Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

By federal express

August 30, 2018

Disciplinary Board of the Supreme Court of Pennsylvania
District II
820 Adams Avenue, Suite 170
Trooper, PA 19403

Re: Bridget L. Kirn, Esq. (PA Bar No. 84689)

To the Disciplinary Board:

Undersigned counsel from the Innocence Project, Inc., in our capacity as attorneys and as longtime post-conviction and retrial counsel for Anthony Wright of Philadelphia, herby submit this Complaint against Bridget L. Kirn, Esq., and respectfully request that the Board investigate the allegations herein.

Two years ago this month – on August 23, 2016 – Anthony Wright was acquitted by a Philadelphia jury of murder, rape, burglary, and related offenses, after a trial lasting more than two weeks. All of the charges arose out of the murder and sexual assault of 77 year-old Louise Talley in her home on October 19, 1991, crimes of which Mr. Wright maintained his actual innocence for over twenty-five years. Ms. Kirn, then an Assistant District Attorney in Philadelphia, was lead trial counsel for the Commonwealth. (Ms. Kirn's employment with the Philadelphia District Attorney's Office was terminated in January 2018. Since that time, she has worked on an hourly/contract basis with the Montgomery County District Attorney's Office.)[1]

[1] An earlier version of this complaint dated August 23, 2018 incorrectly stated that Ms. Kirn was now employed as an "Assistant District Attorney" in Montgomery County. The Montgomery County District Attorney has since clarified that while Ms. Kirn did begin working for the appeals division of the Office in February 2018 on an "as needed" basis, she has never been sworn in as an ADA in Montgomery County.

The instant Complaint asks the Board to investigate new evidence, developed by civil counsel for Mr. Wright in the two years since his acquittal, that Ms. Kirn knowingly violated the Rules of Professional Conduct during the course of the August 2016 trial. Specifically, sworn deposition testimony obtained from numerous law enforcement witnesses during the course of Mr. Wright's subsequent civil rights lawsuit – and not disputed by Ms. Kirn herself – has revealed that Ms. Kirn failed to correct what she personally knew to be false testimony given by two of the lead detectives called as witnesses by the Commonwealth.

As discussed *infra*, the detectives' testimony related to an issue that was at the heart of the trial: newly-developed DNA evidence that stood in direct conflict with the detectives' earlier claim about Mr. Wright's supposedly voluntary "confession" to the crime, and with physical evidence they claimed to have recovered from Mr. Wright's home. Yet despite (or, perhaps, because) the detectives' credibility and truthfulness in the eyes of the jury was absolutely critical to the Commonwealth's prospects for securing Mr. Wright's conviction despite the new DNA evidence, Ms. Kirn failed to alert the Court or the jury to what she personally knew was the falsity of their testimony, or otherwise honor her ethical duty to correct it. As such, counsel respectfully submits that the Board has substantial grounds to investigate and discipline Ms. Kirn for at least two violations of Pa. Rule Prof'l Conduct 3.3(a)(3).

I. Background and Summary of Grounds for Disciplinary Action

As members of the Board may already be aware, the trial at which Ms. Kirn appeared on behalf of the Commonwealth was actually Mr. Wright's *second* trial for a heinous crime he did not commit. Mr. Wright was first tried, convicted, and sentenced to life in prison in June 1993, at the age of twenty-one. He ultimately served nearly twenty-five years behind bars – more than half his life – before new DNA evidence led to the vacatur of his 1993 conviction and the unanimous verdict of a Philadelphia jury acquitting him of all charges in 2016.[1]

Mr. Wright's 1993 convictions arose from the sexual assault and murder of Louise Talley, a 77-year-old widow who lived alone in North Philadelphia, who was found nude and stabbed to death in her home on October 19, 1991. At trial, the Commonwealth relied chiefly on

[1] Unless otherwise indicated, the background information set forth in this section can be found in Mr. Wright's Third Amended Petition for Post-Conviction Relief dated May 30, 2014 (attached hereto as Exhibit A). Additional narrative summaries of the events leading up to and including Mr. Wright's 1993 and 2016 trials can be found at Paul Solotaroff, "The Trials of Tony Wright: How DNA Exonerated Convicted Murderer," *Rolling Stone*, March 2, 2015, *available at* https://www.rollingstone.com/culture/culture-news/the-trials-of-tony-wright-how-dna-exonerated-convicted-murderer-99926/, and Marc Bookman, "Three Murders in Philadelphia," *Slate*, May 12, 2017, *available at* http://www.slate.com/articles/news_and_politics/trials_and_error/2017/05/three_murders_in_philadelphia _in_the_early_1990s_and_three_men_who_didn.html.

then-Detective Manuel Santiago's claim that Mr. Wright gave a detailed, voluntary "confession" to the crime while in police custody on October 20, 1991. This alleged confession was not recorded on audio or videotape, but was instead a document bearing Mr. Wright's signature that was written out by hand by another detective (Martin Devlin). Det. Santiago maintained in 1993 (and again at Mr. Wright's 2016 retrial) that the nine-page statement was a "word for word," contemporaneous record of the exact questions he asked Mr. Wright in the interrogation room, and the answers that Mr. Wright supposedly gave to those questions.[2] In the police-authored statement, Mr. Wright "confessed" to entering Ms. Talley's home alone on the night of October 18, 1991; raping the victim and stabbing her to death; and returning to the scene later that night with a man named Earl Floyd to steal the victim's television and other items. (None of this property was ever recovered in Mr. Wright's possession nor traced to him, and Mr. Floyd was not prosecuted on any charges arising from Ms. Talley's murder, rape, or burglary.)

The other pillar of the Commonwealth's 1993 prosecution of Mr. Wright was the testimony of then-Det. Frank Jastrzembski as to the alleged recovery of physical evidence stained with the victim's blood. Det. Jastrzembski testified that, upon executing a search warrant at Mr. Wright's mother's home hours after the "confession" was given, he discovered and seized a blood-stained sweatshirt, jeans, and sneakers from Mr. Wright's bedroom. These items, the Commonwealth claimed, perfectly matched the exact three items that Mr. Wright had allegedly "confessed" to wearing during the commission of the rape-murder hours earlier while giving his statement to Detectives Santiago and Devlin. Det. Jastrzembski waited more than six hours after Mr. Wright allegedly informed police about the location of these clothes to obtain a search warrant, and he did not photograph the items he allegedly seized when the warrant was executed.

Mr. Wright declined the State's offer to plead guilty to the murder as a way to avoid imposition of the death penalty, and testified in his own defense at trial (as he did again in 2016). He maintained that he played no role whatsoever in Ms. Talley's rape, murder, or burglary. He told the jury that he never "confessed" to the crime to Det. Santiago or anyone else, but only signed the police-authored statement under duress, after being threatened with extreme violence by the detectives while he was handcuffed in the interrogation room. He also insisted that the clothing Det. Jastrzembski claimed to have "found" under his bed was not his; his mother (who was present when the search warrant was executed) corroborated that testimony.

[2] The sheer impossibility of the claim that Det. Devlin – who is not trained as a stenographer, and wrote out the statement in neat cursive handwriting – could actually transcribe "word for word" the contents of the purported question-and-answer session was vividly demonstrated to the jury at Mr. Wright's retrial. Det. Devlin proved unable to accurately transcribe *even a few words* of the first paragraph of the statement when it was read back to him in court in August 2016. *See* Testimony of Martin Devlin, August 22, 2016 (attached as Exhibit B), at 65-66, 68-74. .

No DNA testing or other physical evidence connected Mr. Wright to the crime in any way. Nonetheless – with Mr. Wright's defense resting on the admittedly challenging contention that multiple Philadelphia Police Detectives had essentially framed him for murder – he was convicted on all charges. He narrowly escaped the death penalty after five of the twelve members of the 1993 jury voted to spare his life, requiring the court to impose a mandatory life sentence.

