
**COURT OF APPEALS
STATE OF NEW YORK**

In the Matter of Letitia James, etc., Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

In the Matter of New York Civil Liberties Union,
Appellant, v Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080307/14)

In the Matter of NYP Holdings, Inc., etc., Petitioner,
v. Daniel Donovan, etc., Respondent.
(Index No. 080308/14)

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., Appellants, v. Daniel Donovan, etc.,
Respondent-respondent.
(Index No. 080009/15)

**NOTICE OF MOTION AND
AFFIRMATION BY EMERY CELLI
BRINCKERHOFF
& ABADY LLP FOR LEAVE TO APPEAL**

**MATTHEW D. BRINCKERHOFF
R. ORION DANJUMA.
ATTORNEYS FOR APPELLANT
600 FIFTH AVENUE, 10TH FLOOR
NEW YORK, NEW YORK 10020
(212) 763-5000**

COURT OF APPEALS
STATE OF NEW YORK

-----X
In the Matter of Letitia James, etc., Appellant, :
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant, :
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

NOTICE OF MOTION

In the Matter of New York Civil Liberties Union, :
Appellant, v Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080307/14) :

In the Matter of NYP Holdings, Inc., etc.,
Petitioner, v. Daniel Donovan, etc.,
Respondent.
(Index No. 080308/14) :

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., Appellants, v. Daniel Donovan, etc., :
Respondent-respondent.
(Index No. 080009/15)

-----X

PLEASE TAKE NOTICE that, upon the annexed affirmation of R. Orion Danjuma, dated August 14, 2015, the undersigned will move this Court on August 24, 2015, or as soon thereafter as counsel can be heard, at the courthouse, 20 Eagle Street, Albany, New York, for an order:

1. Pursuant to C.P.L.R. §5602(a)(1) and 22 N.Y.C.R.R. §500.22, granting appellant, LETITIA JAMES, permission to appeal an

order of the Appellate Division, Second Department, rendered July 29, 2015, affirming an order of the Supreme Court, Richmond County, dated March 19, 2015, denying appellant's request, pursuant to C.P.L. §190.25(4)(a), to unseal and release the minutes of the grand jury investigation into the death of Eric Garner at the hands of Officer Daniel Pantaleo which resulted in no true bill;

2. Granting a calendar preference as requested in appellant's Memorandum of Law; and
3. For such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 14, 2015

Sincerely,



Matthew D. Brinckerhoff
R. Orion Danjuma

600 Fifth Avenue, 10th Floor
New York, New York 10020

(212) 763-5000

*Attorneys for
Appellants/Petitioners*

TO: Hon. Daniel L. Master, Jr.
Acting District Attorney
Richmond County
130 Stuyvesant Place
Staten Island, New York 10301
Attn: ADA Anne Grady

COURT OF APPEALS
STATE OF NEW YORK

-----X
In the Matter of Letitia James, etc., Appellant, :
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant, :
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

AFFIRMATION

In the Matter of New York Civil Liberties Union, :
Appellant, v Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080307/14) :

In the Matter of NYP Holdings, Inc., etc.,
Petitioner, v. Daniel Donovan, etc.,
Respondent.
(Index No. 080308/14) :

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., Appellants, v. Daniel Donovan, etc., :
Respondent-respondent.
(Index No. 080009/15)

-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

R. Orion Danjuma, an attorney duly admitted to practice in the courts of
this State, hereby affirms under penalties of perjury that the following
statements are true, except those statements made upon information and belief,

which he believes to be true.

1. This case involves the appeal of a decision by the Appellate Division, Second Department, dated and entered July 29, 2015, affirming an order of the Supreme Court, Richmond County, rendered March 19, 2015, denying the Public Advocate's request, pursuant to C.P.L. §190.25(4)(a), to unseal and release the minutes of the grand jury investigation into the death of Eric Garner at the hands of Officer Daniel Pantaleo which ended in no true bill. (A copy of the decision and notice of entry is attached as Exhibit A).

JURISDICTION

2. The Appellate Division, Second Department, issued an order holding that the Public Advocate lacked legal capacity to petition for access to grand jury materials, which had the effect of finally determining this action in its entirety. This Court therefore has jurisdiction over the motion under CPLR 5602(a).

RELEVANT FACTS

3. On July 17, 2014, Eric Garner died while being choked by police officers during an arrest. A bystander used a cell phone to record what became a widely disseminated video of Mr. Garner's final moments. The medical examiner ruled the death a homicide caused by compression of the neck and

chest during physical restraint by the police.

4. A grand jury was convened on September 29, 2014 to investigate the circumstances surrounding Mr. Garner's death. On December 3, 2014, the grand jury adjourned without charging any person with the commission of a crime. Thereafter, the Richmond County District Attorney ("Respondent") submitted a sealed motion to the Supreme Court, requesting public disclosure of certain information regarding the grand jury proceeding, pursuant to N.Y. Crim. Pro. Law § 190.25(4)(a). In a December 5, 2014 Order, Justice Rooney granted the petition and disclosed summary information about the length of the grand jury proceeding, the number of witnesses who testified, and the number of exhibits admitted into evidence.

5. On December 10, 2014, the Public Advocate moved for an order under CPL § 190.25(4)(a) permitting her to review materials from the Garner grand jury investigation. The New York City Charter vests the Public Advocate with authority to work with government officials to resolve citizens' complaints and introduce legislation to address systemic problems. *See* Charter of the City of New York § 24. The Public Advocate petitioned for access to the grand jury materials pursuant to her duty to investigate official misconduct and propose

reform measures.¹ She sought limited public disclosure of four categories of materials: (1) all instructions to the grand jury, including any instruction to the jury on the elements of crimes charged; (2) all questions asked by grand jury members (redacted, if necessary, to conceal the identity of witnesses and/or jurors); (3) the testimony of the principal officer who was the subject of the investigation; and (4) all non-testimonial evidence presented to the grand jury. JA.130. Grand jury witnesses who object to the disclosure of their testimony would be given an opportunity to notify the court and the parties to of any such objection, consistent with the procedures outlined in *Di Napoli*, 27 N.Y.2d at 238-29.

PROCEDURAL HISTORY

6. In response to the new petition filed by the Public Advocate and other parties to this appeal, the Supreme Court initially ordered that all applications for Garner grand jury materials must be filed under seal. On December 10, 2014, the Public Advocate appealed that order pursuant to CPLR 5704(a). On December 11, 2014, the Second Department granted the Public Advocate's appeal and directed that her petition be unsealed. On December 17, 2014,

¹ Between December 5, 2014 and January 9, 2015, the Legal Aid Society of New York, New York Civil Liberties Union, the owner of the New York Post, and the Staten Island Branch of the National Association for the Advancement of Colored People in association with the New York State Conference of Branches of the National Association for the Advancement of Colored People filed parallel petitions seeking public disclosure of materials from the Garner grand jury proceeding.

Justice Rooney recused himself from further consideration of the petitions.

7. On July 29, 2015, the Appellate Division affirmed the Supreme Court's denial of the Public Advocate's petition without addressing the merits of the application. A majority of Justices on the Appellate Division panel held that the Public Advocate lacks the legal capacity to seek disclosure of grand jury materials and that her petition should have been dismissed on those grounds. Justice Leventhal concurred in the judgement but disagreed with the panel majority's conclusion that the Public Advocate lacks capacity to petition for disclosure under § 190.25(4)(a) disclosure. The Public Advocate served the Appellate Division's decision on Respondent on August 10, 2015. The instant motion for permission to appeal was timely filed within thirty days of service of that notice of entry. *See* CPLR 5513(b).

LEAVE TO APPEAL SHOULD BE GRANTED

8. This appeal presents novel, time-sensitive issues of substantial public importance regarding the investigative authority of the New York City Public Advocate, the State's grand jury system, and the role of local district attorneys in cases of alleged police misconduct. On December 10, 2014, the Public Advocate petitioned for access to grand jury materials from the investigation into the death of Eric Garner. The decision not to return an indictment in this case has prompted a public debate virtually unprecedented

in its scope and potential impact on core aspects of the State's criminal justice system. There is broad public concern that district attorneys' reliance on local law enforcement to prosecute their cases presents an inherent conflict of interest and risk of collusion when district attorneys investigate members of the local police force accused of misconduct. The Public Advocate sought limited disclosure of the Garner grand jury materials so that the sweeping reform measures currently under review would be informed by an understanding of what occurred in the Garner grand jury proceeding itself.

9. At issue in this appeal is whether the Public Advocate, elected as a check against abuse of authority by the Executive Branch, is even permitted to request disclosure of grand jury materials when investigating allegations of official misconduct. In a significant departure from precedent, a divided majority of the Second Department panel held that the Public Advocate has less legal capacity than any other member of the public to seek access to grand jury materials even when conducting an official investigation. The majority opinion rejects the Public Advocate's petition based on an unprecedented interpretation of the scope of her authority under the New York City Charter ("the Charter"). The majority's analysis rests on the fact that provisions of the Charter require the Public Advocate to refer

“complaint[s] alleging criminal conduct” to appropriate law enforcement officials. Charter at § 24(k); *see also id.* at § 24(f).

