



July 27, 2018

The Honorable Andrew M. Cuomo
Governor of New York State
New York State Capitol Building
Albany, New York 12224

Re: Support for S.2412D (DeFrancisco)/ A.5285C (Perry)

Dear Governor Cuomo:

As the Executive Director of Brooklyn Defender Services, I respectfully urge you to call on the Senate to send you S.2412D (DeFrancisco)/A.5285C (Perry) and for you to sign the bill into law. This bipartisan legislation establishes a statewide Commission on Prosecutorial Conduct based on the successful New York State Commission on Judicial Conduct.

Brooklyn Defender Services (BDS) is one of the largest legal services providers in New York State, representing nearly 35,000 low-income Brooklyn residents each year who are arrested, facing child welfare allegations, or fighting deportation. BDS also provides a wide range of other services to our clients, including housing, education, employment, and immigration legal assistance and advocacy. Over the past twenty-two years, BDS has represented more than half a million people in Kings County Criminal and Supreme courts. This experience has led me to believe that creating a system for prosecutor accountability is critical to ensuring the credibility and integrity of our criminal legal system.

New York State leads the country in overturned wrongful convictions, falling only behind Texas, yet very few prosecutors have ever been held accountable. The New York State Bar Association's Task Force on Wrongful Convictions determined that more than half of New York's wrongful convictions involved misconduct by a government actor (a prosecutor, law enforcement, or judge).

We have seen this firsthand in Brooklyn; cases from Kings County make up 25 percent of New York State’s wrongful convictions.¹ Of Brooklyn’s 68 wrongful conviction cases, the vast majority (49 cases) involved official misconduct, defined as misconduct by prosecutors, police, or both.² Decades of persistent prosecutor and police misconduct in Brooklyn has led to innocent people spending decades in prison for crimes they did not commit, and cost the city and state millions of dollars in incarceration and legal settlements, while also greatly diminishing public trust in the integrity of our court system.

The human and fiscal costs of prosecutor misconduct in Brooklyn alone are staggering. In 2013, a *ProPublica* investigation of prosecutor misconduct in New York City highlighted several Brooklyn cases.³ One example is Jabbar Collins, who served more than 15 years in prison for a murder he did not commit before his conviction was thrown out in 2010. Michael Vecchione, a senior Brooklyn prosecutor, withheld critical evidence during Collins’s trial, including a key witness’s recantation.⁴ Collins settled his civil claims against the City and State for a total of \$13 million, but he will never get those crucial lost years back.⁵ Vecchione was never publicly sanctioned for his misconduct, and he retired from the office in 2013.⁶ Sami Leka is another Brooklyn resident who spent 12 years in prison for a crime he did not commit. In that case, the prosecution waited until three days before trial to tell the defense that an off-duty police officer had witnessed the shooting. The prosecution obtained a court order preventing the defense from contacting the officer, who would have cast doubt on the testimony of the two eyewitnesses. Leka later settled a wrongful conviction lawsuit against the City of New York for \$3.1 million.⁷

The Kings County District Attorney’s Office Conviction Review Unit is an important step in the direction of righting some extremely horrible wrongs, many committed by former prosecutors in that very office. Yet they have made a decision not to hold individual prosecutors accountable for their unlawful or unethical actions.⁸ The Unit has exonerated 24 people over the past four years, but as the *New York Times* noted in a

¹ See National Registry of Exonerations, available at <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (filter by State (NY), County (Kings), and Official Misconduct – OM) (data last updated June 26, 2018).

² *Id.*

³ Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA, April 3, 2013, available at <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

⁴ *Jabbar Collins v. City of New York*, No. CV1-00766 (EDNY, filed Feb. 16 2011), available at <https://www.documentcloud.org/documents/352700-collins-federal-suit-usdc-edny-filed-021611>.

⁵ Stephanie Clifford, *Exonerated Man Reaches \$10 Million Deal with New York City*, N.Y. TIMES, Aug. 19, 2014, available at <https://www.nytimes.com/2014/08/20/nyregion/jabbar-collins-wrongfully-convicted-man-reaches-10-million-settlement-with-new-york-city.html>.

⁶ Joaquin Sapien, *Polarizing Brooklyn Prosecutor Retires amid Scrutiny*, PROPUBLICA, Nov. 15, 2013, available at <https://www.propublica.org/article/polarizing-brooklyn-prosecutor-retires-amid-scrutiny>.

⁷ National Registry of Exonerations, “Sami Leka,” available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3379>.

