosecutors against appealing to "prejudice" or seeking conviction "through the aid of passion, sympathy or resentment."[29] In 1906, the Court of Appeals reversed a criminal conviction because of the prosecutor's improper comments to the jury and expressed its frustration with the frequency of such misconduct:

> We have repeatedly laid down the rule governing prosecuting officers in addressing the jury… We have repeatedly admonished [prosecutors] at times with severity… not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer… *Why should court and counsel violate the law in order to enforce it?* What a pernicious example is presented when such officers, intrusted [sic] with the most important duties, in attempting to punish the guilty, are themselves guilty of departing from the law.[30]

But those early rebukes from the courts seem to have had little impact on prosecutors' practices. Over the last few decades, New York courts have had to remind prosecutors over and over that "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command."[31] Countering the gamesmanship and instinct to win that overcomes many prosecutors at trial, courts have reminded them that "our adversarial system of justice is not a game, it has rules, and it is unfortunate when a prosecutor … plays fast and loose with them."[32]

Summation misconduct continues—apparently unabated—to this day. During oral argument in 2018, Justice LaSalle of the Appellate Division sharply criticized the regularity of summation misconduct:

> At what point does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?… why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[33]

As the above statement of Justice LaSalle makes clear, prosecutors make improper arguments in summation because such remarks are *effective* at winning cases—they go beyond the evidence, to manipulate biases, prejudice, and passions. Discussing prosecutorial misconduct in opening statements—where attorneys are even more limited than in summation—Justice Alan D. Scheinkman of the Appellate Division remarked in oral argument, "It's obvious that the prosecutor who tried this case was saying things for the purpose of winning it."[34]

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[29] *People v. Fielding*, 158 N.Y. 542, 547 (1899).

[30] *People v. Wolf*, 183 N.Y. 464, 471-76 (1906) (emphasis added).

[31] *Ashwal*, 39 N.Y.2d at 109.

[32] *People v. Payne,* 187 A.D.2d 245, 247 (4th Dep't 1993).

[33] V*elez*, 2014-09698, Oral Argument at 0:46:55-0:48:05.

[34] *Cherry,* 2014-10909*,* Oral Argument at 0:27:45-0:28:13.

For that reason, summation misconduct is not trivial or a "mere technicality." Summation misconduct increases the likelihood of a guilty verdict—and of the prosecutor winning their case. However, the prosecutor's role in a criminal trial is not just to win the case: the law requires that prosecutors "seek justice…not merely to convict."[35] In this role, the law requires of prosecutors "to see that the defendant is accorded procedural justice."[36] Winning a case through summation misconduct violates this fundamental obligation. The American Bar Association's own ethical standards insist that "prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."[37]

Improper summations have been a particular problem at the Queens District Attorney's Office in recent years, distorting numerous trials, and sometimes resulting in reversal. As Justice Miller of the Appellate Division stated in oral argument:

> I could read this summation and without knowing what office it is from would say it is from Queens. That's the reputation that your office is building with this court. Because this [summation misconduct] happens repeatedly.[38]

Similarly, commenting on the Queens District Attorney's Office's opening and closing statement misconduct, Justice Austin of the Appellate Division stated in oral argument:

> I feel like a broken record because I address this every time. Almost every time the Queens DA is before us . . . When do we say to your office, enough is enough? . . . I've got to tell you, it distresses me to no end, the line that you consistently cross. Consistently! . . . You always agree [that these remarks are improper] when you're here [in the Appellate Division]. But you keep doing it and you keep doing it and you keep doing it … I've heard somebody from your office standing there every time I've been here saying the same exact thing [agreeing remarks were improper]. And I'm here 9 years this week. It's 9 years of the same thing.[39]

Justice Leventhal, in turn, suggested that the Queens District Attorney's Appeals Bureau train the trial prosecutors about summation misconduct.[40]

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[35] American Bar Association, Standard 3-1.2 Functions and Duties of the Prosecutor (2017) ("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

[36] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[37] Commentary, Criminal Justice Standards Comm., Am. Bar Ass'n, Standards for Criminal Justice: Prosecution and Defense Function Standards 3-5.8 (3d ed. 1993).

[38] *Velez*, 2014-09698, Oral Argument at 0:48:30-0:49:00.

[39] *Cherry,* 2014-10909*,* Oral Argument at 0:26:34-0:29:31.