10. This novel legal theory directly conflicts with existing authority from the First Department and is internally inconsistent with the logic of the majority opinion. Contrary to the majority’s holding, the cited provisions of the Charter do not apply here because the Public Advocate’s petition is not part of a criminal investigation. It is a civil action directed at evaluating possible collusion or conflicts of interest between district attorneys and local police officers accused of misconduct. In suggesting that district attorneys are exempt from the Public Advocate’s oversight because district attorneys investigate allegations of criminal conduct, the Appellate Division’s holding contradicts the First Department’s decision in *Green v. Safir*, 255 A.D.2d 107 (1st Dep’t 1998) (permitting access to disciplinary records of police officers despite officers’ involvement in investigating allegations of criminal conduct).

11. Even if District Attorneys were indeed exempt from oversight under the Charter, the Public Advocate would still have legal capacity to petition to unseal grand jury materials in order to aid her investigations of other city agencies, such as the New York Police Department (“NYPD”) and the Health and Hospitals Corporation. The sweeping consequences of the

majority's novel legal theory on the Office of the Public Advocate is reason enough for this Court to grant leave to appeal and resolve the divided panel opinion and split in authority between the First and Second Departments.

12. After setting aside the Public Advocate's petition based on lack of legal capacity, the Appellate Division held that the remaining petitioners had failed to articulate a compelling and particularized need for access to the Garner grand jury materials or to demonstrate that the public interest in disclosure outweighs the presumption of grand jury secrecy. The Appellate Division's analysis conflicts with this Court's precedent.

13. This Court has long held that, while there is a rebuttable presumption of confidentiality for grand jury proceedings, the "secrecy of grand jury minutes is not absolute." *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970). In particular, courts have granted public officials access to grand jury materials that will assist them in conducting investigations or implementing policy reform. *See id.* at 237 (permitting disclosure to Public Service Commission "to assist it in its investigation and preparation for the public hearings which it will hold"); *see also Matter of Dist. Attorney of Suffolk Cnty.*, 86 A.D.2d 294, 299 (2d Dep't 1982) *aff'd*, 58 N.Y.2d 436 (1983) (grand jury materials may be disclosed to a petitioner who "demonstrate[s] why, and to what extent, he requires the minutes of a

particular Grand Jury to advance the actions or measures taken, or proposed (e.g., legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served.”).

14. Here, the Appellate Division erroneously equated this case to *Matter of Hynes*, 179 A.D.2d 760, 760 (2nd Dep’t 1992), where the District Attorney sought to disclose grand jury materials solely to “quell public unrest.” The public interest posited in *Matter of Hynes* are not analogous to those presented here, where the Public Advocate seeks to advance specific legislation and proposals to reform the grand jury system and address conflicts of interest between local district attorneys and police officers. Indeed, this Court’s precedent directs that grand jury minutes may be disclosed to uncover conflicts of interest between a prosecutor and the target of an investigation. *See People ex rel. Hirschberg v. Bd. of Sup’rs of Orange Cnty.*, 251 N.Y. 156, 167 (1929) (granting access to grand jury materials to evaluate whether District Attorney had “wrongfully protected the accused whom it was his duty to prosecute.”).

15. In addition, the Appellate Division incorrectly relied on a fear of a potential chilling effect if the testimony of grand jury witnesses is disclosed. That conclusion directly conflicts with this Court’s holding in *People v. Di Napoli* which concluded that the possibility of a chilling effect is insufficient

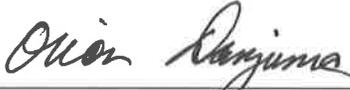
to outweigh public interest in disclosure. 27 N.Y.2d at 236.

THE MOVANT SHOULD BE GRANTED A CALENDAR
PREFERENCE

16. Finally, the Public Advocate seeks a calendar preference because these appeals implicate pressing and time-sensitive matters of deep public concern. Public figures and elected officials at every level of state, local, and federal government have spoken out about Eric Garner's death. Numerous proposals for legislation and policy change are now under active consideration in direct response to the grand jury's decision not to return an indictment and to the Public Advocate's petition in this case. *See* Public Advocate's Opening Appellant Br. at 12-16; Br. Amici Curiae of the Legislative Caucus at 4-10. These proposals are under consideration and the outcome of this appeal has the potential to significantly impact the course of reform. The Appellate Division granted a calendar preference in light of the importance of the issues presented by the petitioners. The Public Advocate respectfully requests that this Court similarly expedite its consideration of this appeal.

WHEREFORE, appellant respectfully requests that permission to appeal to the Court of Appeals be granted.

Dated: New York, New York
August 14, 2015



R. Orion Danjuma

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of Letitia James, etc., Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080304/14)

In the Matter of Legal Aid Society, Appellant,
v. Daniel Donovan, etc., Respondent-respondent.
(Index No. 080296/14)

In the Matter of New York Civil Liberties Union,
Appellant, v Daniel Donovan, etc., Respondent-
respondent.
(Index No. 080307/14)

In the Matter of NYP Holdings, Inc., etc., Petitioner, v.
Daniel Donovan, etc., Respondent.
(Index No. 080308/14)

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., Appellants, v. Daniel Donovan, etc.,
Respondent-respondent.
(Index No. 080009/15)

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR LEAVE
TO APPEAL**

MATTHEW D. BRINCKERHOFF
R. ORION DANJUMA
EMERY CELLI BRINCKHEROFF & ABADY
ATTORNEYS FOR APPELLANT
600 FIFTH AVENUE, 10TH FLOOR
NEW YORK, NEW YORK 10020
(212) 763-5000

TABLE OF CONTENTS

	<u>PAGE NO.</u>
QUESTIONS PRESENTED.....	1
PRELIMINARY STATEMENT	2
BACKGROUND	6
PROCEDURAL HISTORY.....	8
JURISDICTION.....	10
ARGUMENT	10
I. THE APPELLATE DIVISION’S RULING THAT THE PUBLIC ADVOCATE LACKS CAPACITY TO PETITION FOR ACCESS TO GRAND JURY MATERIALS CONTRADICTS COURT OF APPEALS PRECEDENT AND CREATES A CONFLICT BETWEEN DEPARTMENTS.....	10
A. The Appellate Division’s Decision Creates a Conflict Between the First and Second Departments Regarding the Public Advocate’s Investigative Authority over Law Enforcement Agencies	11
B. The Second Department’s Decision Directly Conflicts with Court of Appeals Precedent Regarding the Definition of a “City Agency” Under the New York City Charter.....	17
C. The Appellate Divison’s Decision Conflicts with This Court’s Precedent Concerning the Capacity to Sue.....	21
II. THE APPELLATE DIVISION’S STANDARD FOR UNSEALING GRAND JURY MATERIALS CONFLICTS WITH CASE PRECEDENT	24
III. A CALENDAR PREFERENCE IS WARRANTED DUE TO THE PARAMOUNT IMPORTANCE OF THE ISSUES UNDER CONSIDERATION IN THIS APPEAL	29
CONCLUSION	33

TABLE OF AUTHORITIES

PAGE NO.

Federal Cases

Douglas Oil Co. of Cal. v Petrol Stops Northwest,
441U.S. 211 (1979)..... 27, 28

State Cases

Application of FOJP Serv. Corp.,
119 Misc. 2d 287 (Sup. Ct. Cnty. 1983).....24

Comm’rs of State Ins. Fund v. Dinowitz,
179 Misc. 278 (Sup. Ct. N.Y. Cnty. 1942)31

Comm’rs of State Ins. Fund v. Statland,
181 Misc. 117(Sup. Ct. N.Y. Cnty. 1943).....31

Community Board 7 of Borough of Manhattan v. Schaffer,
84 N.Y.2d 148 (1994) 20, 21

Goldin v. Greenberg,
49 N.Y.2d 566, (1980)18

Green v. Giuliani,
187 Misc.2d 138 (Sup. Ct. Cnty. 2000).....15

Green v. Safir,
174 Misc.2d 400, 403-404 (1st Dep’t 1998) 14, 20

Green v. Safir,
255 A.D.2d 107 (1st Dep’t 1998) 2, 16

In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art,
93 N.Y.2d 729 (1999)28

Levy v. City Comm’n on Human Rights,
85 N.Y.2d 740, (1995)18

Madison Square Garden, L.P. v. New York Metro. Transp. Auth.,
19 A.D.3d 284, 285, 799 N.Y.S.2d 186 (2005).....20