More than two decades later, however, advanced DNA technology provided objective evidence that corroborated Mr. Wright's longstanding protestations of innocence. Even after securing the pro bono assistance of the Innocence Project, it took more than five years of litigation and ruling by the Pennsylvania Supreme Court to overcome the Commonwealth's refusal to allow him to conduct a simple DNA test. *See Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011). Ultimately, however, the testing was obtained, and it was profoundly exculpatory. The new DNA not only excluded Mr. Wright as the lone perpetrator whose semen was found inside the elderly victim's vagina and rectum, but identified the actual source: a recently-deceased felon named Ronnie Byrd. Byrd was nearly twice Mr. Wright's age at the time of the crime, and had no connection to him whatsoever. Thus, in this respect alone, the DNA test results provided powerful, objective evidence that Mr. Wright's "confession" (which made no mention of any other assailant, much less any reference to Ronnie Byrd) was a fabrication, as he had maintained for over twenty years. Further, Mr. Wright's post-conviction counsel also developed and presented new evidence that in October 1991, Byrd was a well-known crack user who "squatted" in the building next door to Ms. Talley's home, and that he (unlike Mr. Wright) was a known associate of the neighborhood drug dealers who falsely told detectives that Mr. Wright was responsible for the murder in an apparent effort to deflect suspicion from themselves and Byrd.

The DNA tests also provided stunning new evidence about the disputed source of the clothing and shoes that Det. Jastrzembski had sworn to the 1993 jury were recovered from Mr. Wright's bedroom. The testing revealed that *the victim herself* – not Mr. Wright – was either the "major" or lone donor of the skin, sweat, and/or saliva cells swabbed from multiple interior areas of the clothing and shoes. The new DNA tests thus revealed that the actual owner and "wearer" of the blood-stained items was not Mr. Wright, as the Commonwealth had long claimed: it was the victim herself. Notably, this was not just the opinion of the defense's expert who conducted the testing; it was independently confirmed and attested to by the Philadelphia Police Department's own DNA and serology experts.[3] Thus, as with the semen identification to Ronnie Byrd, the test results provided powerful new scientific evidence that Detectives Santiago and Jastrzembski had lied under oath in 1993 when they claimed that Mr. Wright admitted to owning and wearing these items and that they were recovered from his bedroom,. Instead, as Mr.

[3] *See* Trial testimony of Danielle Imes, August 19, 2016 (attached as Exhibit C).

Wright's counsel would later argue at his retrial, the most likely explanation for the origin of the clothes and shoes is that the victim herself (who was a very tall woman) was the owner/wearer, and they were spattered with traces of her blood during the murder, where detectives recovered them while processing the crime scene.

Represented by the Innocence Project and a *pro bono* team of lawyers from the Philadelphia office of Schnader Harrison Segal & Lewis LLP, Mr. Wright filed his initial PCRA petition in March 2013. After opposing any relief for eighteen month, and after requesting multiple rounds of DNA testing and retesting that merely confirmed and strengthened the original test results, the Commonwealth finally withdrew its futile objections to post-conviction relief. Mr. Wright's 1993 conviction was finally vacated based on the new DNA results in September 2014.

Notwithstanding this profoundly exculpatory DNA evidence, then-District-Attorney Seth Williams elected to put Mr. Wright on trial yet again. (The Commonwealth even threatened to seek the death penalty at his retrial -- notwithstanding its failure to get a jury to impose the death penalty in 1993, even before the new DNA evidence was available -- filing a Notice of Aggravating Circumstances on October 14, 2014, before later withdrawing it.)

At the August 2016 retrial, Ms. Kirn appeared as lead counsel on behalf of the Commonwealth, with ADA Carlos Vega as her second chair. She presented both opening and closing arguments, and argued that notwithstanding the defense's new DNA evidence excluding Mr. Wright and identifying Ronnie Byrd, the jury should continue to credit the detectives' twenty-five year old claims as to the voluntary and truthful nature of Mr. Wright's "confession" and the seizure of the bloody clothing and shoes from his home.[4] Both Det. Santiago and Det. Jacztrembski took the stand as Commonwealth's witnesses yet again, and continued to insist on the veracity of their earlier accounts on these key issues.

The former detectives' credibility in the jury's eyes was thus absolutely critical to what little chance Ms. Kirn had of securing a conviction in the face of the new DNA evidence. Simply put, her only hope of getting jurors to disregard the patently exculpatory nature of the DNA and the obvious questions it raises about (at the very least) the incompleteness and inaccuracy of the events set forth in Mr. Wright's so-called "confession" was for the jury to believe that the detectives were truthful in their claims that (1) he gave this confession spontaneously, voluntarily, and in his own words, and (2) the clothing and shoes were recovered in his home. Yet Ms. Kirn stood mute while two of these witnesses made factual statements to the jury that went directly to their veracity, and which she knew were false.

[4] *See* Opening statement of ADA Bridget Kirn, August 10, 2016 (attached as Exhibit D); closing statement of ADA Bridget Kirn, August 22, 2016 (attached as Exhibit E).

Specifically, the false testimony occurred during cross-examination of what were arguably the Commonwealth's two most important police witnesses – former Det. Santiago, who conducted the 1991 interrogation of Mr. Wright, and Det. Jastrzembski, who claimed to have seized the bloodstained clothes from Mr. Wright's bedroom. In response to defense counsel Samuel Silver's initial, foundational questions about their knowledge of the DNA results that led to Mr. Wright's retrial – DNA results that, as noted above, raised an array of troubling questions about the veracity of the detectives' earlier testimony – each witness maintained that he knew essentially nothing about the new DNA testing or what the results showed. These detectives told the jury that no one from the Commonwealth had told them "anything" about the new DNA results -- much less any detail about the defense's claims as to the significance of the new testing, and how they contradicted the detectives' accounts of what occurred in the interrogation room and during execution of the search warrant in 1991. Det. Santiago even went so far as to deny, under oath, that he had "ever, ever . . . from any source whatsoever" even *heard the name Ronnie Byrd* before he took the witness stand (other than what he may have happened to see "in a newspaper article before the trial started").

This was false, as Ms. Kirn well knew. In fact – as has now been confirmed by these and other police witnesses, and by Ms. Kirn herself, in sworn deposition testimony – Ms. Kirn had *personally briefed* the former detectives in great detail about the new DNA results. Her briefings included information about the defense's identification of Byrd as the semen donor on the victim's intimate samples; the defense's contention that Byrd was a crack user with close connections to the drug dealers who falsely implicated Mr. Wright; and the presence of "wearer DNA" on the clothing and shoes that turned out to be from the victim, not Mr. Wright.

These briefings occurred at a series of meetings with the key police witnesses between 2015-2016 in the wake of Mr. Wright's overturned 1993 conviction and the lead-up to his retrial. They were attended by Dets. Santiago and. Jastrzembski, as well as other witnesses with the Philadelphia Police Department. Yet at no time during Mr. Wright's trial did Ms. Kirn alert the Court or the jury to the fact that her chief witnesses had just abjectly perjured themselves when they denied that such meetings had ever occurred, as is plainly required by Rule 3.3(a)(3).

Fortunately, the jurors who heard the DNA evidence and other proof of Mr. Wright's actual innocence at his two-week-long retrial quickly rejected Ms. Kirn's bid to wrongly convict him a second time. On August 23, 2016, the jurors unanimously found (on their first ballot) that the evidence warranted a not-guilty verdict on all counts. And as the jury foreperson, Grace Greco, explained after the verdict, the jurors further recognized that this was a case not just of reasonable doubt, but of actual innocence: that Mr. Wright "did not commit this crime." Ms.

Greco went on to add how "angry" she and other jurors were that Mr. Wright had to endure a trial at all ("The city should never have brought this case").[5]

That same day, Mr. Wright was freed from custody after serving nearly a quarter-century behind bars for crimes he did not commit. His time in state prison caused him to miss virtually the entire childhood of his only son, who was just four years old when he was arrested, and a married man in his late twenties when Mr. Wright was released. And Mr. Wright's additional time in pretrial detention awaiting retrial caused him to miss the birth of his first grandchild, who was born in February 2016.

In 2017, Mr. Wright sued the officers and the City for damages arising from the police misconduct that caused his wrongful conviction; in June 2018, the City settled the case for a record $9.85 million.[6] It was during the discovery process in Mr. Wright's civil rights lawsuit that the evidence of Ms. Kirn's ethical violations at trial came to light.