[40] *Velez*, 2014-09698, Oral Argument at 0:49:30-0:50:15.

Professor and former prosecutor Bennett Gershman highlights the broad shadow that summation misconduct continues to cast over the entire criminal justice system:

> The problem is not new … [M]isconduct by prosecutors in oral argument has indeed become staple in American trials. Even worse, such misconduct shows no sign of abating or being checked by institutional or other sanctions … Virtually every federal and state appellate court at one time or another has bemoaned the 'disturbing frequency' and 'unheeded condemnations' of flagrant and unethical prosecutorial behavior.[41]

Despite the courts' clear prohibition of summation misconduct, prosecutors often ignore the law in an attempt to win their cases.

C. 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.[42] 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.[43]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[44]—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.[45]

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[41] Bennett L. Gershman, *Prosecutorial Misconduct*. § 11:1. Introduction (2d ed.) (August 2018 update) (internal citations omitted.) Gershman is a former New York prosecutor. See also Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 Hastings Const. L. Q.915 (2011).

[42] *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").

[43] *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).

[44] 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).

[45] 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

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."[46] "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."[47]

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.[48] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[49] But even a short suspension like that received by Rain and Kurtzrock[50]—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 Aloise will continue unabated and undeterred.

2. In *McCray*, the Appellate Division Found That Aloise Made Multiple Improper Statements During Her Summation.

Rather than allowing the jury to evaluate the case by focusing exclusively on the evidence, as the law requires, Aloise tipped the scales through misconduct. The Appellate Division found that

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

[46] 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).

[47] *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

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

[49] *Matter of Kurtzrock*, 192 A.D.3d 197 (2d Dep't, Dec. 30, 2020).

[50] 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 Morrison's twitter thread following the *Kurtzrock* decision, https://twitter.com/Nina_R_Morr/status/1344413003903602688).

Aloise made "multiple improper summation statements" in *McCray*, including: (1) vouching for the strength of the prosecution's case; (2) appealing to the jury's sympathy for the complainant; (3) disparaging the defendant; (4) vouching for the credibility of the complainant; and (5) denigrating the defense.[51]

The Appellate Division reversed McCray's conviction based on ineffective of counsel, rather than on Aloise's improper conduct, but one of the reasons defense counsel was ineffective was because he failed to object to Aloise's improper statements.[52] The Appellate Division condemned Aloise's "multiple," "patently improper" remarks.[53]

A. Aloise Improperly Vouched for the Strength of the Government's Case, Thereby Inserting Her Own Credibility Into the Case.

At the start of her summation in McCray, Aloise improperly vouched for the strength of her own case:

> I told you that I would prove this man guilty beyond a reasonable doubt. And, I submit, that I've done just that. I've given you everything you need to convict him of every crime he's charged with. And not to undermine the significance of your role here, but *I submit that this should not take you very long*.[54]

Aloise continued, calling on the jury to convict because of the "*overwhelming* evidence that [McCray] is guilty."[55]

As the Court of Appeals has explained, a prosecutor "may not inject his own credibility into the trial" because of the "possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor."[56] Moreover, courts have long held a prosecutor's definitive pronouncements of a defendant's guilt to be improper.[57]

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[51] Ex. A, *People v. McCray*, 140 A.D.3d at 797-98.

[52] *Id*.

[53] *Id*.

[54] Trial Transcript at 429:10-15, *People v. McCray*, Ind. No. 3112/12 (Queens Sup. Ct. July 11, 2013) (emphasis added).

[55] *McCray* Trial Tr. at 443:24 – 25 (emphasis added).

[56] *People v. Paperno*, 54 N.Y.2d 294, 300-01 (1981). *See also People v. Irving*, 130 A.D.3d 844, 846 (2d Dep't 2015) (improper for prosecutor to vouch for strength of her case); *People v. Jamal*, 307 A.D.2d 267, 268 (2d Dep't 2003) (improper for prosecutor to give "personal opinion . . . as to defendant's guilt").