<i>Maloff v. City Commision on Human Rights,</i> 38 N.Y.2d 329, (1975).....	18
<i>Matter of Comptroller of City of New York v. Mayor of City of New York,</i> 7 N.Y.3d 256, 263 (2006).....	21
<i>Matter of Crain,</i> 139 Misc. 799 (Sup. Ct. N.Y. Cnty. 1931).....	22
<i>Matter of Dist. Attorney of Suffolk Cnty.,</i> 58 N.Y.2d 436, (1983).....	23
<i>Matter of Dist. Attorney of Suffolk Cnty.,</i> 86 A.D.2d 294, 299 (2d Dep’t 1982).....	4
<i>Matter of Hynes,</i> 179 A.D.2d 760 (2nd Dep’t 1992).....	4, 26
<i>Parker v. Metropolitan Transp. Auth.,</i> 17 Misc.3d 1112(A) (Sup. Ct. Cnty. 2007).....	18
<i>People ex rel. Hirschberg v. Bd. of Sup’rs of Orange Cnty.,</i> 251 N.Y. 156, (1929).....	4, 24
<i>People v. Butt,</i> 113 Misc. 2d 538 (App. Term 1981).....	18
<i>People v. Di Napoli,</i> 27 N.Y.2d 229 (1970).....	passim
<i>Schulz v. State,</i> 175 A.D.2d 356 (3d Dep’t 1991).....	29
<i>Silver v. Pataki,</i> 96 N.Y.2d 532 (NY Ct. App. 2001).....	21
State Statutes	
22 N.Y.C.R.R § 500.17(b).....	28
Charter § 1125.....	19
Charter § 1150 (2).....	18

Charter § 24.....	6
Charter at § 24(k)	2, 13, 14
CPL § 190.25(4)(a)	6
CPLR 3403(a)(1).....	31
CPLR 5513(b)	9
CPLR 5602(a)	9
CPLR 5704(a)	8
Other Authorities	
COIB Advisory Opinion 93-26	19
COIB Advisory Opinion No. 2008-5.....	19
<i>COIB v. Campbell Ross</i> , OATH Index No. 538/98, COIB Case No. 1997-76 (Order Dec. 22, 1997).....	19
<i>COIB v. Collins</i> , OATH Index No. 556/14, COIB Case No. 2013-258 (Order July 30, 2014)	19
N.Y. City Comptroller Audit of Manhattan District Attorney’s Office, Audit No. FM10-111A, <i>available at</i> https://comptroller.nyc.gov/reports/audit/?r=03-24-10_FM10-111A , last visited on May 31, 2015.....	19
<i>The Public Advocate for New York City: An Analysis of the Country’s Only Elected Ombudsman</i> , 42 N.Y.L. Sch. L. Rev. 1093, 1098 (1998)	11, 12
<i>Twenty-Five Years Later: Reflections on New York City’s 1989 Charter Revision Commission and on Charter Commissions in General</i> , 58 N.Y.L. Sch. L. Rev. 95 (2013-2014).....	12

QUESTIONS PRESENTED

Petitioner-Appellant New York City Public Advocate Letitia James (“the Public Advocate”) respectfully submits this memorandum of law in support of her motion, pursuant to CPLR 5602(a), for leave to appeal to this Court and for a calendar preference with respect to the following significant questions of law:

- (1) Does Section 24(f) or (k) of the New York City Charter preclude the Public Advocate from petitioning for access to grand jury materials?
- (2) Are district attorneys located in the five boroughs of New York City “city agencies” for the purpose of the Public Advocate’s investigatory powers and duties under the Charter?
- (3) Does the Public Advocate otherwise lack legal capacity to petition for the unsealing of grand jury materials?
- (4) Is there a compelling and particularized public interest in limited disclosure of grand jury materials to evaluate possible collusion or conflicts of interest when local district attorneys investigate police officers accused of misconduct?
- (5) Is there a compelling and particularized public interest in limited disclosure of grand jury materials to inform specific legislative and policy proposals for reform of the grand jury system?
- (6) Does the potential chilling effect on grand jury witnesses from disclosure of grand jury testimony require the denial of a petition to unseal when the factors outlined in *People v. Di Napoli*, 27 N.Y.2d 229 (1970) weigh in favor of disclosure?

PRELIMINARY STATEMENT

This appeal presents novel, time-sensitive issues of substantial public importance regarding the investigative authority of the New York City Public Advocate, the State's grand jury system, and the role of local district attorneys in cases of alleged police misconduct. On December 10, 2014, the Public Advocate petitioned for access to grand jury materials from the investigation into the death of Eric Garner. The decision not to return an indictment in this case has prompted a public debate virtually unprecedented in its scope and potential impact on core aspects of the State's criminal justice system. There is broad public concern that district attorneys' reliance on local law enforcement to prosecute their cases presents an inherent conflict of interest and risk of collusion when district attorneys investigate members local police officers accused of misconduct. The Public Advocate sought limited disclosure of the Garner grand jury materials so that the sweeping legislative and regulatory measures currently under review would be informed by an understanding of what occurred in the Garner grand jury proceeding itself.

At issue in this appeal is whether the Public Advocate, elected as a check against abuse of authority by executive officials, is even permitted to request disclosure of grand jury materials when investigating allegations of official misconduct. In a significant departure from precedent, a divided panel of the

Second Department held that the Public Advocate has *less* legal capacity than any other member of the public to seek access to grand jury materials, even when conducting an official investigation. The majority opinion rejects the Public Advocate's petition based on an unprecedented and erroneous interpretation of the scope of her authority under the New York City Charter ("the Charter"). The majority's analysis rests on the fact that provisions of the Charter require the Public Advocate to refer "complaint[s] alleging criminal conduct" to appropriate law enforcement officials. Charter at § 24(k); *see also id.* at § 24(f).

This novel legal theory directly conflicts with existing authority from the First Department and is internally inconsistent with the logic of the majority opinion. Contrary to the majority's holding, the cited provisions of the Charter do not apply here because the Public Advocate's petition is not part of a criminal investigation. It is a civil action directed at evaluating possible collusion or conflicts of interest between district attorneys and local police officers accused of misconduct. In suggesting that district attorneys are exempt from the Public Advocate's oversight because district attorneys investigate allegations of criminal conduct, the Appellate Division's holding contradicts the First Department's decision in *Green v. Safir*, 255 A.D.2d 107 (1st Dep't 1998) (permitting access to disciplinary records of police officers despite officers' involvement in investigating allegations of criminal conduct). Even if District Attorneys were indeed exempt

from oversight under the Charter, the Public Advocate would still have legal capacity to petition to unseal grand jury materials in order to aid her investigations of other city agencies, such as the New York Police Department (“NYPD”) and the Health and Hospitals Corporation. The sweeping consequences of the majority’s novel legal theory on the Office of the Public Advocate is reason enough for this Court to grant leave to appeal and resolve the divided panel opinion and split in authority between the First and Second Departments.

After setting aside the Public Advocate’s petition based on lack of legal capacity, the Appellate Division held that the remaining petitioners had failed to articulate a compelling and particularized need for access to the Garner grand jury materials or to demonstrate that the public interest in disclosure outweighs the presumption of grand jury secrecy. The Appellate Division’s analysis conflicts with this Court’s precedent. This Court has long held that, while there is a rebuttable presumption of confidentiality for grand jury proceedings, the “secrecy of grand jury minutes is not absolute.” *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970). In particular, courts have granted public officials access to grand jury materials that will assist them in conducting investigations or implementing policy reform. *See id.* at 237 (permitting disclosure to Public Service Commission “to assist it in its investigation and preparation for the public hearings which it will hold”); *see also Matter of Dist. Attorney of Suffolk Cnty.*, 86 A.D.2d 294, 299 (2d

Dep't 1982) *aff'd*, 58 N.Y.2d 436 (1983) (grand jury materials may be disclosed to a petitioner who “demonstrate[s] why, and to what extent, he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed (e.g., legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served.”).

Here, the Appellate Division erroneously equated this case to *Matter of Hynes*, 179 A.D.2d 760, 760 (2nd Dep't 1992), where the District Attorney sought to disclose grand jury materials solely to “quell public unrest.” The public interest posited in *Matter of Hynes* is not analogous to those presented here, where the Public Advocate seeks to advance specific legislation and administrative proposals to reform the grand jury system and address conflicts of interest between local district attorneys and police officers. Indeed, this Court's precedent directs that grand jury minutes may be disclosed to uncover conflicts of interest between a prosecutor and the target of an investigation. *See People ex rel. Hirschberg v. Bd. of Sup'rs of Orange Cnty.*, 251 N.Y. 156, 167 (1929) (granting access to grand jury materials to evaluate whether district attorney had “wrongfully protected the accused whom it was his duty to prosecute”). In addition, the Appellate Division incorrectly relied on a fear of a potential chilling effect if the testimony of grand jury witnesses were disclosed. That conclusion directly conflicts with this Court's

holding in *People v. Di Napoli*, which concluded that the possibility of a chilling effect is insufficient to outweigh public interest in disclosure. 27 N.Y.2d at 236.

