May 3, 2021

Grievance Committee for the Second,
Eleventh & Thirteenth Judicial Districts
Renaissance Plaza
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Re: Grievance Complaint Regarding Attorney Denise Tirino, State Bar No. 2165249.

To the Grievance Committee,

We write to complain about the professional misconduct of attorney Denise Tirino[1] for her misconduct in *People v. Simpson*[2] and *People v. Sands.*[3] We call on the Grievance Committee to investigate and suspend Tirino for this misconduct.

In *People v. Sands,* the Appellate Department found that Tirino violated the trial court's explicit pretrial ruling by making a false claim about the purpose for which evidence was admitted in her summation.[4] In *People v. Simpson*, the Appellate Division found that Tirino made improper remarks in summation about the defendant's pre-arrest silence.[5] We also ask the Grievance Committee to investigate two additional cases, *People v. Benton* and *People v. Lynch* as they seem to indicate a pattern of improper remarks by Tirino.[6]

Tirino's documented summation misconduct in two separate cases is especially troubling—and particularly worthy of discipline—because of Tirino's position in the Queens District Attorney's Office ("QDAO"). According to her LinkedIn profile, Tirino is a Deputy Bureau Chief of Training for Criminal Court, and has trained approximately 60 new attorneys. It is troubling that a prosecutor, whose misconduct courts have explicitly denounced, would be promoted to train, supervise, and mentor new attorneys as a Deputy Chief. If the Grievance Committee does not discipline Tirino, it would send a message—to Tirino's superiors, supervisees, trainees, and City prosecutors generally—that prosecutorial misconduct is acceptable, and prosecutors can continue to engage in wrongdoing with impunity.

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[1] Denise Tirino, State Bar No. 2165249, Queens District Attorney's Office, 125-01 Queens Blvd, Kew Gardens, NY, 11415. Phone: (718) 286-6477. The Unified Court System website does not list an email for Tirino.We do not have personal knowledge of any of the facts or circumstances of Tirino or the cases mentioned; this grievance is based entirely on the court opinions, briefs and other documents cited herein.

[2] Exhibit A, *People v. Simpson*, 151 A.D.3d 762, 763 (2d Dep't 2017). Available at: https://www.nycourts.gov/reporter/3dseries/2017/2017_04474.htm.

[3] Exhibit B, *People v. Sands*, 164 A.D.3d 613, 615 (2d Dep't 2018). Available at: https://www.nycourts.gov/reporter/3dseries/2018/2018_05701.htm.

[4] *Id*.

[5] Ex. A, *Simpson*, 151 A.D.3d 762.

[6] Exhibit C, *People v. Benton*, 103 A.D.3d 746 (2d Dep't 2013). Available at: https://www.nycourts.gov/reporter/3dseries/2013/2013_00932.htm. Exhibit D, *People v. Lynch*, 166 A.D.3d 904, 904 (2d Dep't 2018). Available at: https://www.nycourts.gov/reporter/3dseries/2018/2018_08035.htm.

Tirino's misconduct in Queens is 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.[7] Another QDAO policy established a wall between different units in the office, inevitably leading to trial prosecutors failing to disclose exculpatory material in the hands of another unit.[8] The Appellate Division has repeatedly criticized Queens prosecutors' improper summation conduct and advised that the Office provide better training for its trial lawyers.[9] There are numerous court decisions finding that QDAO prosecutors acted improperly – a recent civil lawsuit contains a list of 117 published decisions involving prosecutorial misconduct in Queens cases.[10] Tirino's misconduct appears to fall within this appalling, unprecedented, and largely-unaddressed pattern of improper conduct.

Tirino's position seems to demonstrate that prosecutorial misconduct—even when identified by appellate courts in published opinions—leads to promotions, not discipline. Despite the findings of misconduct noted in this grievance, as of this grievance, the New York Attorney Detail Report lists "Disciplinary History: No record of public discipline" for Tirino.[11]

Yet just as prosecutors hold individuals accountable for crimes, so should prosecutors be held accountable for their misconduct. By suspending Tirino, the Grievance Committee will begin to address the damage caused by prosecutors' apparent dereliction of their duty to guard against misconduct.

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

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

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

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

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

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

A. Prosecutorial Misconduct is Pervasive and Unchecked.

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

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

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

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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.*

[18] *Id.*

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 arguments ("summation"), the prosecutor's task is to explain how evidence introduced at trial 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 forms of arguments is prejudicial and improper and can violate the accused's constitutional right to a fair trial.[28]

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,

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[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.

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

> 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—mostly 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 precisely because 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]

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

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

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

[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).