[57] *See, e.g., People v. Anderson*, 35 A.D.3d 871, 872 (2d Dep't 2006) (finding improper "unqualified statements of the defendant's guilt"); *People v. Rogers*, 59 A.D.2d 916, 918 (2d Dep't 1977) (holding improper where prosecutor said "we feel that we have proven this case, easily, beyond a reasonable doubt"); *People v. Jodhan*, 37 A.D.3d 376, 377 (1st Dep't 2007) (holding that prosecutor "blatantly vouched for the strength of her case" by stating "there is no reasonable view of [the evidence] that would lead you to the conclusion" that defendant was not guilty); *People v. Rivera*, 116 A.D.2d 371, 375 (1st Dep't 1986) ("[T]he district attorney wrongfully vouched for the strength of the People's case by

But Aloise did just that. At the onset of her summation, she immediately drew on the prestige, credibility and weight of her position and that of her office to improperly support and reinforce her case, thus sidelining the only relevant inquiry before the jury—whether the evidence proved the charges. Such comments also undermine respect for the presumption of innocence and the reasonable doubt standard—tossing the fundamental and sacrosanct pillars of the legal system. At the end of her summation, Aloise again improperly pronounced the strength of her case, solidifying her earlier vouching efforts.

B. Aloise Improperly Appealed to the Jury's Sympathies and Vouched for the Complainant's Credibility.

Aloise repeatedly drew the jurors away from considering the evidence in the case and instead appealed to their emotions and sympathies for the complainant. In her summation, Aloise improperly emphasized both who the complainant is and how she had suffered from the crime:

> [The complainant] also told you about how what [McCray] did changed her life. You heard about a girl who moved to New York City from Ohio. She got a job waitressing the night shift in Times Square. She took the train home by herself. You heard that that same girl can't even put her trash out alone anymore. Because of the decisions he made that night, that morning, she had to move.[58]

To be clear: such personal details were irrelevant to Mr. McCray's innocence or guilt. Instead, these remarks harped on the jurors' sympathies for a small town girl, who moved to the Big City, worked hard in difficult circumstances and was now so scared she had to move. They had nothing to do with whether McCray had committed the alleged crime.

Aloise's attempt to appeal to jurors' sympathy was flatly improper and prejudicial to the defendant's right to a fair trial. Aloise's remarks went even beyond many that the appellate courts have found improper.[59] Such remarks were clearly irrelevant to the question of guilt and instead only "pla[yed] upon the emotions of the jurors in an obvious attempt to align them with the complainant and to thus bolster [her] testimony."[60]

After arousing the jury's sympathies toward the complainant, Aloise improperly contrasted her with McCray, who she improperly painted as a shameless predator:

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asserting that the prosecution had more than met its burden of proof.").

[58] *McCray* Trial Transcript at 443:12-19.

[59] *See, e.g., People v. Mohammed*, 81 A.D.3d 983, 984 (2d Dep't 2011) (improper for prosecutor to remark that the jury "saw what [the complainant] went through on the witness stand" and to ask jury "to treat [the complainant] with dignity"); *People v. Smith*, 288 A.D.2d 496, 497 (2d Dep't 2001) (prosecutor improperly appealed to jurors' sympathy by commending victim for "courageous[ly]" going to police and testifying).

[60] *Fogarty*, 86 A.D.2d 617. See also *Ashwal,* 39 N.Y.2d at 110; *Brown,* 26 A.D.3d at 393 (prosecutor inappropriately remarked to jury, "'God forbid you had a gun pointed at your side'"); *People v. Davis*, 256 A.D.2d 474, 474 (2d Dep't 1998) (prosecutor improperly appealed to jurors' fears regarding drug dealing); *People v. Moss*, 215 A.D.2d 594, 595 (2d Dep't 1995) (prosecutor's invitation to jurors to imagine themselves in the shoes of defendant's victims was improper).

> I submit to you that it's at this point in her testimony that we get to learn who [the complainant] really is, who she is as a person . . . She told you that even though her body told her that something was wrong and that her senses were heightened, she gave this man the benefit of the doubt and, unfortunately for her, he did not deserve it . . . And it's at this point, ladies and gentlemen, that we get to learn about the real Joel McCray. We get to learn how cocky and how brazen this man is[.]"[61]

With these statements, Aloise exalted the complainant while vilifying McCray – prejudicial misconduct that has been repeatedly rejected by the appellate courts.[62]

Aloise continued to make arguments that played to the jury's sympathy:

> [McCray] thought he was going to make money that night by taking [the complainant's]. He counted on a quick and easy payday, but what he did not count on, ladies and gentlemen, was [the complainant]. He did not count on her [] coming in here and subjecting herself to this nerve-racking situation, allowing herself to be put in a position of being cross-examined by two lawyers [and] standing up there and pointing at him as the man who robbed her.[63]

Aloise's remarks here violated the rules of summation in two different respects. First, they impermissibly appealed to the jury's sympathies.[64] Second, Aloise presented the complainant's actions in coming to testify as bravery, and thus vouched for her credibility.[65]

C. Aloise Improperly Turned the Jury Into a Community Defender and Avenger.

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[61] *McCray* Trial Tr. at 431:4-21.