Finally, the Public Advocate seeks a calendar preference because these appeals implicate pressing and time-sensitive matters of deep public concern. Public figures and elected officials at every level of state, local, and federal government have spoken out about Eric Garner's death. Numerous proposals for city and state legislation and policy change are now under active consideration in direct response to the grand jury's determination and the Public Advocate's petition in this case. *See* Public Advocate's Opening Appellant Br. at 12-16; Br. Amici Curiae of the Legislative Caucus at 4-10. The outcome of this appeal has the potential to significantly impact the course of those efforts. The Appellate Division granted a calendar preference in light of the importance of the issues presented by the petitioners. The Public Advocate respectfully requests that this Court similarly expedite its consideration of this appeal.

BACKGROUND

On July 17, 2014, Eric Garner died while being choked by police officers during an arrest on Staten Island. (Joint Appendix "JA" at 139). A bystander used a cell phone to record what became a widely disseminated video of Mr. Garner's final moments. The medical examiner ruled the death a homicide

caused by compression of the neck and chest during physical restraint by the police. (JA: 139).

A grand jury was convened on September 29, 2014 to investigate the circumstances surrounding Mr. Garner's death. (JA: 139). On December 3, 2014, the grand jury adjourned without charging any person with the commission of a crime. Thereafter, the Richmond County District Attorney ("Respondent") submitted a sealed motion to the Supreme Court, requesting public disclosure of certain information regarding the grand jury proceeding, pursuant to CPL § 190.25(4)(a). (JA: 140). In a December 5, 2014 Order, Justice Rooney granted the petition and disclosed summary information about the length of the grand jury proceeding, the number of witnesses who testified, and the number of exhibits admitted into evidence. (JA: 65).

On December 10, 2014, the Public Advocate moved for an order under CPL § 190.25(4)(a) permitting her to review materials from the Garner grand jury investigation. (JA: 71). The New York City Charter vests the Public Advocate with authority to work with government officials to resolve citizens' complaints and introduce legislation to address systemic problems. *See* Charter § 24. The Public Advocate petitioned for access to the grand jury materials pursuant to her duty to investigate official misconduct and propose reform

measures.¹ She sought limited public disclosure of four categories of materials: (1) all instructions to the grand jury, including any instruction to the jury on the elements of any crimes charged; (2) all questions asked by grand jury members (redacted, if necessary, to conceal the identity of witnesses and/or jurors); (3) the testimony of the principal officer who was the subject of the investigation; and (4) all non-testimonial evidence presented to the grand jury. (JA:130). Grand jury witnesses who object to the disclosure of their testimony would be given an opportunity to notify the court and the parties to of any such objection, consistent with the procedures outlined in *Di Napoli*, 27 N.Y.2d at 238-29. (JA:130).

Numerous proposals for reform of New York's grand jury system, including the appointment of independent prosecutors and increased transparency have been introduced in the State Legislature in the wake of Eric Garner's death and the instant litigation. *See* Public Advocate's Opening Appellant Br. at 12-16; Br. Amici Curiae of the Legislative Caucus at 4-10.

PROCEDURAL HISTORY

In response to the petition filed by the Public Advocate and other parties to this appeal, the Supreme Court initially ordered that all applications for

¹ Between December 5, 2014 and January 9, 2015, the Legal Aid Society of New York, New York Civil Liberties Union, the owner of the New York Post, and the Staten Island Branch of the National Association for the Advancement of Colored People in association with the New York State Conference of Branches of the National Association for the Advancement of Colored People, filed parallel petitions seeking public disclosure of materials from the Garner grand jury proceeding.

Garner grand jury materials be filed under seal. (JA: 87). On December 10, 2014, the Public Advocate appealed that order pursuant to CPLR 5704(a). (JA: 83). On December 11, 2014, the Second Department granted the Public Advocate's appeal and directed that her petition be unsealed. (JA: 88). On December 17, 2014, Justice Rooney recused himself from further consideration of the petitions. (JA: 90).

The cases were reassigned to Justice Garnett and consolidated for argument. The trial court heard oral arguments on February 5, 2015. In a March 19, 2015 Decision and Order, the Supreme Court denied the petitions in their entirety, ruling that the movants had not met the legal standard for unsealing materials under N.Y. Crim. Pro. Law § 190.25(4)(a). (A copy of the Supreme Court decision and notice of entry is attached as Exhibit A).

On July 29, 2015, the Appellate Division, Second Department affirmed the Supreme Court's denial of the Public Advocate's petition without addressing the merits of the application. A majority of Justices on the Second Department panel held that the Public Advocate lacks the legal capacity to seek disclosure of grand jury materials and that her petition should have been dismissed on those grounds. Justice Leventhal concurred in the judgement but disagreed with the panel majority's conclusion that the Public Advocate lacks capacity to petition for disclosure under § 190.25(4)(a) disclosure. (A copy of the Appellate Division decision and notice of entry is attached as Exhibit B).

The Public Advocate served the Appellate Division’s decision on Respondent on August 10, 2015. The instant motion for permission to appeal was timely filed within thirty days of service of that notice of entry. *See* CPLR 5513(b).

JURISDICTION

The Appellate Division, Second Department, issued an order holding that the Public Advocate lacked legal capacity to petition for access to grand jury materials, which had the effect of finally determining this action in its entirety.

This Court therefore has jurisdiction over the motion under CPLR 5602(a).

ARGUMENT

I. THE APPELLATE DIVISION’S RULING THAT THE PUBLIC ADVOCATE LACKS CAPACITY TO PETITION FOR ACCESS TO GRAND JURY MATERIALS CONTRADICTS COURT OF APPEALS PRECEDENT AND CREATES A CONFLICT BETWEEN DEPARTMENTS

A majority of the Second Department panel found that the New York City Charter cannot be read as giving the Public Advocate the “authority to civilly review, oversee, or investigate district attorneys’ offices in the substantive performance of their criminal law-related prosecutorial responsibilities.” (Exh. B at 5). Based on this erroneous premise, the majority concluded that the Public Advocate lacks any legal capacity to bring a petition under CPL § 190.25(4)(a) to unseal grand jury materials in aid of her investigation into systemic problems associated with the death of Eric Garner. The panel’s reading of the Charter is inconsistent with the legislative intent that established the Office of the Public

Advocate and the history of the position. Furthermore, the majority decision contradicts this Court’s precedent on legal capacity and the definition of “city agency” under the Charter, and it creates a conflict between Departments regarding the authority of the Public Advocate.

The Appellate Division’s error is further compounded by the fact that it reached this legal conclusion *sua sponte*, without requesting any briefing or analysis from the parties on the Public Advocate’s legal capacity to bring suit. This Court should grant leave to appeal if for no other reason than to ensure that the momentous question of the Public Advocate’s investigative authority and legal capacity to sue can be addressed fully in briefing by the parties.

A. The Appellate Division’s Decision Creates a Conflict Between the First and Second Departments Regarding the Public Advocate’s Investigative Authority over Law Enforcement Agencies

The panel majority denied the Public Advocate’s petition based on the fact that she “is required to forward complaints alleging potential criminal conduct” to appropriate law enforcement authorities. (Exh. B at 4). The majority concluded that the “language of New York City Charter § 24(f) and (k),” which outlines this requirement, “exempts . . . district attorneys from the Public Advocate’s oversight” (Exh. B at 4). The majority’s analysis is predicated on a misreading of the pertinent provisions of the Charter.² The purpose of § 24(f) and

² The pertinent provision of the Charter in § 24(f)(4) reads:

(k) is to ensure that the Public Advocate does not directly conduct a criminal investigation. No language in these provisions purports to exempt any law enforcement agency or official from the Public Advocate's oversight.

The Office of the Public Advocate has existed since 1831, before the five boroughs were unified to form the City of New York as it currently exists. In its original form, the officeholder served as the president of the Board of Aldermen, then later as the City Council President, and, finally, as a citywide elected ombudsman as a result of Charter revisions passed by the electorate in 1989. Mark Green & Laurel Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. Sch. L. Rev. 1093, 1098 (1998).

The creation of a city ombudsman's office as an independent check on executive power was an outgrowth of then-Mayor Lindsay's failed initial attempt

“[The Public Advocate shall] investigate and otherwise attempt to resolve such individual complaints except for those which (i) another city agency is required by law to adjudicate, (ii) may be resolved through a grievance mechanism established by collective bargaining agreement or contract, or (iii) involve allegations of conduct which may constitute a violation of criminal law or a conflict of interest.”