II. The Commonwealth's Two Most Critical Police Witnesses -- Detectives Santiago Jastrzembski – Each Gave Sworn Testimony Disclaiming Knowledge of Exculpatory DNA Evidence that Ms. Kirn Failed to Correct, Even Though She Knew This Testimony Was False

A. Opening Statements Established the Centrality of the New DNA Evidence and Identification of Ronnie Byrd to Mr. Wright's Defense

The burden of proof in a criminal case remains, of course, with the prosecution; a citizen accused of a crime has no burden to put on any evidence or defense whatsoever. Nor is a defendant required preview any evidence or arguments he or she intends to present in an opening statement. In Mr. Wright's August 2016 retrial, however, defense counsel chose to give a highly detailed opening statement that put the prosecution and the jury on direct notice as to Mr. Wright's "actual innocence" defense, and the affirmative DNA evidence the defense intended to (and did) present at trial in support of that defense. Thus, by the time Detectives Santiago and Jastrzembski took the stand as witnesses for the Commonwealth and were asked by defense

[5] *See* Joseph A. Slobodzian and Tommy Rowan, "25 years later, freed by DNA evidence: 'It's the greatest day of my life'," *The Inquirer*, August 23, 2016, *available at* http://www.philly.com/philly/news/20160824_Philly_jury_deliberating_in_retrial_of__91_rape-murder_of_Nicetown_woman__77.html?arc404=true

[6] *See* Mensah M. Dean and Mark Fazlollah, "Philly man, wrongly imprisoned for 25 years, gets nearly $10 million from city," *The Inquirer*, June 6, 2016, *available at* http://www2.philly.com/philly/news/crime/anthony-wright-louise-talley-10-million-settlement-dna-evidence-rape-murder-nicetown-25-years-philadelphia-20180606.html

counsel about these very issues, Ms. Kirn was well aware of the potential importance of their answers to the jury's deliberations.

Specifically, Innocence Project attorney Peter Neufeld told jurors in his opening statement that Mr. Wright's defense would rest on new DNA evidence which, in light of the entire record, showed that (1) Mr. Wright was actually innocent of all charges, (2) another man – Ronnie Byrd – was the real perpetrator of the crimes at issue, and (3) the new DNA evidence proved that in 1991, several former Philadelphia Police Detectives had coerced Mr. Wright into signing a false "confession" he did not make, and falsely claimed that clothing and shoes stained with the victim's blood were found in Mr. Wright's bedroom when in fact they were not his, but the victim's own.

With respect to the DNA evidence, the defense's opening highlighted the new technology that was not available in 1991, when Mr. Wright was first arrested and charged, and the DNA identification of Ronnie Byrd that occurred more than two decades after the murder:

> The evidence will show that state of the art DNA testing conducted on the evidence in this case, the evidence collected during 1991, when Mrs. Talley was murdered -- the DNA recently conducted at the request of the defense in the last couple of years -- that that DNA evidence conclusively reveals two very significant findings.
>
> First, the DNA evidence reveals that Tony Wright is not guilty. Very important. The second revelation from the DNA testing done over the last couple of years is the DNA testing shows conclusively – not inconclusively, conclusively -- on sample after sample that another man named Ronnie Byrd is the source of all the semen that was recovered from Mrs. Talley's body when the medical examiner conducted their autopsy the day after she was killed. The DNA evidence, the scientific evidence, will conclusively prove to you that the perpetrator of the murder and the rape is not Tony Wright, but is Ronnie Byrd. Ronnie Byrd, who was a crack user. Ronnie Byrd, who lived in an abandoned house as a squatter less than one block away from poor Mrs. Talley. That's who Ronnie Byrd is, that's who Ronnie Byrd was, and that's what the scientific evidence will show.[7]

The defense also made clear, from the outset, its intent to directly challenge the prosecution's claim that Mr. Wright had "confessed" to the crime, by directly attacking the credibility and veracity of the officers who claimed to have witnessed it:

> The prosecutor told you that Tony Wright confessed to this crime. In fact, he did not confess. Instead, he was forced to sign a piece of paper that he didn't even

[7] *See* Defense opening statement, August 10, 2016 (attached as Exhibit F), at 92-93.

> write. The paper was written out by the Homicide detectives. And that Tony Wright was forced to sign that piece of paper only after a lengthy interrogation when actual threats by the detectives against Tony Wright were made. And it's in that context that Tony Wright was forced to sign this statement, this story, made up and written by the detectives.[8]

Mr. Neufeld proceeded to tell the jurors that it was the defense's contention that the same detectives had reason to fear the results of DNA testing – that they didn't want to know whose DNA was actually deposited at the crime scene, even back in 1991. He explained that while DNA technology had advanced considerably over the last twenty-five years, the evidence would show that the same officers who took Mr. Wright's "confession" did not even attempt DNA testing to determine who had sexually assaulted the victim using available technology in the early 1990s. It was Mr. Wright's contention that these detectives failed to request any DNA testing at that time, for fear that the testing would prove his innocence and expose their fabricated case against him:

> [A]fter they decided in their rush to judgment that they were going to get Tony Wright for this crime, they stopped looking for scientific evidence. These Homicide detectives never requested that the rape kit get sent out for DNA testing. They didn't want to know the answer.
>
> And the same detectives never requested that the fitted sheet that their own laboratory now told them had semen stains on it doesn't go out for DNA testing. Two requests made routinely by Homicide detectives all over America deliberately not requested in this case. And the reason it wasn't requested is they didn't want to know the answer. It would gum up the confession that they were attributing to this man.[9]

Next, the defense asked the jurors to listen to and consider the new DNA evidence not just for what it has revealed about the identity of the true perpetrator (Ronnie Byrd), but also for what it would show about the "fabricat[ed]" case made out by police detectives against Mr. Wright. There were, Mr. Neufeld submitted, "two critical questions" that the jury would be asked to resolve:

> The first question is: Who is telling the truth about the so-called confession, Tony Wright or the detectives? The second question that the DNA will answer is: Who was the true wearer of the three items of clothing that the police wrote into Tony's story? Was it, as the police claim, Tony Wright? Are these clothes that he wore

[8] *Id.* at 94 (emphasis supplied).

[9] *Id.* at 106 (emphasis supplied).

> over and away from Mrs. Talley's house? Or will the DNA show that the wearer of those clothes was not Tony Wright at all, but was somebody else, and that instead, these clothes are simply a fabrication by the police? These questions are both finally answered by the DNA testing, and they're both finally answered in Tony Wright's favor.[10]
>
> …..
>
> [W]hat the DNA evidence can tell you scientifically is that at some point in time she wore the jeans, she wore the sweatshirt, and she wore the sneakers. And the DNA will tell you scientifically that Tony Wright didn't.
>
> We believe that the science is compelling evidence, that the police took these clothes from Mrs. Talley's house, that they had them already in hand when they brought Tony Wright in for questioning on the 20th, and that's why these very detailed descriptions of them appear in the statement that they wrote. And that is why they falsely claimed that they belonged to Tony Wright.[11]

B. Detectives Santiago and Jastrzembski Falsely Deny They Were Briefed Before Trial About the DNA Test Results and the DNA Identification of Ronnie Byrd

1. Former Det. Manuel Santiago

During its case in chief, the Commonwealth called former Homicide Det. Manuel Santiago as one of its two witnesses to Mr. Wright's alleged, unrecorded "confession." On direct examination conducted by Ms. Kirn's co-counsel Carlos Vega, with Ms. Kirn sitting next to Mr. Vega at counsel's table, Det. Santiago described for the jury what he claimed to still recall in great detail about his investigation and arrest of Mr. Wright twenty-five years earlier. He read into the record the nine-page statement that Mr. Wright had signed in police custody – in which Mr. Wright (purportedly) admitted to entering the victim's house alone, where he alone raped and stabbed her. Det. Santiago further swore, just as he had at Mr. Wright's 1993 trial, that the signed "confession" was a "word for word" transcription taken by his colleague, Det. Martin Devlin, containing the exact questions he asked Mr. Wright, and the exact answers that Mr. Wright gave when he allegedly admitted – freely and voluntarily – to (1) raping and murdering the elderly victim, and (2) hiding the bloodstained clothing and shoes he wore in his bedroom at his mother's home. Det. Santiago adamantly denied that any portion of the confession was false

[10] *Id.* at 107 (emphasis supplied).