[62] *See People v. Green*, 183 A.D.2d 617, 618 (1st Dep't 1992) (prosecutor's remarks "appear as a calculated appeal to the jury's emotions, in particular wrath toward the defendant, and sympathy for the victim. We strongly disapprove of such efforts to inflame the passions of the jury."); *People v. Shanis*, 36 N.Y.2d 697, 699 (1975) (prosecutor "exceeded the bounds of legitimate advocacy by resorting to name calling."); *People v. Bowie*, 200 A.D.2d 511, 513 (1st Dep't 1994) ("prosecutor who resorts to name-calling instead of confining her remarks to the facts commits a blatant act of prejudice which can only result in denying a defendant a fair trial, regardless of the merits of the case.") (internal citations omitted).

[63] *McCray* Trial Tr. at 445:10-20.

[64] *See, e.g., Mohammed*, 81 A.D.3d at 984; (improper for prosecutor to remark that the jury "saw what [the complainant] went through on the witness stand" and to ask jury "to treat [the complainant] with dignity"); *Smith*, 288 A.D.2d at 497 (prosecutor improperly appealed to jury's sympathy by commenting that complainant was "courageous" for "coming before you" and that while "ill," complainant still came to court).

[65] *See, e.g., United States v. Young*, 470 U.S. 1, 18-19 (1985) (holding it was misconduct for prosecutor to vouch for a witness); *People v. Puglisi*, 44 N.Y.2d 748, 750 (1978) (same); *Brown*, 26 A.D.3d at 393 (finding improper a prosecutor's remark that witnesses were "credible and accurate," "told you the truth," and "told you exactly how it happened"); *People v. Valdivia*, 108 A.D.2d 885, 887 (2d Dep't 1985) (holding that it is "fundamental" that prosecutors not present their opinions about the veracity of witnesses); *People v. Paul*, 229 A.D.2d 932, 933 (4th Dep't 1996) (holding prosecutorial vouching improper); *People v. Hicks*, 102 A.D.2d 173, 183 (1st Dep't 1984) (same).

Aloise's summation remarks improperly prodded the jury to "expand its role from that of a fact finder in this case to that of a community defender and avenger."[66] She appealed:

> [By testifying, the complainant] she put her faith in the criminal justice system. Essentially she put her faith in each and every one of you.[67]

Such remarks are improper because they push jurors to feel personally indebted to the complainant and return a guilty verdict as a recognition of the complainant's suffering and trust —disregarding the jurors' duty to dispassionately analyze the evidence.

This type of argument has been "consistently condemned as improperly deflecting the jurors' attention from the issues of fact on the question of guilt or innocence to that of achieving vengeance and protection for the community.[68] Appellate courts have routinely held that statements like those made by Aloise are improper.[69]

D. Aloise Improperly Disparaged Mr. McCray and Resorted to Name-calling.

Aloise repeatedly disparaged the accused and displayed contempt for him by calling him names, pointing to his "real" nature, and attacking his appearance. Examples of Aloise's disparaging comments include:

- "[I]t's at this point, ladies and gentlemen, that we get to learn about the real Joel McCray. We get to learn how cocky and how brazen this man is . . ."[70]
- "[W]hat brazen Joel McCray doesn't count on is . . ." [71]
- "[The complainant] gave this man the benefit of the doubt and, unfortunately for her, he did not deserve it."[72]

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[66] *People v. Miller*, 149 A.D.2d 439, 440 (2d Dep't 1989).

[67] *McCray* Trial Tr. at 445:21-23.

[68] *Davis*, 256 A.D.2d at 474-75.