The pertinent provision of the Charter in § 24(k) reads:

“If during the conduct of any investigation, inquiry, or review authorized by this section, the public advocate discovers that the matter involves conduct which may constitute a violation of criminal law or a conflict of interest, he or she shall take no further action but shall promptly refer the matter regarding criminal conduct to the department of investigation or, as applicable, to the appropriate prosecuting attorney or other law enforcement agency”

to create a civilian complaint review board to hear allegations of police misconduct. The failure of that effort highlighted the need for an independent check on executive power. *Id.* at 1109-1112. As was noted by the Chair of the 1989 Charter Commission, the expansion of the Public Advocate's powers was an effort to make the office the programmatic equivalent of the Comptroller, who is charged with oversight of the City's fiscal matters. Frederick Schwarz, *Twenty-Five Years Later: Reflections on New York City's 1989 Charter Revision Commission and on Charter Commissions in General*, 58 N.Y.L. Sch. L. Rev. 95, 102 (2013-2014). Far from removing the Public Advocate from investigations involving the conduct of law enforcement, the office in its current form was created as the result of the public decrying the absence of an independent body to do just that.

No provision of the Charter purports to circumscribe the Public Advocate's investigative authority over law enforcement officials. The only limitations in the Charter on the Public Advocate's authority to investigate allegations of misconduct are complaints alleging conduct which: 1) may constitute a violation of criminal law; 2) may constitute a conflict of interest when a public official receives gifts or services; 3) another city agency is required to adjudicate; or 4) may be resolved through a grievance mechanism established by collective bargaining agreement. Those complaints are to be referred to the

appropriate agencies for adjudication. *See* Charter §§ 24(k), 24(f)(4). The Court below cited these limitations as support for the proposition that the Public Advocate has no authority to launch civil investigations into matters involving criminal law enforcement. But these provisions merely serve to ensure that individual complaints under the jurisdiction of other agencies or legal agreements be resolved by those agencies and agreements. They do not infringe on the Public Advocate's ability to investigate abuses that are systemic in nature.

The minutes of the Charter Revision Commission confirm that the language Second Department panel relied upon was intended simply to ensure that the Public Advocate does not independently conduct her own criminal investigation. The language requiring that criminal matters be referred to a prosecutor or the Department of Investigations ("DOI") came about because of a concern raised by the DOI during the charter revision commission's 1989 meetings. The exchange was this:

MR. LANE: Basic changes – the only changes, in fact, are changes in response to the Department of Investigation's concern that we make sure that the [Public Advocate] *not be able to pursue a criminal investigation*, that we define a point at which they must stop.

.....

Then it says, "If the [Public Advocate] receives a complaint which is subject to the proscribed in items (i) or (ii), the [Public Advocate] shall advise the complainant of the appropriate procedure for resolution of such complaint." So it might be send you to the ethics

commission or to send you to the DOI or the district attorney, or (iii) would be the district attorney, because it says, “If the [Public Advocate] receives a complaint described in (iii) of this paragraph the [Public Advocate] shall promptly refer the matter in accordance with subdivision k,” and if you turn to k on Page 2-8, that’s where it ties in. What it says is you must refer this complaint regarding criminal conduct to the DOI or to the appropriate prosecuting attorney.

Minutes of the Public Meeting of the 1989 Charter Revision Commission, July 31, 1989, 247-248 (emphasis added).

From this simple language—meant only to ensure that the Public Advocate did not become a prosecutor in individual cases—the Appellate Division erroneously drew the extraordinary conclusion that Charter § 24(f) and (k) “exempts courts and district attorneys from the Public Advocate’s oversight.” (Exh. B at 4). This novel reading of the Charter is wholly inconsistent with the Public Advocate’s authority to investigate complaints of systemic misconduct by public officials.

The Public Advocate has investigated systemic issues in law enforcement ever since the office was reformed by the Charter amendments ratified in 1989. The First Department has upheld this investigatory role as a legitimate function of the Public Advocate’s office. In *Green v. Safir*, 174 Misc.2d 400, 403-404, *aff’d* 255 A.D. 107 (1st Dep’t 1998), the Public Advocate sought records relating to the discipline of police officers. The lower court, in a decision affirmed by the First Department, held: “Misconduct by those invested with police

power is now, and always has been, an area of concern to government. Here the petitioner is seeking to review files of the NYPD to determine whether any patterns exist to the decisions of its Commissioner with respect to police discipline. . . . [A]n examination of the files sought is within the purview of the powers and duties of petitioner.”

In *Green v. Giuliani*, 187 Misc.2d 138 (Sup. Ct. Cnty. 2000), the Public Advocate initiated an inquiry under Charter § 1109 seeking information relating to Mayor Giuliani’s public statements about the victim of a police killing, Patrick Dorismond. The Court held that the Public Advocate was entitled to obtain information that would reveal how confidential records of a criminal proceeding were maintained and disclosed.

The First Department has held that, though the Public Advocate lacks the authority to investigate individual criminal complaints, she is, nonetheless, entitled to investigate alleged misconduct on the part of law enforcement personnel. The panel majority’s decision hinges on the erroneous premise that the Public Advocate cannot conduct a civil inquiry into the conduct of any agency merely involved in the investigation of criminal misconduct.³ That decision is in

³ Indeed, this conclusion is inconsistent with the panel’s own analysis elsewhere in the decision. In addressing Respondent’s argument that the Supreme Court’s denial of a § 190.25 petition is unappealable, the panel stated that the “order appealed from is civil, rather than criminal, in nature, for although it relates to a criminal investigation, it does not affect the criminal investigation itself, but only a collateral aspect of it, namely, the unsealing and release of the grand jury minutes.” (Exh. B at 4) (internal quotation marks and alterations omitted). The same

direct conflict with First Department precedent, and is also inconsistent with the history of the office. This Court should grant the instant motion to resolve this conflict.

B. The Second Department’s Decision Directly Conflicts with Court of Appeals Precedent Regarding the Definition of a “City Agency” Under the New York City Charter.

Under Charter § 24(j), the Public Advocate is entitled to timely access to those records and documents of city agencies deemed necessary to complete the investigations, inquiries, and reviews required by her position. In *Green v. Safir*, *supra*, the First Department found that, when investigating city agencies under § 24(j) of the Charter, the Public Advocate has wide discretion to determine which records are necessary to publicize “any inadequacies, inefficiencies, mismanagement and misfeasance found, with the end goal of pointing the way to right the wrongs of government.” 255 A.D.2d 107, 107. The panel majority improperly distinguished the Public Advocate’s current petition from the application made by the Public Advocate in *Green v. Safir*, in part by asserting that the Public Advocate’s right to timely access to records is limited to records generated by “city agencies” and the District Attorney is not a “city agency.” (Exh. B at 4-5). The majority both misapprehended the nature of the inquiry and

is true of the Public Advocate’s legal capacity to petition for access to grand jury materials. Her petition does not “affect a criminal investigation itself, but only a collateral aspect”: information in the minutes that will assist in evaluating complaints of misconduct by public officials and city agencies.

rendered a decision that is inconsistent with Court of Appeals precedent regarding the definition of a “city agency” under the Charter.

The Public Advocate petitioned for access to the grand jury minutes in order to assist her investigation into the events that led to Eric Garner’s death. This investigation extends to a variety of city agencies including the NYPD, the Health and Hospitals Corporation, and the Richmond County District Attorney’s Office. Specifically, the publicly available video of the death of Eric Garner suggested that the NYPD may have used excessive force in killing an unarmed man. The failure of the medical personnel on the scene to resuscitate Garner appeared to indicate a neglect of duty. And the District Attorney’s failure to obtain an indictment resulted in complaints that the grand jury proceeding was tainted. The release of the grand jury proceedings would shed light on each of these public concerns—all valid areas for the Public Advocate to investigate.

While the Appellate Division acknowledged that the Public Advocate has the right to “timely access to records” that would aid in her investigations, (Exh. B at 4), the panel majority held that the grand jury materials sought in the Petition were not appropriate for disclosure because they were in the possession of the District Attorney. The majority concluded that the Richmond County District Attorney’s Office cannot be a “city agency” because it is created by the State Constitution. The majority’s analysis is incorrect.

The Charter defines a city agency as “a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury.” Charter § 1150 (2). The Court of Appeals has consistently interpreted this definition to mean that a governmental body need not be created by the Charter to be considered a “city agency” for the purposes of jurisdiction under the Charter.

In *Maloff v. City Commission on Human Rights*, 38 N.Y.2d 329, 332-333 (1975), this Court held that the definition of “city agency” in the Charter creates “no doubt” that offices and bodies that are funded by the city “come[] within the jurisdiction conferred” by the Charter. Accordingly, the New York City Commission on Human Rights could exercise jurisdiction over the State-created Board of Education. *Id.* This interpretation has been expanded since *Maloff* to include other state-created institutions, from the New York City Health and Hospitals Corporation to the New York City Transit Authority. *See Goldin v. Greenberg*, 49 N.Y.2d 566, 572 (1980); *see also Levy v. City Comm’n on Human Rights*, 85 N.Y.2d 740, 746 (1995); *People v. Butt*, 113 Misc. 2d 538, 538 (App. Term 1981); *Parker v. Metropolitan Transp. Auth.*, 17 Misc.3d 1112(A) (Sup. Ct. Cnty. 2007).