⁸ Del Quentin Wilber, *How these Brooklyn Prosecutors Work to get Innocent Convicts out of Prison*, L.A. TIMES, Aug. 5, 2016, available at <http://www.latimes.com/nation/la-na-brooklyn-prosecutors-exonerations-20160805-snap-story.html>.

2017 article, “[I]n only a handful of the cases have lawyers in the unit held anyone accountable.”⁹

In 2017, for example, Jabbar Washington was released after serving twenty years in prison for a crime he did not commit. His case was investigated by the KCDA Conviction Review Unit, and the unit concluded that Mr. Washington had been wrongfully convicted. Rather than explicitly sanctioning the prosecutor and detective who acted unlawfully, then-Acting Brooklyn District Attorney Eric Gonzalez said in a statement that “it was determined that Mr. Washington did not receive a fair trial and crucial information that would have been useful to the defense was withheld.”¹⁰

The facts of the misconduct were much more troubling than this bland statement belies. Washington testified that he was coerced into confessing by the now-discredited Detective Scarcella, whom he said beat him, choked him, and squeezed his testicles during the interrogation.¹¹ Additionally, the trial prosecutor, Kings County Assistant District Attorney Kyle Reeves, withheld from the defense an exculpatory statement from one of the victims.¹² Reeves was never held accountable for his misconduct, just as Detective Scarcella continues to avoid criminal prosecution or any official sanction, despite the fact that 13 of his previous convictions have been overturned for misconduct.¹³ According to the *New York Daily News*, Reeves left the Brooklyn DA’s office in 2013 and works as an asbestos trial attorney in private practice. He was “sued in federal court for malicious prosecution and was found to have participated in prosecutorial misconduct for badgering a defense witness.”¹⁴ Yet on his firm’s webpage, Reeves’ biography proudly touts his 25 years of experience in the Kings County District Attorney’s Office.¹⁵

My office worked on dozens of cases with both Michael Vecchione and Kyle Reeves. It was well-known that they were not ethical, they lied, and they withheld evidence. Despite complaints to the elected District Attorney at the time, Charles Hynes, no action

⁹ Alan Feuer, *Wrongful Convictions Are Set Right, but Few Fingers Get Pointed*, N.Y. Times, Aug. 8, 2017, available at <https://www.nytimes.com/2017/08/08/nyregion/wrongful-convictions-are-set-right-but-no-fingers-get-pointed.html>.

¹⁰ *Id.*

¹¹ Innocence Project, *News: Brooklyn Man Released after Judge Vacates 1995 Murder Conviction*, July 13, 2017, available at <https://www.innocenceproject.org/brooklyn-man-released-conviction-vacated/>.

¹² Paul Frangipane, *Brownsville Man Released from Prison 20 Years After Wrongful Conviction*, BROOKLYN DAILY EAGLE, July 12, 2017, available at <http://www.brooklyneagle.com/articles/2017/7/12/brownsville-man-released-prison-20-years-after-wrongful-conviction>.

¹³ Chelsia Rose Marcius & James Fanelli, *Dirty Detective Louis Scarcella Insists, ‘I’ve Done Nothing Wrong,’ Despite Sending 13 Wrongfully Convicted People to Jail*, N.Y. DAILY NEWS, May 20, 2018, available at <http://www.nydailynews.com/new-york/law-punish-detective-louis-scarcella-dirty-tactics-article-1.4000501>.

¹⁴ Christina Carrega, *Brooklyn Man Who Claimed Ex-Detective Louis Scarcella Coerced Him Into 1995 Murder Confession Walks Free*, N.Y. DAILY NEWS, July 12, 2017, available at <http://www.nydailynews.com/new-york/brooklyn/man-allegedly-coerced-1995-murder-confession-walk-free-article-1.3320805>.

¹⁵ McGivney Kluger & Cook, P.C., “Kyle C. Reeves – Partner,” available at <https://mcgivneyandkluger.com/people/kyle-c-reeves/> (last viewed July 26, 2018).

was ever taken against these two Assistant District Attorneys (ADAs). They were not the only ADAs who have had a reputation for failing to follow their ethical and moral obligations when it came to people arrested in Brooklyn. There are always one or two bad apples who manage to escape accountability for their actions, even though the defense bar knows very well what they are doing.

New York State needs a dedicated prosecutor conduct commission because our current attorney disciplinary system consistently fails to hold prosecutors accountable.