[69] *See People v. Collins*, 12 A.D.3d 33, 40 (1st Dep't 2004) (improper for prosecutor to ask jurors to act as community defender by stating, "Hold him responsible for his actions. Hold him accountable for his decision to be a part of narcotics street sales"); *People v. Bhupsingh*, 297 A.D.2d 386, 388 (2d Dep't 2002) (improper for prosecutor to urge jurors not to let defendant "get away with it"); *People v. Demott*, 178 A.D.2d 935, 935 (4th Dep't 1991) (prosecutor's remark that jury should not "let [defendant] get away with it" was "clearly improper"), *superseded on other grounds by* 188 A.D.2d 1068 (4th Dep't 1992); *People v. Fogel*, 97 A.D.2d 445, 446 (2d Dep't 1983) (prosecutor improperly urged jurors not to let defendant "get away with" charged crimes); *People v. Robinson*, 260 A.D.2d 508, 510 (2d Dep't 1999) (prosecutor improperly told jurors, "[t]he only way this defendant walks out of the courtroom is if you let him").

[70] *McCray* Trial Tr. at 431:19-21.

[71] *Id.* at 433:19.

[72] *Id.* at 431:14-15.

Courts have repeatedly condemned prosecutors for resorting to name-calling and directing disparaging remarks towards defendants—just as Aloise did here.[73]

More brazenly, Aloise's remarks apparently sought to twist McCray's calm demeanor at trial against him, as evidence of a guilty conscience:

> [Y]ou can rely on what [the complainant] told you when she said she was attacked [by McCray] . . . [but not on] this Joel McCray, ladies and gentleman, not this man who sits here with his buttoned up shirt hunched over, trying to make himself look younger or smaller with his hands folded.[74]

Aloise's remarks apparently suggested to the jurors that McCray attempted to deceive them by acting innocently. Such attacks on a defendant's character are improper.[75] More egregiously, Aloise's improper attack on McCray's in-court behavior prejudiced his constitutional right "to have his guilt or innocence determined solely on the basis of the evidence introduced at trial."[76]

E. Aloise Improperly Denigrated Defense Counsel.

Aloise did not stop at disparaging McCray, also denigrating his attorney:

- "Defense counsel really harped on the fact that it was [the co-defendant] pulling on her bag. He also harped on the fact that the property, ladies and gentlemen, was recovered from [the co-defendant]."[77]

- "Do not be fooled [by defense counsel]."[78]

- "[N]o amount of lawyering or manipulating of [complainant's] words and the details of that event were going to change the way she told it to you."[79]

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[73] See, e.g., *Green*, 183 A.D.2d at 618 (holding improper prosecutor's remarks that "appear[ed] as a calculated appeal to the jury's emotions, in particular wrath toward the defendant, and sympathy for the victim"); *Shanis*, 36 N.Y.2d at 699 (holding that name-calling exceeds bounds of legitimate advocacy); *Bowie*, 200 A.D.2d at 513 ("[P]rosecutor[s] who resort[s] to name-calling instead of confining [their] remarks to the facts commit[] a blatant act of prejudice which can only result in denying a defendant a fair trial, regardless of the merits of the case" (internal citations omitted)).

[74] *McCray* Trial Tr. at 444:24 - 445:4.

[75] *People v. Wilkinson*, 43 A.D.2d 565, 565 (2d Dep't 1973) ("It is axiomatic that the prosecution may not attempt to prove a defendant's bad character unless the latter has introduced evidence of his good character.").

[76] *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *see also United States v. Schuler*, 813 F.2d 978, 980-82 (9th Cir. 1987) (prosecutorial comment on a defendant's non-testimonial behavior may impinge on that defendant's fifth amendment right not to testify).

[77] *McCray* Trial Tr. at 442:10-13.

[78] *Id.* at 442:13.

[79] *Id.* at 444:17-19.

Aloise's remarks impermissibly suggested to the jurors that defense counsel engaged in improper tactics to protect his guilty client. Courts have repeatedly held that disparaging defense counsel is an improper tactic, and explicitly held that suggesting "manipulation" on the part of defense counsel is improper.[80]

Speaking about defense's witness, the arresting officer – who Aloise did not call – she continued:

> I didn't ask him one question. I didn't have to. I didn't call him because he wasted your time. He was repetitive. He told you everything you already knew . . . Ladies and gentlemen, he wasted your time.[81]

By repeating the phrase "wasted your time" for emphasis, Aloise's remarks impermissibly attacked defense counsel—rather than the facts of the case, the only legitimate issue at trial.[82] Additionally, with these remarks, Aloise "expressed a personal opinion concerning the merits of particular evidence."[83]

3. In *Velez*, the Appellate Division Harshly Criticized Aloise's Improper Summation Comments.

Aloise's misconduct was on display again in *People v. Velez*, where she repeated many of the same violations of the rules for summation conduct as she did in *McCray*. In the Appellate Division's written decision, the court only states that "to the extent that some of the prosecutor's remarks were improper," reversal was not required.[84] The opinion does not identify the improper remarks.