Both the Appellate Division and the Respondent have acknowledged that the Richmond County District Attorney's office is funded by New York City. (Exh. B at 4, 9); *see also* Charter § 1125. While the office of district attorney is created by the state constitution, it clearly falls within the definition of a city agency for the purposes of the Charter. Indeed, it has been treated as such by the Conflicts of Interest Board and the Comptroller. *See, e.g.*, N.Y. City Comptroller Audit of Manhattan District Attorney's Office, Audit No. FM10-111A, *available at* https://comptroller.nyc.gov/reports/audit/?r=03-24-10_FM10-111A, last visited on May 31, 2015; *COIB v. Collins*, OATH Index No. 556/14, COIB Case No. 2013-258 (Order July 30, 2014); *COIB v. Campbell Ross*, OATH Index No. 538/98, COIB Case No. 1997-76 (Order Dec. 22, 1997); COIB Advisory Opinion 93-26; COIB Advisory Opinion No. 2008-5.

This Court has held that the definition of "city agency" in the Charter should not exclude agencies created by operation of state law. Furthermore, even if the District Attorney could not be deemed a "city agency" as defined by the Charter, there is no precedent barring the Public Advocate from seeking grand jury materials that relate to the conduct of other entities that are, indisputably, "city agencies," such as the NYPD and the the Health and Hospitals Corporation. The Public Advocate's motion for leave to appeal should be granted to address the inconsistency of the lower court's position with Court of Appeals precedent.

C. The Appellate Divison’s Decision Conflicts with This Court’s Precedent Concerning the Capacity to Sue.

The Public Advocate is empowered by the Charter to investigate city agencies. The Public Advocate has been found to have the capacity to bring suits against city agencies. *See Madison Square Garden, L.P. v. New York Metro. Transp. Auth.*, 19 A.D.3d 284, 285, 799 N.Y.S.2d 186 (2005); *Green v Safir*, 174 Misc. at 406. The Charter does not limit the Public Advocate from requesting confidential materials during its investigation or from evaluating complaints against officers and agencies involved in investigating crimes.

The panel majority also contends that the Public Advocate cannot demonstrate capacity by “necessary implication” as allowed in *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148 (1994). The majority’s rejection of the Public Advocate’s legal capacity derives from its misinterpretation of § 24(f) of the Charter as limiting the particular city agencies that the Public Advocate can investigate. There is no basis in the Charter for such a limitation.

In *Community Board 7*, the Court of Appeals held that “capacity to bring suit does not require that in every instance there be express legislative authority.” *Id.* at 156. Instead, the capacity to sue can be “inferred as a necessary implication from the agency’s powers and responsibilities, provided, of course, that there is no clear legislative intent negating review.” *Id.* at 156. The test laid out in

Community Board 7 requires that “the agency in question has functional responsibility within the zone of interest to be protected.” *Id.* at 156. In the instant case, there can be little doubt that the petition for grand jury materials falls within the Public Advocate’s role as city ombudsman charged with investigating city agencies.

The Court of Appeals has continually upheld *Community Board 7*’s core holding that legal capacity can be “inferred as a necessary implication from the agency’s powers and responsibilities.” *Id.* at 156. In *Silver v. Pataki*, 96 N.Y.2d 532, 538 (NY Ct. App. 2001), the Court applied the “zone of interests” test from *Community Board 7* to hold that an individual legislator has the capacity to sue “when confronted with allegedly unlawful or unconstitutional conduct of others that directly affects their official responsibilities.” Similarly, in *Matter of Comptroller of City of New York v. Mayor of City of New York*, 7 N.Y.3d 256, 263 (2006), this Court found that the Comptroller had capacity to bring an Article 78 proceeding against the City and a third party to a contract, as it was within his zone of interest.

Furthermore, the Court of Appeals and other courts have repeatedly rejected the proposition that only entities with express authority over criminal law enforcement may petition for access to grand jury materials. In *Di Napoli*, this Court stated that “a copy of the minutes may be furnished to *any . . . person . . .*

upon the written order of the court.” 27 N.Y.2d at 234 (emphasis added) (internal quotation marks omitted). Indeed, the *Di Napoli* Court specifically rejected the position adopted by the panel majority here, holding; “We find no merit in the appellants’ contention that permission to inspect grand jury minutes has been granted only to those officials or agencies concerned with the administration or enforcement of the criminal law.” *Id.* at 236; *see also Matter of Crain*, 139 Misc. 799 (Sup. Ct. N.Y. Cnty. 1931) (granting access to grand jury minutes involving investigation into food and fish market conditions because “although not involved in a criminal action, [the petition] yet involves public interests in the broadest measure”). The Public Advocate is aware of no case concluding that any other public official lacks the legal capacity to petition for access to grand jury materials.

The majority opinion of the Appellate Division runs afoul of the Court of Appeals’ liberal approach to an official’s legal capacity to bring suit and leads to a perverse result in this case. The City’s ombudsperson, entrusted with investigating individual complaints of misconduct, and complaints of a systemic nature, has less of a right to seek records in aid of her investigations than any other member of the public. This Court should grant review to address and correct the panel majority’s erroneous analysis.

II. THE APPELLATE DIVISION'S STANDARD FOR UNSEALING GRAND JURY MATERIALS CONFLICTS WITH CASE PRECEDENT

Because it fundamentally misconstrued the Public Advocate's investigative authority, the Appellate Division did not address the specific merits underlying her petition to unseal. However, in rejecting the motions to unseal filed by other petitioners in this case, the Second Department applied a standard that is in clear tension with this Court's precedent governing grand jury secrecy. Should it stand, the lower Court's analysis of grand jury secrecy would erect a nearly insurmountable barrier preventing any access to grand jury materials in high profile cases even for investigations into prosecutorial misconduct. In its decision the Second Department acknowledged "the intense public interest in this case" and the exceptional "importance of this matter." (Exh. B at 6, 8). This Court should grant leave to appeal so that it can clarify the correct standard for unsealing of grand jury materials in this case of statewide public importance.

Although there is a rebuttable presumption of secrecy that attaches to grand jury materials, "the rule of secrecy is not absolute." *Matter of Dist. Attorney of Suffolk Cnty.*, 58 N.Y.2d 436, 444 (1983). A party seeking access to grand jury materials must satisfy a two step procedure: She "first must demonstrate a compelling and particularized need for access." *Id.* "[T]hen "disclosure may be directed when, after a balancing of a public interest in disclosure against the one

favoring secrecy, the former outweighs the latter.” *Id.* (citing *Di Napoli*). In *Suffolk County*, the Court of Appeals clarified that government officials cannot obtain grand jury materials merely by invoking the public interest generally. *Id.* at 446. A petitioner must provide some particular purpose for the grand jury materials rather than relying on generalized assertions that disclosure will be in the public interest.

The Appellate Division’s determination that there is no compelling and particularized public interest presented in this case conflicts with prior precedent from this Court. The Court of Appeals has permitted petitioners to pierce the veil of grand jury secrecy when the compelling issue warranting disclosure is whether the District Attorney “wrongfully protected the accused whom it was his duty to prosecute.” *People ex rel. Hirschberg v. Bd. of Sup'rs of Orange Cnty.*, 251 N.Y. 156, 167 (1929). A central concern prompted by the Garner grand jury proceeding is whether there is an inherent risk of collusion or conflict of interest when prosecutors investigate police officers with whom they cooperate to secure convictions. The Public Advocate and other legislators and officials have a legitimate concern that prosecutors may conduct grand jury investigations that shield law enforcement officers from liability. *Hirschberg* establishes that a District Attorney “cannot seek shelter behind that rule of secrecy to prevent inquiry into” the performance of his or her duties. *Id.* at 170. *See also Application of FOJP Serv. Corp.*, 119 Misc. 2d 287, 292 (Sup. Ct. Cnty. 1983) (“It is manifest

that there is a substantial public interest” in investigating allegations of corruption because the “very integrity of the judicial process and advocacy system is involved.”).

The Appellate Division erroneously treated *Matter of Hynes* as controlling authority mandating the denial of the petitioners’ motions to unseal. (Exh. B at 7) (“The similarities between the circumstances of *Matter of Hynes* and those presented here are striking.”). While there was substantial public attention and protest in connection with the *Matter of Hynes* case, that is where similarities to this case end. First, as the Appellate Division noted, the “target of the grand jury proceedings in *Matter of Hynes* was a civilian, and the targets here are public servants.” (Exh. B at 7). In doing so, the Second Department panel ignored the essential distinction between the cases. The identity of the target of grand jury is central to the compelling public interest underlying the petition. The Public Advocate’s application focuses directly on the risk of collusion or conflict of interest between district attorneys and local police officers. *Matter of Hynes* is simply inapposite because the relationship between the district attorney and the police was not at issue.