[11] *Id.* at 119.

or fabricated, nor that he or any other detective had threatened Mr. Wright in any way to get him to sign the statement.[12]

On cross-examination, defense counsel Samuel Silver of the Schnader firm attacked Detective Santiago's credibility, and the police-authored "confession," on multiple fronts. Chief among them related to the line of defense that Mr. Neufeld had previewed in his cross-examination: that this supposedly voluntary and freely-given confession by a suspect who (according to Det. Santiago) immediately told police in great detail what happened in the victim's home on the night she was raped and killed was highly suspect because it contained no mention of any other assailant – even though the DNA test results all showed that Ronnie Byrd, *not* Mr. Wright, was the lone male whose semen was found inside the elderly victim. Further, counsel established that Mr. Wright (according to Det. Santiago) was allegedly so cooperative that he freely gave police the name of Earl Floyd (the man with whom he allegedly returned to the home, *after* the victim was raped and killed, to burglarize it) as well as two other men who helped dispose of evidence after the fact. Yet there was no mention of Byrd, the one man whose DNA *was* found at the scene, anywhere in the police-authored statement.[13]

In response to these questions, Det. Santiago suddenly gave a long-winded defense of the confession's purported veracity in which he offered his own, new interpretation of what may have transpired in Ms. Talley's home prior to her death. Suddenly, and for the first time in a quarter century, Det. Santiago claimed that Mr. Wright's "confession" could reasonably be read to suggest that *multiple* assailants, rather than just Mr. Wright, committed the rape and murder:

> I'm just saying that in his statement, he tells me that basically this became an open house . . . obviously he's letting people into the house and they're coming in and out. . . . It seemed like <u>they made it an open house</u>, where they could basically – beyond terrorizing this woman, <u>they killed her, raped her and then they robbed her</u>. [14]

This raised an obvious line of potential further cross, one that went to the heart of the statement's accuracy and Det. Santiago's own credibility. Why had this detective suddenly – after twenty-five years – revised his entire original theory of the crime to include *multiple* rapists and/or murderers, in a desperate and calculated effort to account for the new DNA evidence without admitting that the "confession" was false? In other words, was Det. Santiago now claiming that Mr. Wright had acted in concert with others to commit the rape and murder

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[12] *See* Exhibit G (testimony of former Det. Manuel Santiago, August 16, 2016).

[13] *Id.*at 110-12.

[14] *Id.* at 113.

because he knew – through his preparation as a Commonwealth's witness for retrial – that the defense would argue that the new DNA test results and identification of Byrd directly contradicted what was in the 1991 police-authored statement?

Mr. Silver immediately pressed Det. Santiago about the source of his "they killed her, they raped her" theory. He confirmed that Det. Santiago, as an experienced witness, had deliberately and carefully chosen the word "they" moments earlier. Mr. Silver then established through further cross-examination that back in 1991, the police had no information suggesting that anyone but Mr. Wright had played any role in the rape or murder. Det. Santiago conceded these facts, but insisted that he was "absolutely certain" that Mr. Wright was guilty of these crimes and had given a truthful confession to them, just as he was twenty-five years ago.[15]

Mr. Silver next attempted to ask Det. Santiago about the relationship between the recent DNA results and Det. Santiago's newly-revised theory that more than one person raped and killed the victim. At this point, Det. Santiago resisted. He insisted that before he took the stand that day and speculated for the first time in a public proceeding about additional rapists and killers who may have been acting in concert with Mr. Wright, he personally knew nothing about the recent DNA test results. Nor, he insisted, had anyone from the Commonwealth ever mentioned an alternate suspect named Ronnie Byrd:

Q. [In 1991],did you believe that someone else murdered Mrs. Talley?
A. Oh, absolutely not. I am absolutely certain that your client, the defendant here, murdered and raped Mrs. Talley, yes.
Q. You're absolutely certain [of Mr. Wright's guilt] to this day, right?
A. To this day, I believe his words.
Q. And you do not know anything about what subsequent DNA analysis showed, correct?
A. I do not know, sir.
Q. Nobody's told you that? As you sit here on the witness stand under oath today, nobody has told you about subsequent DNA analysis?
A. Oh, no, I have been told that there has been DNA testing done on this case, yes.
Q. What are the results?
MR. VEGA: Objection.
THE COURT: Sustained.
BY MR. SILVER:
Q. Have you been told what the results were?
A. No, sir.
Q. Have you been told anything about what the results were?
A. No, sir.
Q. Have you been told what Mr. Wright contends the results were?

[15] *Id.* at 114-115.

A. No.
MR. VEGA: Objection.
BY MR. SILVER:
Q. You haven't?
MR. VEGA: Objection. What Mr. Wright contends?
THE COURT: Sustained.
BY MR. SILVER:
Q. Have you been told what the defense contends, sir?
MR. VEGA: Objection; improper.
THE COURT: You can answer it, if you can.
THE WITNESS: No, I don't know what the defense contends.
. . . .

Q. Sir, at any time to the present to today [sic] when you're on the witness stand, have you ever, ever, ever, ever heard the name Ronnie Byrd?
A I did hear the name Ronnie Byrd, yes.
Q. When did you hear the name Ronnie Byrd?
A. There was a -- I guess I read a newspaper article before the trial started.
MR. VEGA: I would object to that.
THE COURT: Sustained.
BY MR. SILVER:
Q. Yeah, let me ask you a question so we don't have that. Other than what you just said, have you ever heard the name Ronnie Byrd from any source whatsoever?
A. No, I have not.[16]

This testimony was false, as Ms. Kirn well knew. In fact, Det. Santiago's knowledge of the DNA results was not limited to a brief mention in a "newspaper article" he barely recalled reading. It came directly from Ms. Kirn, who *personally briefed Det. Santiago* about the DNA results in great detail prior to trial, over the course of multiple meetings with him and other of her chief police witnesses.

During those meetings – and directly contrary to what Det. Santiago would claim under oath at trial, in her presence – Ms. Kirn specifically told him that (1) the defense's DNA laboratory had identified Ronnie Byrd as the lone source of the rapist's seminal fluid, (2) that Byrd had further been identified as a crack addict residing near Ms. Talley's home at the time she was killed, and (3) that Ms. Talley's own "wearer" DNA was found inside the victim's clothing.

Det. Santiago apparently forgot about his own perjury less than a year after it was given. In May 2017, while being deposed as a defendant in Mr. Wright's civil rights lawsuit, he freely admitted that Ms. Kirn had provided him with a wealth of information about the DNA evidence

[16] *Id.* at 115-119 (emphasis supplied).

before he testified at trial. Here are his detailed responses to questions about information that Ms. Kirn provided to him at various preparation sessions meetings that began in 2015 and continued through the summer of 2016 -- the last one occurring approximately two weeks before he took the stand at the retrial:

Q. Now, as you sit here today, are you aware of the fact that there was DNA testing in this case that led to the conviction being vacated?
A. Yes, I am aware of that.
Q. Okay. And did you first become aware of that when DA Kirn brought you into her office in 2015 to first tell you about the need to testify at a second trial?
A. Yes, yes.
Q. That's the first time you learned of it?
A. That's the first time I learned of it.
Q. Okay. Fine. And since that time, after you learned of it from DA Kirn, did you also read any of the newspaper articles from the Inquirer or any place else which describe this case?
A. I did read the articles and I'll -- I'll be honest with you, I don't know exactly the timeframe but I did review articles, yes.

. . . .

Q. And so you understood, even before the second trial, that according to the articles or according to Miss Kirn DNA testing was done on the sperm recovered from the vaginal and rectal swabs, right?
A. So there was -- there was sperm?
Q. Well, that's something you learned from Miss Kirn and from the articles, did you not?
A. I did, I did. I -- I forget now but, you're right, but there was sperm.

. . . .

Q. And you learned that that DNA testing ·excluded Tony Wright as the source of the sperm, correct?
A. Yes, I did.
Q. And you learned that the DNA testing was a hit to a single man, and that man was Ronnie Bird. You learned that?
A. Yes, sir, I did learn that.
Q. Okay. And my question first is -- one moment. And, quite frankly, when you first learned about that, it surprised you, didn't it?
A. Yes.
Q. And did you ask any questions of either the police or prosecutors or anyone else, to see whether or not perhaps the DNA testing here was not accurate or was unreliable or something?· Did you make any inquiry?
A. No, I just spoke to the -- I spoke to the DA about the DNA testing.
A. And -- and she told me that -- that another person had been identified.

Q. Okay.
A. You know as -- you know -- you know, with the sperm. And, I believe, she told me the name. I -- you know, I'm pretty sure she told me the name, you know, Mr. Bird, I think, said that he had died in prison somewhere. And I said, well, if that's the case, what's going to happen with the case?· She says, well, do you still believe that he's guilty? I said, yeah, absolutely, he's still guilty of this murder.
Q. Okay.
A. And she said, well, so do we and we're gonna -- we're gonna retry him.
Q. Okay. Fine. And did you also learn that Mr. Bird, whose semen it was inside the -- the deceased, was a crack addict at the time of Miss Talley's death, who was a squatter living in an abandoned house on Bott Street, just behind Miss Talley's house? Did you learn that?
A. I learned that he was on Bott Street, also squatting back there, yes. I don't know the exact house.