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 specifically train the trial prosecutors about summation misconduct.[40]

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]

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[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.

[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).

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

C. Prosecutors Have a Duty to Present Evidence Honestly.

Prosecutors may not mislead the court or jury and many prohibitions on prosecutorial conduct relate to dishonesty. For example, it violates due process for a prosecutor to knowingly present perjured testimony.[42] If a prosecutor knows that a witness intends to lie on the stand, she must encourage the witness not to do so or else refuse to call the witness to testify. If a prosecutor later learns that a witness fabricated testimony, she is required to take remedial steps.[43] Prosecutors possess a "special duty" not to mislead a judge, jury, or defense counsel.[44]

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

The Grievance Committee is in a unique position to hold New York prosecutors accountable for misconduct. While other attorneys and law enforcement officers are liable to civil lawsuits when they neglect their duties, the absolute immunity doctrine shields prosecutors from civil accountability.[45] 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.[46]

Unfortunately, the U.S. Supreme Court's assumption—that professional disciplinary actions "would provide an antidote to prosecutorial misconduct"[47]—has not been borne out. A 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct

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

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

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

[45] *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").

[46] *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).

[47] 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).

between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly disciplined.[48]

In their 2016 article, "Prosecutorial Accountability 2.0," ethics experts Professors Ellen Yaroshefsky and Bruce Green pointed out that prosecutors are "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."[49] "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."[50]

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.[51] In December 2020, the Appellate Division imposed the same penalty for the egregious misconduct of ex-prosecutor Glenn Kurtzrock.[52] But even a short suspension like that received by Rain and Kurtzrock[53]—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 Tirino will continue unabated and undeterred.

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[48] Center for Prosecutor Integrity, *White Paper: An Epidemic of Prosecutor Misconduct* (December 2013) www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf; *see also Proj. On Gov't Oversight*, Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards (Mar. 12, 2014), http://pogoarchives.org/m/ga/opr-report-20140312.pdf; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[49] 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).

[50] *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.

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

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

[53] 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)

2. In *People v. Sands*, the Appellate Division Found That Tirino Violated the Trial Court's *Molineux* Ruling in Her Summation.

The Appellate Division found that Tirino "violat[ed]" the trial court's "explicit[]" ruling on the admissibility of prior bad acts, also called a *Molineux* ruling.[54]

Spencer Sands was charged with murder, robbery, possession of stolen property, and possession of a weapon. The prosecution's theory was apparently that Sands killed a man named James Bona in order to steal his car.[55] Sands' apparent defense argument, which was based on his statement to police about the incident, was that Bona had brandished a knife and threatened Sands and that Bona was stabbed as the men struggled for the knife.[56]

Before trial, Tirino requested permission from the court to admit Sands's prior conviction for possession of a stolen vehicle as evidence to disprove Sands's self-defense claim.[57] The court "explicitly rejected" this request, allowing the conviction into evidence *only* to prove Sands's knowledge and intent in stealing a vehicle in the charged case.[58]

The *Sands* trial was a bench trial, but occurred in front of a *different judge* than had made the *Molineux* ruling about the prior conviction. In summation, Tirino falsely told the court that the prior conviction was actually admitted to disprove self-defense:

> The last piece of evidence that was introduced into evidence, your Honor, was the defendant's previous conviction of Criminal Possession of Stolen Property. And lo' and behold in that case the stolen property was a vehicle. *Well, that evidence was admitted to disprove the defendant's claim of self-defense, your Honor*. The defendant's true motive in this case was to possess the stolen car; that's why the evidence was introduced at this trial. And, therefore, James Bona was killed in the court of and in furtherance of this robbery and that's felony murder.[59]

Sands was convicted. On appeal, the Appellate Division found that the trial court should not have admitted the prior conviction at all. The court also found that Tirino's above argument that the prior conviction was admitted to disprove self-defense was in "violation of the [trial] court's *Molineux* ruling"[60] and that "the Supreme Court [had] explicitly rejected the People's claim that that evidence was probative to disprove the defendant's justification defense."[61] But Sands' attorney had not objected to Tirino's remarks, and the Appellate Division found that Tirino's misconduct did not deprive Sands of a fair trial under the circumstances of the case.

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[54] Ex. B, *Sands,* 164 A.D.3d at 615. The decision does not identify Tirino by name, but the transcript does. Trial Transcript at 285, *People v. Sands*, Ind. No. 1875/11 (Queens Sup. Ct. March 31, 2015).

[55] *See* Brief for Appellant at 5-6, *People v. Sands* (2d Dep't).