Second, in *Matter of Hynes*, the petitioner “premise[d] the application” solely on generalized public interest—arguing that “release will both curb the community unrest . . . and restore confidence in the Grand Jury

system” 179 A.D.2d 760. This reasoning does not apply here. The Public Advocate’s petition identified a specific set of compelling and particularized needs for disclosure that go well beyond generalized public interest. Information from the Garner grand jury proceeding is needed to evaluate and inform pending legislation, conduct official investigations, and reform police practices, measures that are a direct result of the grand jury’s decision. None of the petitioners in *Suffolk County, Hynes*, or the other cases cited by the Appellate Division offered anything resembling such a showing in support of their application for disclosure. The authority the Appellate Division relied upon simply does not apply to the Public Advocate’s application.

In the seminal *People v. Di Napoli* case, the Public Service Commission was granted access to grand jury materials to determine appropriate statewide rates for public utilities. 27 N.Y.2d at 238. *Di Napoli* stands in part for the proposition that broad public policy reform represents a compelling public interest favoring disclosure of grand jury materials. The Court of Appeals lifted the veil of grand jury secrecy because the “charges to consumers” for public utilities “depend[ed] upon” the content of sealed grand jury minutes. *Id.* at 235. Here too, the need for—and the content of—grand jury reform proposals depends upon information from the Garner grand jury proceeding.

Furthermore, the Appellate Division’s application of the *Di Napoli* balancing test conflicts with this Court’s holding in the *Di Napoli* case itself. The Appellate Division acknowledged: “It is true that most of the factors enumerated in *People v Di Napoli* (27 NY2d at 235) are not implicated here in light of the fact that the grand jury declined to return an indictment, and that the identities of the target, as well as of certain witnesses who testified before the grand jury, are already publicly known.” (Exh. B at 8). But the panel nevertheless concluded that the balance of interests favors secrecy, stating, “if pre-indictment proceedings were made public, especially in high profile cases such as this, ‘[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties.’” (Exh. B at 8) (citing *Douglas Oil Co. of Cal. v Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)).

The Appellate Division’s conclusion is precisely what this Court rejected in *Di Napoli*. The *Di Napoli* Court held:

[I]t may not be said that the disclosure here ordered will have a chilling effect on the ability of future grand juries to obtain witnesses. . . . Having in mind the nature of the conspiracy under investigation by the grand jury, witnesses before it could reasonably have anticipated that some investigating body, even though it might not be the Public Service Commission, would be set up to consider the impact of such criminal activity upon the public utility, as well as its consumers, and procure a copy of the minutes to assist it in such investigation.

27 N.Y.2d at 236. Likewise, witnesses before the Garner grand jury would have reasonably anticipated their testimony might become public when they testified because the case could have gone to trial. Both the United States Supreme Court in *Douglas Oil* and this Court in *Di Napoli* and *Suffolk County* have recognized exceptions to grand jury secrecy and outlined procedures for the protection of grand jury witnesses. *See Douglas Oil*, 441 U.S. at 223 (“[I]f disclosure is ordered, the court may include protective limitations on the use of the disclosed material . . .”). The Public Advocate has proposed only limited disclosure with the redaction of identifying information for all grand jurors and witnesses. (JA:130). The Appellate Division’s decision effectively rebalances the factors announced by this Court in *Di Napoli*. The Public Advocate’s motion for leave to appeal should be granted to address and correct its analysis.

III. A CALENDAR PREFERENCE IS WARRANTED DUE TO THE PARAMOUNT IMPORTANCE OF THE ISSUES UNDER CONSIDERATION IN THIS APPEAL

The Court should grant a calendar preference for these appeals in order to expedite the Court’s ultimate resolution of time-sensitive issues of substantial public interest and import. *See* 22 N.Y.C.R.R § 500.17(b); *see also In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 N.Y.2d 729, 734-35 (1999) (granting motion for leave to appeal and for calendar preference). Respondent, the Richmond County District Attorney, opposes the

request for a calendar preference. The legal issues in this appeal do not correspond with any of the categories of selected appeals enumerated in 22 N.Y.C.R.R. § 500.11(b).

There is good cause for a calendar preference for at least three reasons: First, these appeals raise issues of exceptional public interest and importance. Second, the resolution of these appeals will have a direct bearing on legislation and policy reform currently under consideration. Third, a calendar preference is often granted when, as here, an action is brought by or against officers of the state or political subdivisions of the state. Any of these factors standing alone would be sufficient to warrant a preference from this Court. *See Schulz v. State*, 175 A.D.2d 356, 357 (3d Dep't 1991) ("Calendar preferences can be granted to appeals . . . upon a showing of urgency or good cause.").

First, this Court should grant a preference due to the issues of exceptional public importance raised by the appeal and the widespread public interest generated by the case. Indeed, the Appellate Division acknowledged the importance of the case and granted the Public Advocate's motion for a calendar preference in its hearing of the appeal. There is, in effect, no dispute between the parties regarding the significance of this case. The Public Advocate's petition has attracted widespread public attention because the Garner grand jury proceedings raise fundamental questions about conflicts of interest in our criminal justice

system. Public officials have a manifest interest in understanding the evidence that was presented to the grand jury in order to determine how the system should be reformed. In light of the unmistakable importance of the matters at issue in this appeal, this case should be heard expeditiously.

Second, there is urgency in hearing this appeal as swiftly as possible because the grand jury materials sought by the Public Advocate bear directly upon a panoply of proposed legislation, policy implementation, and reform measures currently being discussed by lawmakers. *See* Public Advocate's Opening Appellant Br. at 12-16; Br. Amici Curiae of the Legislative Caucus at 4-10. That process will be significantly impaired or delayed without access to information from the very grand jury proceedings that prompted concerted efforts at reform. It is critical that this public policy debate be informed by concrete and more complete facts regarding the grand jury's decision not to indict, the decision that catalyzed calls for reform. Fundamental alterations to our system of criminal justice require more than speculation and supposition about what might have occurred or may have been presented to the Garner grand jury. Without the grand jury materials, both lawmakers and the general public will be prejudiced in their ability to meaningfully weigh these divergent proposals.

This Court's determination whether grand jury materials will be disclosed will itself affect legislation under consideration. For instance, some

public officials have proposed eliminating the statutory presumption for grand jury secrecy under various circumstances. How this Court interprets the exceptions to grand jury secrecy will therefore have a direct bearing on the content of such legislation going forward. A decision on this appeal is essential for lawmakers and the public to adequately determine which pending proposals are needed and whether certain measures should be amended, altered, or abandoned.

Third, there is a statutory and common law presumption in favor of calendar preferences for lawsuits involving government officials and officers of the state. CPLR 3403(a)(1) provides for trial preferences in any “action brought by or against the state, or a political subdivision of the state, or an officer or board of officers of the state” The priority for actions to which state officers are a party derives not just from the provisions of the CPLR outlining trial preferences but also from common law. *See e.g., Comm’rs of State Ins. Fund v. Statland*, 181 Misc. 117, 118 (Sup. Ct. N.Y. Cnty. 1943) (recognizing a preference for “case[s] in which the State is suitor or defendant,” which derives from “common law preference and priority” (*citing Commissioners of State Ins. Fund v. Dinowitz*, 179 Misc. 278, 280, 39 N.Y.S.2d 34 (Sup. Ct. N.Y. Cnty. 1942))). A calendar preference is warranted in light of the fact that the Public Advocate has brought suit against the Richmond County District Attorney. But beyond that fact, this is an action which raises essential questions about the integrity and transparency of the

state's grand jury and criminal justice system. As such, this is an appeal that inherently triggers the priority for cases in which the state is a party.

Appellants propose the following schedule of dates: Appellants will file their opening briefs by September 30, 2015. Respondent may file response briefs on or before October 31, 2015. Appellants' subsequent replies would be due November 14, 2015. Oral argument on the appeal could then be calendared for any date during this Court's November term.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court grant Petitioners' leave to appeal from the decision and order of the Appellate Division, Second Department, dated July 29, 2015.

Dated: August 14, 2015
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP



Matthew D. Brinckerhoff
R. Orion Danjuma

600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Attorneys for Appellants/Petitioners

GENERAL COUNSEL-LITIGATION
NEW YORK CITY PUBLIC
ADVOCATE

Jennifer Levy, Esq
Mat Thomas (admission pending)

1 Centre Street, 15th Floor North
New York, NY 10007
(212) 669-2175

*Attorneys for New York City Public
Advocate Letita James*

EXHIBIT A

At a Civil Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse thereof, 18 Richmond Terrace, Staten Island, New York, on 19th day of March 2015.

PRESENT:

THE HONORABLE WILLIAM E. GARNETT, J.S.C.

