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August 6, 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 President of the Chief Defenders Association of New York, I respectfully urge you to sign S.2412D (DeFrancisco)/A.5285C (Perry) into law.

The Chief Defenders Association of New York (“CDANY”) is a membership organization of the appointed Public Defenders, Conflict Defenders, Executive Directors of non-profit public defense offices and Administrators of Assigned Counsel Panels throughout New York State. Our organizations collectively represent the vast majority of people prosecuted in counties across New York State—hundreds of thousands of people each year. Collectively, public defense offices represent close to 400,000 people in the criminal, family, and appellate courts of New York State every year.

CDANY strongly supports the creation of a State Commission on Prosecutorial Conduct. Prosecutors have the greatest discretion at every point in the criminal justice process, from choosing how to charge people, what evidence to turn over, what plea to offer, whether to allow for alternative to incarceration programs, and what sentence to ask for upon conviction. As such, prosecutors should be held to a high standard. And yet for too long, New York has effectively allowed prosecutors to act with impunity.

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New York has an epidemic of wrongful convictions, with the second highest number of exonerations in the nation. We are ranked just below Texas, with 267 people exonerated in our state since 1989.¹ Over 60 percent, or 169 cases, were overturned because of “official misconduct” by prosecutors, police or both.

Prosecutors in New York are very rarely held accountable for their actions, even in cases where innocent people spend years or decades in prison. Despite the exoneration data cited above showing an abundance of opportunities for sanctions, we know of only three examples in recent history of public reprimand of prosecutors who engaged in blatant misconduct.^{2,3,4} That is why a bi-partisan majority in both houses of the Legislature took action and passed this bill.

Attorney Grievance Committees are insufficient to provide the public with real accountability for prosecutors whose unlawful, unethical, or otherwise transgressive actions harm the integrity of our justice system. The broad mission of these Committees, including resolving quotidian fee disputes, precludes focused and timely action on allegations of prosecutorial misconduct. Often as a result of such unchecked misconduct, innocent people in our communities have spent a total of 2,532 years in prison before being exonerated, countless others remain incarcerated, and New York City and counties across the state have paid out millions of dollars in civil lawsuits.^{5,6}

1 The National Registry of Exonerations, *Exonerations by State*, available at <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

2 Former Suffolk County prosecutor Glenn Kurtzrock was discovered to have concealed 45 different items of exculpatory evidence at trial in five cases, including four that cases that had resulted in wrongful murder convictions. Mr. Kurtzrock was fired from his job but never criminally charged for his actions. He now works as a defense lawyer in private practice. (Nina Morrison, *Opinion: What Happens When Prosecutors Break the Law?*, N.Y. TIMES, June 18, 2018, available at <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html>.)

3 A Queens County Assistant District Attorney Claude Stuart withheld critical evidence at trial from Tony Bennett, who served nearly 15 years before his conviction was overturned. His conduct in the Bennett case prompted appellate courts to throw out two other convictions. Stuart lost his job and had his law license suspended for three years. (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>; see also William K. Rashbaum & Danny Hakim, *Figure Under Scrutiny in Inquiry Into Charity Was on Senate Payroll*, N.Y. Times, Feb. 11, 2010, available at <https://www.nytimes.com/2010/02/11/nyregion/11hired.html>.)

4 Former St. Lawrence County District Attorney Mary Rain was recently sanctioned by the Third Judicial Department Attorney Grievance Committee for a long list of egregious misconduct, including withholding key evidence from defense attorneys in a murder trial that fortunately resulted in an acquittal. (Dan M. Clark, *Former Upstate DA Barred from Practicing Law After Misconduct Investigation*, N.Y. LAW JOURNAL, June 28, 2018, available at <https://www.law.com/newyorklawjournal/2018/06/28/former-upstate-da-barred-from-practicing-law-after-misconduct-investigation/>.)

5 The National Registry of Exonerations, *Exonerations by State*, available at <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

6 See, e.g., Jim Dwyer, *Prosecutor Misconduct, at a Cost of \$3.5 Million*, N.Y. TIMES, Oct. 21, 2008, available at <https://www.nytimes.com/2008/10/22/nyregion/22about.html>; Joaquin Sapien, *Millions*

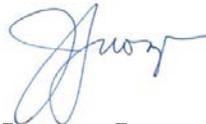
There is a better existing model for accountability in our state. Four decades of decision-making by the Commission on Judicial Conduct has demonstrated that open and honest scrutiny of judges provides a framework for developing ethical best practices. By creating a body of expectations arising from individual cases, ethical norms for the judiciary as a whole have become widely recognized, helping to guide and standardize ethical judicial conduct. This bill, modeled on the success of the New York State Commission on Judicial Conduct, will help ensure that prosecutors who misuse their power are held accountable for their actions.

The only opposition to this bill comes from the District Attorneys Association of New York. They have argued that a commission on prosecutorial conduct is unnecessary because Grievance Committees can effectively sanction bad actors, but this point is not supported by the evidence cited above. They have also argued that the commission would violate the separation of powers clause of the Constitution, which gives only Governors the power to remove District Attorneys from office. This argument is moot because the bill in question would not change that in any way, only authorizing the commission to *recommend* removal from office when such action is warranted.

The reality is there is currently no effective oversight in New York for prosecutors who abuse their power. In order for the criminal justice system to operate fairly, with the bedrock American principles of liberty and justice at stake, we need to ensure that prosecutors are held accountable. Creating an independent commission to meaningfully address complaints of prosecutorial misconduct is urgent and necessary.

The Chief Defenders Association of New York supports this legislation for the reasons stated above and respectfully urges you to sign it.

Sincerely,



Justine Luongo, President