[56] *Id*. at 10, 36.

[57] Ex. B, *Sands,* 164 A.D.3d at 615.

[58] *Id*.

[59] *Sands* Trial Tr. at 314:13-25 (emphasis added). *See also* Ex. B, *Sands,* 164 A.D.3d at 615.

[60] *Id*.

[61] *Id*.

3. Tirino Committed Misconduct in *People v. Simpson* by Remarking on Defendant's Silence and Denigrating the Defense in Summation.

New York state law does not permit prosecutors to use a defendant's pretrial silence in their direct case, whether the silence occurred pre- or post- arrest.[62] In *People v. Simpson*, Tirino remarked on Simpson's pre-arrest silence in both cross-examination and summation. On appeal, the Appellate Division held those comments to be "improper" but that the court's curative instruction was sufficient, so reversal was not necessary.[63]

While Simpson was testifying, Tirino referred to Simpson coming back to the scene in the aftermath of the incident but not "say[ing] a word" or "anything" to the police.[64] The trial court admonished Tirino for these comments during cross-examination,[65] but that did not appear to deter her. In summation, Tirino told the jury that when Simpson first encountered the police upon returning to the site of the incident, "[h]e said nothing to the police, except when they placed the handcuffs on him."[66]

The Grievance Committee should also investigate Tirino's other inflammatory summation remarks, which the Appellate Division found were unpreserved for appeal and "not so egregious as to deprive the defendant of a fair trial."[67] Though prosecutors must refrain from denigrating the defense,[68] Tirino called Simpson's self-defense explanation a "bold-faced lie," "ludicrous," and "impossible,"[69] and characterized the remorse he expressed as "crocodile tears."[70] She told the jury that, for part of Simpson's testimony, Simpson "made that up," that it was "not true."[71]

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[62] *People v. Conyers*, 49 N.Y.2d 174, 177 (1980); *People v. Pavone*, 26 N.Y.3d 629, 638-39 (2015). This rule applies to both post-arrest and prearrest silence. *People v. DeGeorge*, 73 N.Y.2d 614, 619 (1989). In most cases, pre-arrest silence cannot be used even for impeachment because of the silence's ambiguity and limited probative value. *Id.* at 618-19.

[63] Ex. A, *Simpson*, 151 A.D.3d at 763. The decision does not identify Tirino by name, but the trial transcript does. Trial Transcript at 874, *People v. Simpson*, Ind. No. 1008-2014 (Queens Sup. Ct. January 14, 2015).

[64] Brief for Appellant at 35, *People v. Simpson* (2d Dep't).

[65] *Id*. at 36.

[66] *Simpson* Trial Tr. at 904:13-905:4.

[67] Ex. A, *Simpson*, 151 A.D.3d at 763.

[68] *See, e.g., People v. Anderson*, 142 A.D.3d 713, 716 (2d Dep't 2016) (improper to "denigrate[] the defense" by calling it "absolutely beyond absurd"); *People v. Redd*, 141 A.D.3d 546, 548 (2d Dep't 2016) (same); *People v. Skinner*, 298 A.D.2d 625, 626-27 (3d Dep't 2002) (prosecutor improperly referred to defendant as a "liar" and his story as "false"); *People v. Walters*, 251 A.D.2d 433, 434 (2d Dep't 1998) (prosecutor improperly referred to defendant's testimony as "lies on top of lies"); *People v. Jackson*, 174 A.D.2d 552, 554 (1st Dep't 1991) ("exceed[ing] the boundaries of fair comment" to"denigrate[] the defense" by referring to its witnesses' testimony as "false" and "fictional").

[69] *Simpson* Trial Tr. at 902:17-19, 906:19-907:6, 916:12-13.

[70] *Id*. at 902:8-9.

[71] *Id.* at 910:2-8.

4. Tirino's Summation Remarks in *Benton* and *Lynch* Were Also Challenged on Appeal.

In at least two other cases Tirino prosecuted, appellate attorneys raised Tirino's summation as an issue on appeal, potentially revealing a pattern of improper statements for a high-ranking supervisor at the Queens District Attorney's Office.