Unlike the rest of the country, New York has a “uniquely decentralized” system for handling complaints about attorney conduct, with “four different sets of procedures administered by eight regional grievance offices.”¹⁶ These complaints include fee disputes and other more quotidian matters, in addition to thornier allegations involving misconduct by prosecutors. In a 2015 report, the New York State Commission on Statewide Attorney Discipline found that the current system for disciplinary actions in New York lacks transparency, uniform standards, and consistent sanctions for the same conduct.¹⁷ Thousands of complaints are filed statewide every year and more than 90 percent of complaints are dismissed.¹⁸ The average length of time for a complaint from the opening of the investigation through final order is 856 days, or nearly two years.¹⁹ Simply put, the grievance committees do not have the focus and resources to effectively sanction or deter prosecutorial misconduct. These outcomes fall far short of the kind of accountability for prosecutors that New Yorkers need and deserve.

When I was President of the New York State Association of Criminal Defense Lawyers, our organization filed a complaint against a prosecutor who was named in an Appellate Division decision for his misconduct. Members of the Association knew well that this was only one of many cases where this prosecutor committed similar acts, so it seemed obvious that there should be some action against him by the Grievance Committee. Instead, we were told that there would be no discipline for this prosecutor and, in addition, we were instructed in the letter that we would face discipline ourselves if we published the letter in any way. This shows how ineffective and protective the Grievance system is and why another way to investigate prosecutorial actions must exist.

New York University School of Law Professor Stephen Gillers, an expert in legal ethics, explains New York’s prosecutor accountability issue succinctly:

We have a broken system. We disbar lawyers for taking two hundred dollars from a client’s escrow account, even if they return it. But there are

¹⁶ New York State Commission on Statewide Attorney Discipline, *Enhancing Fairness and Consistency, Fostering Efficiency and Transparency* (September 2015), p. 6, available at <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AttyDiscFINAL9-24.pdf>.

¹⁷ *Id.*

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 51.

rarely consequences for someone who has stolen someone else's due-process rights and possibly put an innocent person in jail.²⁰

In its report, the Commission on Statewide Attorney Discipline acknowledged that the public is greatly concerned about holding prosecutors accountable for misconduct. The Commission noted that “there is a perception of rampant prosecutorial misconduct which is ignored by the disciplinary committees” and that the issue of prosecutor misconduct was raised at all three of the Commission’s public hearings.²¹ During the course of its investigation, the Commission learned that local disciplinary committees do not automatically open an inquiry in cases where courts have found prosecutor misconduct and such decisions are “made on a case-by-case basis.”²² But rather than calling for a complete overhaul of how our state addresses the issue of prosecutor misconduct, the Commission merely called on disciplinary committees to ensure that prosecutor misconduct is promptly referred to the committees and recommended that committees publish data about the number of complaints of prosecutor conduct received and the number of cases resulting in public or private discipline.

In 2018, for the first time, the state legislature acted to provide the public with accountability for prosecutors who violate the public’s trust. S.2412D (DeFrancisco)/A.5285C (Perry) passed the Senate and Assembly this year with broad bipartisan support. Critically, the bill creates the nation’s first Commission on Prosecutorial Conduct. The Commission will be based on the successful New York State Commission on Judicial Conduct, which for over forty years has provided a fair and deliberate process for reviewing and resolving complaints about judges.

The only opposition to the bill comes from the District Attorneys Association of the State of New York (DAASNY), whose members would be newly subject to scrutiny. DAASNY inaccurately claims that the bill presents unconstitutional separation of power issues. However, the bill text is clear that the Commission on Prosecutorial Conduct would be limited to making recommendations, when warranted, to the Governor for a prosecutor’s removal and would not have the authority to order such removal. The proposal thus does not infringe on Executive Branch power and would not present any constitutional conflicts.

In a 1940 speech, Robert H. Jackson, the future U.S. Supreme Court Justice and lead prosecutor at the Nuremburg War Crime Tribunals described the unique power of prosecutors in the U.S. legal system:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done

²⁰ Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA, April 3, 2013, available at <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

²¹ *Id.* at 77.

²² *Id.* at 77.

to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. *While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.*²³

It is truly disturbing that the current New York State prosecutors oppose a measure that would increase the beneficial purposes they were elected to uphold by helping to cast light on and potentially eliminate those within their ranks whose motives and actions are not honest or pure.

Brooklyn Defender Services supports the formation of a Commission on Prosecutorial Conduct for the reasons stated above and respectfully urges you to call on the Senate to send you the bill for your prompt signature.

Sincerely,

Lisa Schreibersdorf
Executive Director

²³ Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. 3 (1940) (address at Conference of United States Attorneys, Washington, D.C., April 1, 1940) (emphasis added), available at <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.