. . . .

Q And you also learned, prior to the second trial, that there was additional -- that DNA testing was not just done on the rape kit, but that it was also done on the three items of clothing that were deemed pertinent to this investigation. Were you aware of that?
A. Yes, I was aware of that.
Q. And did they tell you that when they did DNA testing on the blue jeans, the Chicago Bulls sweatshirt and the Fila sneakers, okay, that the results were consistent with Miss Talley having worn those three items and inconsistent with Tony Wright having worn those three items, you heard that as well, didn't you?
A. What I heard -- now, this is from the DA I'm -- that I'm –
Q. I understand.
A. And the DA said to me that they found Miss Talley's -- some type of DNA and I don't know what ·they -- she had a name for it.
Q. Wearer DNA?
A. Excuse me, yes, you're right, wearer DNA. She said that -- that there was wearer DNA on -- on the clothing -- Miss Talley's wearer DNA on the clothing.
Q. Okay. And did she tell you that her wearer DNA was found on the inside of the clothing?
A. Yes, yes.[17]

2. Det. Frank Jastrzembski

Former Det. Frank Jastrzembski also attended at least one of Ms. Kirn's pretrial briefings about the new DNA evidence that Det. Santiago and other police witnesses would later recount at their depositions. But like Det. Santiago, when appearing as a witness against Mr. Wright at

[17] *See* Deposition of Manuel Santiago, May 4, 2017 (attached as Exhibit H), at 375-381.

the August 2016 trial, Det. Jastrzembski falsely and flatly denied that prosecutors had told him *anything* of substance about any of the new DNA results before he took the stand.

The new DNA testing went to the heart of Det. Jastrzembski's testimony (in 1991, and 2016) that he found bloody clothing and shoes in Mr. Wright's bedroom when executing the search warrant. Mr. Wright had always maintained that he did not own these items, and that detectives either planted them in his home or lied when they said they "found" them there. As Mr. Neufeld explained, it was the defense's contention that "wearer DNA" testing, conducted with newly-available technology in 2013, provided scientific corroboration for Mr. Wright's claim – and that in the early 1990s, neither Det. Jastrzembski nor any other police officer knew that this "wearer DNA" technology would one day expose the fact that they had lied about this issue and framed Mr. Wright for this crime. And the presence of Ronnie Byrd's semen inside the victim exposed the falsity of the police-authored confession statement in which (detectives claimed) Mr. Wright allegedly described these clothes in great detail *before* Det. Jastrzembski executed the search warrant and "discovered" those exact items in Mr. Wright's bedroom.

For obvious reasons, then, defense counsel Samuel Silver sought to question Det. Jastrzembski at Mr. Wright's retrial about his familiarity with this "wearer DNA" technology, and the DNA test results obtained on these and other items years after he searched the Wright home. These questions were met with unequivocal (and false) denials:

> Q: Now, in 1991, when you were executing this search, you had never heard of something called "wearer DNA," correct?
> A: Wearer DNA? Never heard of it until right now.[18]
> . . . .
> Q: And I assume, because you said that you still have not heard of wearer DNA, that nobody, to this date, has brought to your attention the results of the wearer DNA analysis in this case?
> A: That's correct.
> Q: Nobody?
> A: I've heard something that DNA came back, but I'm not fully –
> Q: You did?
> A: Yes?
> Q: Who told you?
> A: District Attorney.
> Q: And what did they tell you?
> A: That there was DNA.
> MR. VEGA: Objection.
> BY MR. SILVER:
> Q: That's it, right?
> A: Yes.

[18] Testimony of Frank Jastrzembski, Aug. 15, 2016, at 98 (attached as Exhibit I).

Q: And I was talking about wearer – has anybody told you anything about seminal fluid, DNA analysis of semen?
A: No.[19]

One year later, however, Det. Jastrzembski – like Det. Santiago – apparently forgot all about his earlier false testimony. In his civil deposition, he admitted what he and Ms. Kirn both knew back in August 2016 -- that she had briefed him and other detectives in great detail about the very DNA evidence (including the scientists' findings as to "wearer DNA," and the DNA identification of Byrd), *i.e.*, the same scientific testing that he swore to the jury he had had "never heard of" and "never been told" about by anyone:

Q. Now, there's been testimony by other officers that sometime in 2015 that you all received ·a call from Bridget Kirn and that she asked you all to come down, you, Manny Santiago and Marty Devlin. Any recollection of coming to the office and meeting Bridget Kirn with them?
A. Yes.
Q. Do you know, was anyone else there besides Marty Devlin and Manny Santiago and yourself and Miss Kirn for that first meeting?
A. I don't recall.
Q. What was discussed at that meeting?
A. The fact that he was getting a new trial. She asked us if we, you know, would be willing to testify, you know, at the retrial. We said yes.
Q. Did she tell you at that first meeting that the reason for the new trial was there had been new DNA testing?
A. Yes.
Q. She explained to you at that meeting what the significance of the DNA testing was that was leading to the new trial?
A. Yes.
Q. And was there a discussion amongst the four of you about what that DNA evidence meant or questions about the DNA evidence?
A. There was a lot of questions, sure.
. . . .
Q. What did she tell you about the DNA in the pants and the sweatshirt?
A. That DNA came back from another guy Byrd or something. I think DNA was found in her body from Byrd.
Q. Did she also explain to you at that meeting that the Philadelphia Police Department's own laboratory and DNA unit had agreed that the most likely explanation for all the DNA evidence was that Mrs. Talley had worn those items of clothing?
A. Yes.[20]

[19] *Id.* at 100-101 (emphasis supplied).

[20] Deposition of Frank Jastrzembski, August 15, 2017, at 31-35 (emphasis supplied), attached as Exhibit J.

3. Corroboration by Other Detective Witnesses

The evidence that Dets. Santiago and Jasztrzembski gave testimony at Mr. Wright's retrial that Ms. Kirn knew at the time was false is established by their own depositions. But there is other corroborating evidence as well. At least two other detectives who attended one or more of these briefings at which the two detectives were present confirm that Ms. Kirn provided information about the new DNA evidence to her police witnesses before they took the stand and claimed they knew nothing about it. Documents produced during the civil suit also revealed that well prior to trial, Ms. Kirn even asked one of these detectives for assistance in locating a DNA expert who could help her prepare to rebut some of the defense's new DNA evidence.

Former Det. Martin Devlin – who hand-wrote the October 1991 "confession" statement, which Mr. Wright signed and later disavowed – confirmed that he attended the group meeting with Ms. Kirn in August 2015, shortly after Mr. Wright's first conviction was vacated, along with his former colleagues Santiago and Jasztrzembski. Det. Devlin could not recall whether Ms. Kirn briefed him and the other detectives about the DNA evidence at that meeting or a subsequent one, but agreed that it must have been some time well in advance of trial, and did not deny that she had told him about the DNA results well before trial began. He was able to confirm this because Ms. Kirn actually contacted him in *October 2015* – eleven months before trial – to see if he had any recommendations for DNA experts she might retain to consult with her and possibly testify for the Commonwealth at trial. (She sought out Det. Devlin's expertise because he was familiar with the use of DNA evidence from his work as a cold case detective in Camden, NJ, where he was employed after leaving the Philadelphia Police Department.)

Her outreach to Det. Devlin nearly a year before trial, seeking his assistance in rebutting the defense's DNA evidence, was memorialized in an internal email she sent to her supervisor and two other colleagues on October 22, 2015, which was later produced during Mr. Wright's civil lawsuit.[21] In his post-trial deposition, Det. Devlin agreed that Ms. Kirn must have explained, "at least in some sense," the DNA results and why the first conviction had been vacated before she asked for his assistance in finding an appropriate expert.[22]

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[21] *See* Email from ADA Bridget Kirn to Jennifer Selber, Edward Cameron, and Brian Zarollo dated October 22, 2015 (attached as Exhibit K) ("I think we should consider getting another set of DNA eyes on this. I asked Det. Devlin from his cold case work if he was familiar with any good DNA analysists [*sic*]. He gave me the name of Dr. Michael Reiders who is the director of NMS labs. He hasn't worked with him directly but is familiar with his reputation") (emphasis supplied).