Tirino prosecuted Ammayeh Benton for manslaughter and related charges, and a jury convicted him after a trial in 2011.[72] On appeal, Benton challenged several of Tirino's opening and summation remarks.[73] On appeal, Benton argued that Tirino committed summation misconduct that violated the right to a fair trial. The February 2013 Appellate Division opinion only decided that no constitutional violation occurred, noting that Tirino's remarks were either proper or improper, but if improper, "harmless."[74]

In May 2013—several months after the *Benton* decision—Tirino prosecuted David Lynch for murder and related charges.[75] On appeal, Lynch challenged several of Tirino's summation remarks.[76] The Appellate Division found the "majority" of Tirino's remarks to be proper, but added that "[t]o the extent" that Tirino's remarks were improper, they were "not so prejudicial" as to deprive Lynch of his fair trial right.[77] The Appellate Division's language is far from a vindication for Tirino's summation argument and seems to indicate that not all—just a "majority"of Tirino's remarks were proper, implying that the others were improper, just not improper enough to justify reversal.[78]

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[72] Ex. C, *Benton*, 103 A.D.3d at 746. The decision does not identify Tirino by name, but the federal decision on Benton's *habeas* petition does. Exhibit C1, *Benton v. Nelson*, 143 F. Supp. 3d 31, 32 (E.D.N.Y. 2015). Available at: https://casetext.com/case/benton-v-nelson.

[73] Ex. C*, Benton*, 103 A.D.3d at 747.

[74] *Id*. The Appellate Division is often clear when it states that all of the prosecutors remarks were proper; this did not happen here. For example, in *People v. Kanios*, the defendant challenged Tirino's summation remarks on appeal. The Appellate Division found that all the challenged remarks were proper. *People v. Kanios*, 53 A.D.3d 555, 556 (2d Dep't 2008). *See* Alejandro Lazo, *Manslaughter Trial Begins In Death Of 10-Year-Old Boy*, Queens Chronicle (September 22, 2005), https://www.qchron.com/editions/western/manslaughter-trial-begins-in-death-of-year-old-boy/article_ca6a4616-75ec-5d01-8334-883eda04d256.html (naming Tirino as trial prosecutor in Kanios's case). Therefore, the *Benton* finding is clear: some of Tirino's comments were improper.

[75] Ex. D, *Lynch*, 166 A.D.3d at 904. The decision does not identify Tirino by name, but news articles covering the case identified her as the trial prosecutor. Christina Carrega-Woodby, *Guardsman convicted in brutal beating death of girlfriend,* NY Post (March 21, 2013), https://nypost.com/2013/03/21/guardsman-convicted-in-brutal-beating-death-of-girlfriend/; The Wave, *Guardsman Convicted of Girlfriend's Murder* (March 29, 2013), https://www.rockawave.com/articles/guardsman-convicted-of-girlfriends-murder/.

[76] Ex. D, *Lynch*, 166 A.D.3d at 905.

[77] *Id*.

[78] As noted above, the Appellate Division is very clear when it wants to state that all of the prosecutor's remarks were proper. *See Kanios*, 53 A.D.3d at 556. Therefore, the *Lynch* finding implies some of Tirino's comments were improper.

5. The Grievance Committee Must Discipline Tirino 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."[79] Professional misconduct occurs with a "violation of any of the Rules of Professional Conduct."[80] Grievance Committees are "committed to … recommending discipline for lawyers who do not meet the high ethical standards of the profession."[81]

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."[82]

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."[83]

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."[84] Similarly, the professional guidelines promulgated by the American Bar Association make clear that a prosecutor's job goes well beyond achieving as many convictions as a prosecutor can.[85] The New York professional rules reflect this higher standard: prosecutors are the only category of attorneys with their own ethical rule.[86] 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. Tirino's Misconduct Violated the Rules of Professional Conduct.

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.[87]

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[79] *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.

[80] 22 N.Y.C.R.R. Part 1240.

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

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

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

[84] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b) (McKinney Commentary).

[85] 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/.

[86] 22 N.Y.C.R.R. Part 1200, Rule 3.8(b).

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

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.*'"[88]

Tirino's misconduct in the cases discussed above violated multiple professional rules. In *Sands*, Tirino received an unfavorable pretrial ruling from one judge, allowing a prior conviction for only a limited purpose. But during summation in the court trial in front of a different judge, Tirino falsely told the court that the prior conviction was admitted to disprove self-defense, which she had requested—but the other judge had rejected. This appears to be a clear violation of Rule of Professional Conduct 3.3(a)(1), ordering that "[a] lawyer shall not knowingly [] make a false statement of fact or law to a tribunal…"[89] Moreover, this conduct violates Rule 8.4(c), the catch-all honesty provision, prohibiting an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[90]

Tirino's improper summations in the above cases prejudiced the administration of justice and are not befitting a member of the New York Bar. 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.[91] The Court of Appeals has stated that a prosecutor's improper summation remarks amount to prosecutorial misconduct in violation of Rule 8.4.[92] A prosecutor's summation misconduct violates Rules 8.4(d) and 8.4(h) by prejudicing the administration of justice and reflecting adversely on the prosecutor's fitness as a lawyer.[93] Tirino prejudiced the administration of justice and acted in a manner not befitting of an attorney, violating Rule 8.4.