However, as noted earlier, at the *Velez* oral argument, the appellate panel harshly criticized Aloise's conduct and that of her office in general during summation. Justice Hector D. LaSalle, a former prosecutor, called Aloise's summation remarks "unprofessional" and wondered why Aloise did not try to win the case through the evidence, rather than being "glib."[85] He continued:

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[80] *See, e.g., LaPorte*, 306 A.D.2d at 95 (error to warn jurors "that defense counsel was manipulating them"). *See also Damon*, 24 N.Y.2d at 260 (holding improper prosecutor accusing defense of "sandbagging witnesses"); *Lombardi*, 20 N.Y.2d at 272 (holding improper prosecutor characterizing defense cross-examination as "foul"); *People v. Clemons*, 166 A.D.2d 363, 366 (1st Dep't 1990) (holding improper prosecutor's comments that cross-examination as "slander" and "character assassination"); *People v. Garrow*, 126 A.D.3d 1362, 1364 (4th Dep't 2015) (expressing "strong disapproval of the prosecutor's tactics" of denigrating both defense strategy and defense attorney personally); *Bhupsingh*, 297 A.D.2d at 388 (finding error for prosecutor to denigrate defense in summation); *People v. Ni*, 293 A.D.2d 552, 552 (2d Dep't 2002) (reversing conviction where prosecutor's comments denigrated the defense); *People v. Wlasiuk*, 32 A.D.3d 674, 681 (3d Dep't 2006) (finding that prosecutor improperly disparaged the defense attorney and expressed a personal opinion of the lack of merit in defense evidence).

[81] *McCray* Trial Tr. at 439:10-19

[82] *Bhupsingh*, 297 A.D.2d at 388 (finding error for prosecutor to denigrate defense in summation); *Ni*, 293 A.D.2d at 552 (reversing conviction where prosecutor's comments denigrated the defense).

[83] *Wlasiuk*, 32 A.D.3d at 681.

[84] Ex. B, *Velez*, 164 A.D.3d 622.

[85] *Velez*, Oral Argument at 46:55-48:05.

> At what point, does the unprofessionalism stop? At what point do we stop trying to win trials by being glib and win them on the evidence?… why weren't these [summation] statements so prejudicial, so unprofessional, so glib, as to inflame the passions of the jury so they wouldn't even consider themselves of the evidence, and come back with a verdict simply based on those [] unprofessional statements?[86]

Justice Robert J. Miller further commented on Aloise's statement in *Velez*:

> I could read this summation and without knowing what office it is from would say it is from Queens. That's the reputation that your office is building with this court. Because this [summation misconduct] happens repeatedly.[87]

Justice John M. Leventhal, faced with the summation in *Velez*, suggested that the Queens District Attorney's Appeals bureau train the trial prosecutors about summation misconduct.[88]

Thus, though the *Velez* decision does not condemn Aloise's misconduct in strong terms, the oral argument in that case demonstrates that at least three judges found her conduct unprofessional and improper.

A. Aloise Improperly Vouched for the Strength of the People's Case, Inserting Her Own Credibility Into the Case.

In *Velez*, Aloise improperly vouched for the credibility of the prosecution's case by telling the jury, "this verdict shouldn't take you long, not much longer than ten minutes."[89]

Not only is this statement virtually identical to comments that the Court of Appeals have found improper,[90] but it is also virtually identical to Aloise's improper statement in *McCray*, claiming that it "should not take [the jury] very long" to convict McCray.[91] Aloise's argument impermissibly vouched for the strength of her case and minimized the high burden of proof in criminal cases.

During appellate oral argument, Justice Hector D. LaSalle of the Appellate Division pointed out that Aloise's "ten minutes" statement was at a minimum unprofessional, and at a maximum, could prejudice the defendant's right to a fair trial.[92]

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[86] *Id*.