[22] *See* Deposition of Martin Devlin, Exhibit L, at 161 (whether at "that first meeting" with Ms. Kirn or another time before she reached out to him for expert recommendations, "I certainly came to know about the DNA").

He also specifically confirmed at his deposition that Ms. Kirn also told him the critical DNA information that his former partner, Det. Santiago, claimed at trial to know nothing about: that the defense's new DNA testing showed that Ronnie Byrd's semen, not Mr. Wright's, was found inside the victim.

> Q. … Well, you certainly knew about that there was DNA testing that was exculpatory prior to the second trial?
> A. Yes.
> Q. Okay. In fact, Mrs. Kern explained that to you, didn't she -- Ms. Kirn?
> A. Well, I -- I knew that Ronny Byrd's DNA was not -- I mean -- yes, that there was a different DNA inside her than the defendant.
> Q. Okay. And you -- by the way, when and -- and you knew that it was the prosecution's theory of the case, okay, always, that a single person raped and murdered Mrs. Talley, and that that single person was Tony Wright? You knew that?
> A. I knew that from -- yes, I knew that.

Similarly, retired Det. Dennis Dusak confirmed that he attended at least one pretrial preparation session with Ms. Kirn at which Det. Santiago and Jasztrzembski were also present.[23] Although Det. Dusak did not testify at trial and did not attend any portion of the trial, he nonetheless recalled that Ms. Kirn conveyed a wealth of information in their meetings prior to trial about the DNA results. She specifically told him about the identification of Ronnie Byrd as the source of the semen; Byrd's history as a crack addict and known associate of two of the Commonwealth's (now deceased) informants; and the opinion of criminalists employed by the City of Philadelphia that Mr. Wright was not the wearer of the clothing and shoes that the other detectives had attributed to him:

> Q. Okay. Now, as you sit here today, you're aware that DNA testing was done in this case?
> A. Yes.
> Q. And other witnesses have testified that when they met with Bridget Kirn she told them about the DNA testing in the case. Did she tell you about the DNA testing in the case too?
> A. I believe she did, sir.
> Q. Okay. And with respect to the DNA testing, as you sit here today you're aware of the fact that DNA testing on the rape kit, okay, produced results that said that the semen recovered from Mrs. Talley's vagina and Mrs. Talley's rectum came from one person and that person was a man named Ronny Bird. Are you aware of that?
> A. Yes, I heard that.
> Q. And you were also aware of the fact as you sit here today that DNA testing on the pants, sweatshirt and shoes, okay, or footwear recovered allegedly from Mr.

[23] *See* Deposition of Dennis Dusak, December 12, 2017, at 41 (attached as Exhibit M).

Wright's premises led to the conclusion by the head of the DNA laboratory of the Philadelphia Police Department and independent DNA expert that those clothes, that there was no evidence that those clothes were worn by Tony Wright but there was evidence supporting the notion that those clothes had been worn by Mrs. Talley. Where you aware of that too?
MR. MILLER: Objection to the form. You can answer.
THE WITNESS: Yes.

BY MR. NEUFELD:

Q. Okay. And are you aware of the fact that none of the semen in the rape kit, either for the vagina or the rectum of the deceased, came back consistent with Tony Wright?
A. Yes.
Q. And were you made aware as you sit here today that Ronny Bird was a 40-year-old crack addict?
A. Yes, I've heard that.
Q. And were you made aware of – so that he was 40 as opposed to Tony Wright at the time being 19?
A. Yes.
Q. Okay. And have you been made aware of the fact that Ronny Bird actually lived on Bott Street, the next block from where Mrs. Talley lived, in an abandoned house?
A. Yes.
Q. And were you made aware of the fact that there was evidence to support the conclusion that Mr. Saint James and Mr. Richardson were in fact friends of Ronny Bird, the man whose semen was recovered inside the deceased?
A. Yes.[24]

4. Ms. Kirn Concedes She Briefed These Detectives on the New DNA Evidence in Her Pretrial Meetings, Yet She Failed to Correct The Record at Mr. Wright's Retrial

After the former detectives were deposed as part of Mr. Wright's civil lawsuit, Ms. Kirn (who, unlike the police witnesses, was not a named defendant) was deposed.[25] She claimed not to have a detailed recollection as to what she told Detectives Santiago and Jastrzembski about the new DNA evidence and its significance in these pretrial preparation sessions. But when given

[24] *Id.* at 194-96.

[25] Unlike police officers, who are shielded from civil liability for misconduct only by qualified immunity, trial prosecutors are absolutely immune from suit in virtually all cases. The United States Supreme Court has emphasized that among the rationales for providing civil immunity to prosecutors is that they are subject to bar discipline as a consequence for serious misconduct, as well as potential criminal prosecution. *See, e.g., Imbler v. Pachtman,* 424 U.S. 409, 429 (1976), ("a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers"); *Connick v. Thompson,* 563 U.S. 51, 65-66 (2011).

the chance to review both detectives' deposition transcripts, she did not in any way dispute their recollections on this point:

> Q. Do you have any reason to doubt that there was some discussion where you may have mentioned Byrd during your conversations with them about the DNA that both of them are referencing in their depositions?[26]
> A. That may have happened.
> Q. Okay. And also, now, just – you know, you don't have any reason -- in other words, if -- certainly, if Byrd was in the newspaper by then, when you met with them, there would be no reason not to mention Byrd to them, correct?
> A. Correct. And --
> Q. And you were interested in Byrd also, because the DNA came back to him?
> A. Correct.
> Q. So, it would be natural for you to mention something about this guy named Byrd, about the DNA matching him to the detectives who on the case?
> A. That's correct.

Similarly, she admitted that she had no "reason to doubt" the accuracy of either Det. Santiago's or Det. Jastrzembski's recollections, as stated in their deposition, that she briefed both of them prior to trial about "the DNA that identified Byrd from the rape kit" as well as the DNA "on the clothes matching Ms. Talley." Indeed, she even recalled that the conversation she had with the detectives was more heavily focused on Byrd's identification than on the lab's discovery of Ms. Talley's DNA on the interior of the clothing.[27]

Later in her deposition, Ms. Kirn was confronted with the relevant portions of the trial testimony given by both detectives in August 2016 -- in which they maintained to the jury that no one from the DA's office or otherwise had told them anything of substance about the DNA, including anything about "wearer DNA" from Ms. Talley or the identification of Ronnie Byrd. Ms. Kirn initially tried to sidestep the obvious inconsistency between her preparation sessions and the detectives' trial testimony by claiming that the *purpose* of the meetings she had with them pretrial was not to discuss the DNA specifically ("I was not meeting with [the detectives] to discuss the DNA evidence in this case. It was telling them that the case was back and were they going to and willing to participate in the case.")[28] But she nonetheless conceded that, just as she had admitted an hour earlier, she had informed both detectives well prior to trial about the DNA evidence and Ronnie Byrd's identification as the semen donor.[29]

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[26] *See* Deposition of Bridget Kirn, March 13, 2018, at 297 (attached as Exhibit N).

[27] *Id.* at 300-302.

[28] *Id.* at 335-36.

[29] *Id.* at 337-38.

She further agreed that as a homicide prosecutor, she had a well-settled duty to correct any testimony given by a Commonwealth's witness in her prescence that she knew was false.[30] But remarkably, she claimed that there was no inconsistency between what the detectives testified to at trial and what she had told them about the DNA prior to that point. When asked whether she "ma[de] any effort to correct the record" when Santiago or Jastrzembski gave this testimony at Mr. Wright's trial, she twice answered only, "The transcript stands, sir."[31] Finally, when pressed for a third time to explain why she allowed this patently false testimony by both witnesses to stand uncorrected, Ms. Kirn stated only, "I didn't correct the record because it didn't seem inaccurate to me."[32]

III. Ms. Kirn's Knowing Failure to Correct These Detectives' False Testimony Violated Rule 3.3(a)(3), and Warrants Commensurate Sanctions

A. Nature of the Violations

Pennsylvania Rule of Professional Conduct 3.3 ("Candor Toward the Tribunal") provides, in relevant part:

> (a) A lawyer shall not knowingly:
>
> > (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> >
> > (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> >
> > (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. . . .

[30] *Id.* at 337-38.

[31] *Id.* at 339; *see also id.* at 340 ("Again, the transcript stands").

[32] *Id.* at 341.

> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

204 Pa. Code Rule 3.3 (emphasis supplied).

It is difficult to conceive of a more textbook violation of this Rule then when an attorney for the Commonwealth fails to correct a pivotal law enforcement witness's false denial of knowledge about facts that *she herself* provided to the witness in their pretrial preparation sessions. Here, Ms. Kirn stood mute while not one, but *two*, of the Commonwealth's most critical witnesses perjured themselves in this fashion. And she did so as an experienced homicide prosecutor, serving as lead counsel for the Commonwealth in a case where the defendant faced mandatory life in prison without the possibility of parole if convicted.

Nor can there be any question about the materiality of the detectives' false testimony under Rule 3.3. Ms. Kirn knew from the outset of the trial (and because of the extensive post-conviction litigation over the significance of the new DNA results, much earlier) that these officers' credibility and veracity was absolutely central to both sides' theories of the case. It was the defense's theory that these same two police officers had deliberately fabricated both the defendant's "confession" to the crime and the alleged "discovery" of bloody clothes and shoes under his bed. And the Commonwealth's entire case rested on its claim Det. Santiago and Devlin were telling the truth when they recalled taking a voluntary, verbatim statement from Mr. Wright admitting to his guilt, which was thereafter "corroborated" by Det. Jastrzembski's seizure of the clothes and shoes that were included in that statement. Thus, the jury's assessment of the detectives' veracity on the witness stand could not have been more material to the outcome of proceeding.

In addition, as noted above, the DNA evidence was relevant to impeach both detectives' versions of what they claimed happened in the interrogation room and at Mr. Wright's home in 1991 (events that were – by their own choosing – unrecorded on audio, video, or by photography). In 2016, Det. Santiago offered a new interpretation of Mr. Wright's "confession" to allow for the possibility of unnamed additional rapists. He then simply lied when defense counsel sought to ask him if he had come up with this new theory only in response to the DNA evidence implicating Byrd – insisting he knew only "there has been DNA testing done on this case" but that he knew "nothing" about the results, much less any evidence directly pointing to man named Ronnie Byrd. He specifically claimed he had not "ever . . . from any source whatsoever" heard the name Ronnie Byrd, other than what he might vaguely recall having read in a "newspaper article." In fact, Ms. Kirn had not only personally briefed him on the DNA identification of Byrd's semen inside the victim before he took the stand. She had also discussed with him a wealth of other information that Mr. Wright's legal team had uncovered about Byrd's

connection to the neighborhood and his close ties to other (now deceased) police informants from the 1991 investigation, previewing what the defense would argue at trial about Byrd's connection to those informants and his lack of any such connection to Mr. Wright.

Similarly, Det. Jastrzembski dodged cross-examination on the issue of how his account of "finding" the clothes and shoes in Mr. Wright's bedroom could be reconciled with new DNA technology, unavailable in 1991, showing that the wearer of these items was Ms. Talley herself. He denied any pretrial preparation by the Commonwealth on this key point, insisting that he knew only "that there was DNA" performed, but nothing about the results. He specifically told the jury that he had "never heard" the term "wearer DNA" from any source until "just now" – *i.e.,* the moment defense counsel asked him that question. We now know that Ms. Kirn had not only briefed him (in the presence of at least two other witnesses) on the DNA results and what the "wearer DNA" testing had revealed, but (1) he "had a lot of questions" for Ms. Kirn about the tests that had been done on these items, and (2) the conclusion that Ms. Talley was the "wearer" of the clothing was not merely a defense expert's opinion, but one that was independently reached by the Philadelphia Police Department's own DNA unit.

Ms. Kirn thus had an absolute obligation to correct what she knew to be false testimony by each detective at the time it was given. That obligation continued through closing arguments, during which defense counsel continued to hammer away at these officers' credibility, and ask the jurors to believe the defendants' word over these officers' sworn testimony (*see, e.g.,* Exh. O at 24 ("Tony Wright and not Officer Santiago is telling the truth about what went on in that interrogation"); *id* at 49 (to convict, "the prosecution needs you to believe beyond a reasonable doubt that there's no way in the world that a member of the Philadelphia Police Department in 1991 would ever blame the wrong man for a crime and backfill the evidence to make the charges stick"); *id.* at 76 (regarding the "confession" signed by Mr. Wright in police custody: "the testimony of Detective Santiago that this was a word for word record of what was said must be a lie. And I'm sorry to say it that cleanly and that boldly. And it sounds like an accusation, but let's just call it what it is"). Yet at no time prior to, during, or after defense counsel's bold challenge to the officers' veracity did Ms. Kirn disclose that she knew for a fact that they had perjured themselves on the witness stand in front of this same jury.

Ms. Kirn's decision to say silent in the face of these officers' false testimony was indefensible. No doubt she did not relish the prospect of adjourning the proceedings and alerting the Court to their perjurious statements, in that it would have eviscerated the detectives' credibility in the middle of the trial. But the fact that following her ethical obligations would have likely been fatal to any remaining hope she harbored of securing Mr. Wright's conviction is, of course, no excuse for her failure to act. Nor does the fact that if she had informed the Court of the officers' false testimony, it could, in theory, have made them vulnerable to prosecutions for perjury – a position in which no Assistant District Attorney who depends on police

cooperation to do her job would ever wish to find herself. The Rules of Professional Conduct are not meant to be followed only when there is little risk of serious consequences for the lawyer's client or cause. *See, e.g.*, Rule 3.3, Comment 11 ("Remedial Measures") ("The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement").

In addition, although the detectives did not admit to this in their deposition, it is both notable and troubling that after their pretrial meetings with Ms. Kirn, both detectives perjured themselves *in virtually the same exact fashion*. Each allowed that they knew there was *some* DNA testing performed which led to a new trial ("that there was DNA") ("that there has been DNA testing done in this case") – and their claimed knowledge ended at precisely the same level of generality. When asked by defense counsel, each detective adamantly (and falsely) denied that Ms. Kirn had told them anything about the substance of the DNA results: not what Mr. Wright's lawyers had alleged the results showed; nothing about a newly-identified man named Ronnie Byrd or the discovery of his semen inside the victim; nothing about the Philadelphia Police Department's exculpatory interpretation of the results; and nothing about "wearer DNA" testing on the clothing and shoes or how it had identified the victim as the likely source.

This remarkably concordant false testimony by two police witnesses who were not present for each others' testimony – but attended joint pretrial meetings with Ms. Kirn – certainly raises a reasonable question as to its source. The Board may thus also wish to investigate whether Ms. Kirn specifically instructed these witnesses in how to (partially and falsely) answer questions about the DNA that might be posed to them on cross-examination. *See* Rule 3.4(b) ("a lawyer shall not . . . counsel or assist a witness to testify falsely"); *see also* Rule 8.4(c), (d) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonestly, fraud, deceit or misrepresentation . . . or engage in conduct that is prejudicial to the administration of justice").

B. Materiality and Appropriate Sanctions

It also bears emphasizing that the fact that the jury ultimately acquitted Mr. Wright of all charges, even without Ms. Kirn advising the court and the jurors of the officers' perjured testimony, in no way make her immune from discipline under Rule 3.3(a). For the definition of "materiality" under the Rules of Professional Conduct generally, and Rule 3.3 specifically, differs from how it is understood in other contexts (for example, a *Brady* claim before a post-conviction court, in which suppression of evidence is material if the prosecutor's actions "undermined confidence *in the outcome* of the trial" (*see, e.g., Kyles v. Whitley*, 514 U.S. 419, 424 (1995)) (emphasis supplied).