B. For Her Misconduct, Tirino 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."[94] The ABA's Model Rule 32 for Lawyer Disciplinary Enforcement makes lawyer discipline "exempt from all statutes of limitations."[95]

In considering discipline, the Appellate Division has considered the role of prosecutor as a "substantial factor in aggravation."[96] Simply being a prosecutor supports aggravated discipline

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

[89] 22 N.Y.C.R.R. Part 1200, Rule 3.3.

[90] 22 N.Y.C.R.R. Part 1200, Rule 8.4.

[91] 22 N.Y.C.R.R. Part 1200, Rule 8.4.

[92] *Wright*, 25 N.Y.3d at 780.

[93] 22 N.Y.C.R.R. Part 1200, Rule 8.4(d), (h); *Rain*, 162 A.D.3d at 1459.

[94] 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/.

[95] *Id.*

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

because the law tasks them "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."[97] Similarly, extensive prosecutorial experience weights towards an aggravated sanction.[98]

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 Rule 8.4 - the rule that Tirino violated.[99]

Tirino's experience as a prosecutor supports her suspension. Tirino was a seasoned prosecutor when she violated the Professional Rules in the above four cases. Tirino began her career as a prosecutor in 1987 and had over 24 years of experience by the time she made the improper remarks discussed above.[100] Although Tirino had plenty of experience to draw on, she still committed misconduct in case after case, fitting seamlessly with the harsh criticisms voiced by Appellate Division judges (as quoted extensively above) about the QDAO's summation practices.

Tirino's current supervisory roles further support her suspension, so that other prosecutors do not follow her improper practices. According to her LinkedIn profile, Tirino has served as the Deputy Bureau Chief of Training For Criminal Court since September 2019, where she has supervised the Queens Office's intake unit and was responsible to train approximately 60 new attorneys.[101] Without severe and public discipline, Tirino's rise—which trailed her public and documented misconduct—will send a message to City and State prosecutors that they can use the same methods to rise in the ranks; they will learn that they need not fear committing misconduct for they will not be held accountable. The Grievance Committee must discipline Tirino, not only because her misconduct must result in consequences, but also to send a clear message to her supervisees and colleagues that they must *not* follow her example.

By suspending Tirino, the Grievance Committee will begin to undo the damage caused by the prosecutorial executive brass's dereliction of its duty to guard against misconduct. For decades, prosecution executives have contributed to the spread of prosecutorial misconduct by rewarding it with promotion, rather than discipline. Queens prosecutors have engaged in a decades-long, publicly-documented history of prosecutorial misconduct, yet many of those committing misconduct have risen to hold supervisory, powerful positions in the Office.[102] Tirino's rise to the role of a Deputy Bureau Chief of Training is troubling given her lack of

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

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

[99] "*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.

[100] Exhibit E, Tirino's LinkedIn Profile.

[101] *Id*.

[102] George Joseph, *Top Queens Prosecutors Broke The Rules, Then Got Promoted. Will The New DA Keep Them In Charge?*, Gothamist (January 9, 2020), https://gothamist.com/news/top-queens-prosecutors-broke-rules-got-promoted; Troy Closson, *Queens Prosecutors Long Overlooked Misconduct. Can a New D.A. Do Better?*, New York Times (January 27, 2021), https://www.nytimes.com/2021/01/27/nyregion/melinda-katz-queens.html.

public discipline or remorse for the improper behavior described above. The apparent absence of internal mechanisms of accountability reinforces the need for Grievance Committee to address prosecutorial misconduct. Only a serious and public sanction—in this case, suspension—will penetrate through the culture of impunity and hold the most powerful players in the criminal legal system accountable for their wrongdoings.

The Grievance Committee must suspend Tirino.

Conclusion

Tirino committed misconduct in summation in multiple cases, including misrepresenting to one judge a ruling made by another judge. In so doing, Tirino violated the legal professional rules that govern all New York attorneys. To our knowledge, Tirino remains unsanctioned publicly or privately for her serious misconduct. Suspension is the only appropriate sanction for this serious misconduct.

As "officers of the court, all attorneys are obligated to maintain the highest ethical standards."[103] 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."[104] 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 Tirino. 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."[105] 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 Tirino'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.[106]

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

[104] *Id.*

[105] Rule 8.3, Comment [1].

[106] 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

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 Tirino 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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(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.