[87] Id. at 48:30-49:00.

[88] Id. at 49:30–50:15.

[89] *Velez* Trial Tr. at 317:8-9.

[90] *See, e.g., Paperno*, 54 N.Y.2d at 300-01; *Irving*, 130 A.D.3d at 846 (improper for prosecutor to vouch for strength of his case); *Jamal*, 307 A.D.2d 267 at 268 (improper for prosecutor to give "personal opinion . . . as to defendant's guilt").

[91] *McCray* Trial Tr. at 429:10-15.

[92] *Velez*, Oral Argument at 46:55–48:05.

B. Aloise Also Appears to Have Committed the Same Types of Summation Misconduct as in *McCray*.

As in *McCray*, Aloise appears to have again appealed to the jurors' sympathies in *Velez*:

> [T]his is not a crime against property. It is not. And any thought that it is means you are missing the point of the *impact* of this crime. This is a serious, *scary*, *unforgettable invasion* of a person's *privacy and the safety* of their home.[93]

Aloise also argued that Velez, when he entered complainant's home, did not know when the family would return and that complainant's "15 year old son is the one who arrived home first."[94] The boy had not encountered Velez in the home.[95] But by implying what would or could have happened, Aloise strayed far from the realm of evidence—the only realm that matters in trial—and to that of imaginative fear and dread.[96]

As in *McCray*, Aloise appears to have disparaged the defense, defense counsel and Velez:

> You know there is an adage in law, if you don't have the facts, you argue the law. If you don't have the law, you argue the facts. And apparently when you have neither, *you blame the victim*. . . . *Blaming the victim*, here is a very nervy move. First the client *victimizes* [the complainant] by breaking into her house and stealing her property. And then gets up here and *blames her*, tries to *criminalize her* behavior.[97]

4. Aloise Apparently Committed Misconduct in an Unidentified Case Reported in the News.

Aloise's apparent misconduct appeared as an afterthought in a recent article published in the New York Law Journal in 2018. The article discussed concerns raised regarding the familial ties between judges and prosecutors – especially in Queens. It opened with an anecdote, in which Aloise was trying a "very serious case," while her father, a Queens Supreme Court judge—who presides over criminal cases litigated by his daughter's associates—sat in the courtroom and watched her.[98]

The article, informed by an unidentified defense attorney, stated that "Aloise told jurors during her summations that the defense attorney had 'made things up' during the trial."[99] Such

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[93] *Velez* Trial Tr. at 311:20-24 (emphasis added).

[94] *Id.* at 315:19 – 316:3.

[95] *Id.* at 315-316.

[96] *See Robinson*, 260 A.D.2d at 509 (improper to appeal to fears of jurors by referring to victim as "classic victim anywhere in this city"); *Moss*, 215A.D.2d at 595 (improper for prosecutor to make "comments during summation which invited the jurors to place themselves in the position of victims being threatened by defendant.").

[97] *Velez* Trial Tr. at 304:9-20 (emphasis added)..

[98] The case was not *Velez* or *McCray* – the judge who presided over it is not one of the judges in those two cases.

[99] Ex. C, Colby Hamilton, *Close Family Ties Between Queens Judges, Prosecutors, Raise Appearance Concerns*.

remarks are denigrating to defense counsel and are improper, as discussed in length in prior sections.

5. The Grievance Committee Must Discipline Aloise 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."[100] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[101] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[102]

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."[103]

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 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."[104]

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."[105] 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.[106] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[107] Indeed, as agents of the state and ministers of justice, prosecutors play a highly public role. Failing to acknowledge their misconduct, or hold them

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[100] *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

[101] 22 N.Y.C.R.R. Part 1240.

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

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

[104] *Kurtzrock*, 192 A.D.3d 197. http://courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D65317.pdf

[105] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[106] 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

[107] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

accountable for it, tarnishes the legitimacy of the criminal system, the bar as a whole, and the rule of law itself.

A. Aloise's Misconduct in Summation Violated New York Rule of Professional Conduct 8.4.

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.[108] 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.*'"[109]

The Appellate Division found that Aloise's arguments were patently improper in *McCray*, multiple Appellate Division judges objected to the improprieties of her arguments in *Velez*, and an independent news article provides further indication of a pattern of improper behavior. In New York, professional misconduct for an attorney includes any violation of the New York Rules of Professional Conduct.