Numerous courts applying Rule 3.3 and related provisions have emphasized that lawyers' violations of the ethical rules are different, and that attorneys may be sanctioned for presenting or failing to correct false testimony even if it ultimately did not change the outcome of the proceedings – as long as it related to an *issue* in the proceedings that was, or might have been, important to the fact-finder. These courts have emphasized that the purpose of robust enforcement of the rules is to protect the integrity of the system as a whole, not to redress harm to the adverse party in the underlying litigation. *See, e.g., In Re Disciplinary Proceedings Against Riley*, 371 Wis.2d 311, 384-85 (Wisc. 2016) (lawyer sanctioned for failing to correct false testimony given by client about employment history in a petition for reinstatement; Court holds that "the fact that this court ultimately denied [the client's] petition does not erase the materiality of the testimony. A false statement made to influence a tribunal does not become less false or less harmful to the adjudicative process because the tribunal ultimately decides against the person giving the false testimony on other grounds"); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993) (government attorney failed to alert court to known misrepresentation by critical expert witness regarding his academic credentials; appeals court holds that attorney's failure to correct the record constituted material "fraud" under Rule 3.3, which is violated when the false testimony "could *conceivably have affected* the outcome of the litigation") (emphasis supplied); *In re Foley*, 787 N.E. 2d 561 (Mass. 2003) (attorney counseled client to testify falsely if criminal case went to trial and thereafter presented client's false account to prosecutor during negotiations; although underlying case was dismissed on other grounds, and the false testimony was never presented in court, court imposes three-year suspension on attorney as sanction for misconduct); *In re Filosa*, (in settlement negotiations over employment discrimination claim, attorney relied on expert report and deposition testimony by client that attorney knew contained misstatements of fact about client's subsequent job offers; attorney's failure to correct false report and testimony violated Rule 3.3(a)(3), even though opposing counsel eventually learned of misstatements and false testimony was never presented in court).

Undersigned counsel further submit that if formal disciplinary proceedings are ultimately brought against Ms. Kirn, and the charges are found to have merit, significant sanctions are warranted. Indeed, numerous courts have imposed lengthy suspensions and/or disbarment of attorneys for comparable violations of the ethical rules. Some of these cases are ones in which the stakes at issue in the underlying proceedings were far less serious than those presented during Mr. Wright's 2016 murder trial.

For example, in August 2015, the Pennsylvania Supreme Court issued an order disbarring former Venango County prosecutor James Paul Carbone as a sanction for multiple violations of the Rules of Professional conduct that Carbone committed in the course of three sexual assault prosecutions. These included using "intemperate" language and obscene hand gestures during closing argument; interviewing witnesses without a psychologist or other witness present in

violation of a court order; contacting a defendant without counsel's permission; and making affirmative misrepresentations in his opening statement at one of the defendant's trials. [33] *See also Montgomery Cty. Bar Assn. v. Hecht*, 317 A.2d 597 (Pa. 1974) (one-year suspension of law license warranted where respondent gave false testimony regarding his ownership of real estate in a lawsuit in which respondent was acting as a party (rather than a lawyer)).

Other states' disciplinary actions arising from attorneys' knowing presentation of and/or failure to correct false testimony are also instructive. For example, in *In re Storment*, 873 S.W.2d 227 (Mo. 1994), the respondent-attorney was disbarred after he was inadvertently recorded by a court reporter in the act of counseling a witness to testify falsely in a divorce proceeding. The court found that disbarment was the appropriate sanction because the attorney had elicited what he knew to be false testimony, and had failed to correct facts asserted by the witness that he knew (from his consultation with the witness earlier) were false, in violation of Rules 3.3 and 8.4. *See* 873 S.W.2d at 229-31.

Similarly, in *People v. Goodman*, 334 P.3d 241 (Colo. 2014), for example, the Court disbarred the respondent-attorney for three violations of Rules 3.3and 8.4, which the attorney committed in the course of a civil suit and related disciplinary investigation. The attorney's acts of dishonesty included offering what he knew to be false evidence in a disciplinary proceeding against him (arising out of an alleged conflict of interest in the underlying civil suit). *See* 334 P.3d at 241-43.

In *Board of Overseers v. Dineen*, 481 A.2d 499 (Maine 1984), a defense attorney was disbarred based on a failure to correct false testimony given by her client at his armed robbery trial, which came to light during post-conviction proceedings. At the trial, the attorney had elicited and failed to correct false alibi testimony from the defendant (that he was at home when the robbery was committed), even though he had earlier told her that he had committed the crime. Finding that there could be "no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach" than the presentation of knowingly false testimony, the Court found disbarment to be the appropriate sanction. *See* 481 A.2d at 504.

Similarly, in *In re Edson*, 530 A.2d 1246 (N.J. 1987), the respondent-attorney was disbarred for his role in proffering false testimony and other fabricated evidence in his clients' defense to DWI charges in two cases (one of which did not go to trial, and from which the attorney later withdrew). The ethical violations substantiated by the Court included the attorney's failure to correct what he knew to be false testimony by his client and an expert witness. *Id.*

[33] *See Office of Disciplinary Counsel v. James Paul Carbone*, No. 71 DB 2014 (August 12, 2015), *available at* http://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/71DB2014-Carbone.pdf.

In re Foley, *supra*, the Supreme Judicial Court of Massachusetts imposed a three-year suspension from the practice of law on an attorney who was secretly recorded counseling a client to concoct false testimony about his ownership of a handgun in response to the client's arrest on charges of driving while intoxicated and illegal possession of the weapon, and relayed the client's false account to prosecutors in pretrial discussions. Although the criminal case was dismissed on other grounds, the Court observed that if the matter had proceeded to a trial at which this false testimony was given, "the sanction respondent would be facing most assuredly would have been disbarment." 787 N.E.2d at 569. *See also In re McCarthy*, 416 Mass. 423, 623 N.E.2d 473 (1993) (one-year suspension for eliciting false testimony and presenting false documents in proceeding before rent control board); *In re Neitlich*, 413 Mass. 416, 597 N.E.2d 425 (1992) (one-year suspension for actively misrepresenting terms of real estate transaction in divorce proceeding); *Filosa*, 976 F. Supp. 2d 460, *supra* (one year suspension for attorney's failure to correct false testimony and expert report prior to settlement of employment action).

Finally – and perhaps most significantly – the opinion of the Arizona Supreme Court in *In re Peasley*, 90 P.3d 764 (Ariz. 2004) is notable. In *Peasley*, the Court adopted the findings of the state bar's disciplinary commission that the respondent-attorney, a homicide prosecutor, had knowingly presented false testimony from law enforcement witnesses at two capital murder trials. Notably – as in Ms. Kirn's case – the false testimony in question related to the officers' purported knowledge (or lack thereof) of key facts in the case that related to the integrity of the police investigation. *Id.* at 767-69. (Unlike here, however, the prosecutor in *Peasley* succeeded in obtaining convictions and death sentences against both defendants, which were later overturned by the courts.) However, the Supreme Court rejected the recommendation of the hearing committee that the respondent-attorney face only a 60 day suspension for his misconduct – finding, instead, that disbarment was the appropriate sanction for a prosecutor's subornation of perjury. In so holding, the Court reasoned:

> By presenting false testimony in the prosecution of two defendants charged with capital murder, Peasley violated one of the most important duties of a lawyer. . . . We cannot conceive of a more serious injury, not just to the defendants but to the criminal justice system, than a prosecutor's presentation of false testimony in a capital murder case.

90 P.3d at 773.

IV. Conclusion

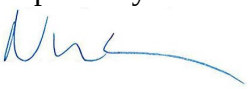
Anthony Wright spent nearly a quarter century of his life behind bars – and narrowly escaped the death penalty – after being tried, wrongfully convicted, and tried yet again for crimes he did not commit. During his incarceration, he stripped of his freedom and dignity; his beloved mother passed away; he was deprived of the ability to raise his only son, who was just four years old when he was arrested; and he missed the birth of his first grandchild, who was born in 2016, while Mr. Wright was in jail awaiting his second trial. Neither his complete vindication upon his acquittal, the overwhelming support of the Philadelphia community to which he returned, nor the sizable civil settlement agreed to by the City can restore what was taken from him.

The Philadelphia District Attorney's Office was legally (if not morally) entitled to present its case to a jury a second time, notwithstanding the overwhelming DNA and other exculpatory evidence that led to the vacatur of his first conviction. What prosecutors could not do was violate the law and the Rules of Professional Conduct in their zeal to secure his re-conviction.

There is compelling evidence that Ms. Kirn crossed that line here, and egregiously so. Had she succeeded in her efforts to convict Mr. Wright of murder a second time, he would still be behind bars, spending the rest of his life in prison without the possibility of parole. The fact that she did not ultimately achieve this objective should not minimize the severity of her misconduct. Nor should it prevent the Board and the Supreme Court from holding her fully accountable for her actions.

Thank you in advance for your consideration of this Complaint. Please do not hesitate to contact our office if we can provide anything further.

Respectfully submitted,



Nina Morrison, Esq. [34]
Senior Staff Attorney
Innocence Project, Inc.

[34] Member, New York State bar; admitted *pro hac vice* in Pennsylvania as trial and post-conviction counsel in *Comm. v. Anthony Wright*, No. CP 51 CR- 1131582-1991.