Under Rules 8.4(d) and 8.4(h), a lawyer shall not engage in conduct that is prejudicial to the administration of justice or engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.[110]

Summation misconduct violates these rules. The Court of Appeals has stated that that a prosecutor's improper statements in summations amount to prosecutorial misconduct.[111] Such summation misconduct violates Rule 8.4. The Third Department found in *People v. Wright* that prosecutor Mary Rain improperly appealed to the jury's sympathy and made other improper comments in her trial summation.[112] In a disciplinary action against Rain, stemming in part from her statements in *Wright*, the Third Department affirmed that Rain violated Rule 8.4 with her summation remarks, which were "prejudicial to the administration of justice" and constituted "conduct adversely reflecting on her fitness as a lawyer."[113]

More broadly, Aloise's "multiple," "patently improper" remarks in *McCray,*[114] her "unprofessional" summation in *Velez,*[115] and her remarks in the unidentified case suggest a pattern of misconduct that undermines the administration of justice in the cases she litigates. Aloise thus violated Rule 8.4(d). At the same time, Aloise's choice to make those remarks, especially given that she had been a practicing prosecutor for years before making these remarks,

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

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

[110] 22 N.Y.C.R.R. Part 1200, Rule 8.4.

[111] *People v. Wright*, 25 N.Y.3d 769, 780 (2015).

[112] *People v. Wright*, 133 A.D.3d 1097, 1098 (3d Dep't 2015).

[113] *Rain*, 162 A.D.3d at 1459.

[114] *McCray*, 140 A.D.3d at 797-98.

[115] *Velez*, Oral Argument at 46:55-48:00.

reflects negatively on her fitness as a lawyer. Such a failure of judgment violated Rule 8.4(h), as demonstrated by *Rain*.

B. For Her Misconduct, Aloise Must be Suspended.

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."[116] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[117]

Aloise was not an uninformed novice when she violated the Professional Rules in these three separate cases. To the contrary, Aloise began her career as a prosecutor in 2008. At the time of her misconduct in *McCray* – the first of these three cases, to take place in the summer of 2013 – Aloise was already an experienced prosecutor with several years of practice under her belt. She was undoubtedly well aware of her professional duties.

Though the ethical rules may be obscure to the general public, attorneys must know and follow them. In 2011, the District Attorneys Association of the State of New York mailed an ethical guide to *every prosecutor in the state* warning prosecutors to comply with the ethical rules and even specifically quoting and explaining Rule 8.4 - the rule that Aloise violated.[118]

Professional discipline, through the Grievance Committee, is the mechanism entrusted by the Supreme Court of the United States to regulate prosecutorial behavior. Without appropriate sanctions, this Committee will derelict its duty and send a message—to prosecutors, defense attorneys, the courts, defendants and the public at large—that prosecutorial misconduct is not taken seriously. Only a strong message from the Grievance Committee can hold Aloise accountable and minimize repeated occurrences of this misconduct by other prosecutors.

Therefore, the Grievance Committee must suspend Aloise.

Conclusion

Prosecutorial misconduct in summation, as committed by Aloise, has a devastating impact on due process and the right to a fair trial. It is a long-standing, largely unaddressed problem in the court system. To our knowledge, though the Appellate Division found Aloise to have acted improperly in her summation in two separate cases, she remains unsanctioned for this

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[116] 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/.

[117] *Id.*

[118] "*The Right Thing" - Ethical Guidelines for Prosecutors*, District Attorneys Association of the State of New York (August 2012) http://www.daasny.com/wp-content/uploads/2014/08/Ethics-Handbook-9.28.2012-FINAL1.pdf Note that this is the 2012 version. The introductory letter states that in 2011, the Ethics Handbook was mailed to "every District Attorney and Assistant District Attorney in the state." It is unclear if this version is the exact same as the 2011 version that was mailed.

misconduct. To the contrary, Aloise has seemingly faced no professional or employment consequences for serious violations of the legal professional rules.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[119] 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."[120] 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 Aloise. 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."[121] 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 as well. The Committee should also identify all of Aloise'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.

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, 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.[122]

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

[120] *Id.*

[121] Rule 8.3, Comment [1].

[122] 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.

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 Rules of Professional Conduct.

4. The Committee should identify any prosecutors trained and/or supervised by Aloise 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, 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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