In the Matter of the Investigation into the Death of
Eric Garner,

DECISION AND ORDER

Richmond County
Index Numbers:

Letitia James, New York City Public Advocate,

080304/2014

The Legal Aid Society,

080296/2014

The New York Civil Liberties Union,

080307/2014

NYP Holdings, Inc. a/k/a New York Post, and

080308/2014

The Staten Island Branch of The National Association
For The Advancement of Colored People and The
New York State Conference of Branches of The
National Association For The Advancement of Colored
People,

080009/2015

Petitioners,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

INTRODUCTION

On July 17, 2014, Eric Garner died during a confrontation with New York City police officers.

The interaction between Mr. Garner and the police was recorded on a cellular phone. Ultimately, and before a grand jury heard the evidence in this case, that tape and the findings of the Medical Examiner's autopsy of Mr. Garner were widely disseminated. Very few members of the public had not formed an opinion about the conduct of the police.

A grand jury was convened on September 29, 2014 to examine the evidence concerning the death of Mr. Garner. On December 3, 2014, the grand jury concluded its inquiry and did not charge any person with the commission of a crime. Thereafter, the District Attorney summarized the grand jury's investigation in a statement authorized by another judge of this court. No grand jury testimony was disclosed in this statement.

In separate motions, the Public Advocate of the City of New York, the Legal Aid Society, the New York Civil Liberties Union (hereinafter, NYCLU), the National Association for the Advancement of Colored People (hereinafter, NAACP) and the owner of the New York Post moved this court to release the minutes of the grand jury pursuant to Criminal Procedure Law § 190.25 (4) (a). The District Attorney opposed the disclosure.

GRAND JURY SECRECY

The Constitution of the State of New York provides that "no person shall be held to answer for a capital or otherwise infamous crime [i.e., a felony] . . . unless on indictment of a grand jury . . ." (NY Const Art I, § 6). Thus, a district attorney may not prosecute a person for a felony or other crime in the Supreme Court without the acquiescence of a grand jury made up of lay jurors. The grand jury's decision to charge a person is manifested when it files an indictment with the Supreme Court.

This constitutional provision is implemented by Article 190 of the Criminal Procedure

Law. Pertinent to these motions is the admonition contained in CPL 190.25 (4) (a) that grand jury proceedings are secret and, in general, no person may disclose the nature or substance of any grand jury testimony without the written approbation of a court. This prohibition is enforced by Penal Law § 215.70 which makes it a felony to disclose grand jury testimony. The only exception to this proscription is that a person may disclose the substance of his/her testimony without approval. CPL 190.25 (4) (a).

Despite these statutory rules, the secrecy of grand jury testimony is not sacrosanct and the minutes of a grand jury may be divulged, in a court's discretion, in the appropriate case. *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983). In general, disclosure is the exception to the rule. *Id.* at 444.

The law is bottomed on the "presumption of confidentiality [which] attaches to the record of grand jury proceedings." *People v Fetcho*, 91 NY2d 765, 769 (1998). To overcome the presumption of confidentiality, a movant must initially demonstrate "a compelling and particularized need for access to the Grand Jury material." *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. This showing is required to demonstrate how a party has a basis to seek relief from a court. Moreover, the mere fact that disclosure is sought by a government agency will not necessarily warrant the breach of grand jury secrecy, nor will the mere general assertion that disclosure will be in the public interest. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444-445.

Thus, each movant must first show a "compelling and particularized need" such as to demonstrate that the party has a greater stake in the disclosure than does any other citizen - even one critical of the grand jury's decision. The movant must explain the purpose for which the party seeks access to the minutes. *Id.* at 444.

Simply put, what would the movant do with the minutes if the movant got them?

Only after such a showing will a court move on to balance the competing interests in deciding whether to grant disclosure.

COLLATERAL ESTOPPEL

The earlier application of the District Attorney to another judge of this court for a limited disclosure does not collaterally estop the District Attorney from arguing in these cases that the movants do not have a "compelling and particularized need" for disclosure.

First, the District Attorney only asked for a limited summary of the work of the grand jury. No grand jury testimony or the substance of any testimony was released.

More to the point, as will be explained later in this decision, each party must show a "compelling and particularized need." Thus, even if the first judge was satisfied that the District Attorney had established a need for a summary, that decision does not preclude the District Attorney from opposing these motions or excuse these movants from making the requisite showing of a "compelling and particularized need."

"COMPELLING AND PARTICULARIZED NEED"

In those cases in which relief has been granted, the successful movant has demonstrated a nexus between the grand jury minutes and a "compelling and particularized need" for those minutes. *People v DiNapoli*, 27 NY2d 229 (1970) (Public Service Commission needed the minutes to adjust rates after a grand jury investigation had revealed evidence of "bid rigging"); *Matter of Quinn [Guion]*, 293 NY 787 (1944) (limited disclosure was allowed for the purpose of the removal of a village tax collector pursuant to the Public Officers Law); *People ex rel Hirshberg v Board of Supervisors*, 251 NY 156 (1929) (a Commissioner sought reimbursement from the District Attorney for the county); *Matter of Aiani v Donovan*, 98 AD3d 972 (2d Dept 2012) (bank records subpoenaed from the United Arab Emirates for a grand jury investigation, not the minutes, were disclosed where the movant had no other means to execute on a large civil judgment); *Jones v State*, 62 AD2d 44 (4th Dept 1978) (statements made by witnesses, not grand jury minutes, were given to the state police for disciplinary proceedings); *Matter of City of Buffalo*, 57 AD2d 47 (4th Dept 1977) (the city's corporation counsel needed grand jury minutes to sue persons who had been

paid for “no show” jobs); *Matter of Scotti*, 53 AD2d 282 (4th Dept 1976) (limited release to State Police superintendent and Correction commissioner for disciplinary actions); *People v Lindsey*, 188 Misc2d 757 (Cattaraugus County Ct 2001) (in a sixty-five [65] year-old murder case in which the grand jury minutes had earlier been released by the prosecutor, the defendant’s son was given access to the minutes to ensure the accuracy of a prospective movie script); *People v Cipolla*, 184 Misc2d 880 (Rensselaer County Ct 2000) (in a case in which the grand jury minutes had earlier been released, the minutes were given to litigants to further a federal lawsuit); *Matter of FOJP Service Corp.*, 119 Misc2d 287 (Sup Ct, New York County 1983) (a nonprofit employer sought grand jury minutes to further a “RICO” civil suit against attorneys who had unethically approached prospective clients); *People v Werfel*, 82 Misc2d 1029 (Sup Ct, Queen County 1975) (the New York City Department of Investigation, tasked with investigating the background of a judicial candidate, sought the minutes of a grand jury which had heard testimony about a narcotics case of which the candidate had been the subject); *People v Behan*, 37 Misc2d 911 (Onondaga County Ct 1962) (a special prosecutor appointed to investigate corruption in the prisons was granted access to grand jury minutes); *Matter of Crain*, 139 Misc 799 (Court of General Sessions, New York County 1931) (grand jury minutes were disclosed to a commissioner appointed to investigate judicial corruption).

Thus, in each of these cases, the movants were able to demonstrate a “compelling and particularized need” for disclosure. Each movant was able to give a specific reason for the disclosure of the minutes. Each movant could answer the question: What would you do with the minutes if you were given them? Thus, a movant must have a strong reason for disclosure unique to that movant.

The case law also demonstrates that even movants with law enforcement responsibilities or governmental authority must also make the same initial showing of a “compelling and particularized need.”

In the seminal case of *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983), the District Attorney, who had been selected by the Suffolk County legislature to bring a federal lawsuit on behalf of the county, was denied access for having failed to

establish a “compelling and particularized need.”

Similarly, in *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992), the Appellate Division of the Supreme Court for the Second Judicial Department found wanting the District Attorney’s request for the release of grand jury minutes to quell community unrest and to restore confidence in the criminal justice system as “compelling and particularized need[s].”

Of particular note are the efforts by public officials over the years to have the minutes of the Wyoming County grand jury which investigated the 1971 Attica prison uprising released. Since 1975, governors and attorneys general of this State have attempted to have the grand jury minutes released. *Matter of Carey*, 68 AD2d 220 (4th Dept 1979).

Most recently, Attorney General Schneiderman moved to disclose the minutes of the grand jury that had been quoted, but redacted, in the “Meyer report.” That report had concluded, in part, that there had been prosecutorial misjudgments in the investigation. The court ruled that, even after nearly forty (40) years since the report, the Attorney General’s contention that the disclosure of the redacted grand jury minutes would inform the public and complete the historical record did not constitute “compelling and particularized need.” *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

Thus, as with any other movant, a public official, even one with prosecutorial duties, must make the same showing of a “compelling and particularized need” to obtain the release of grand jury minutes.

THE PUBLIC ADVOCATE

The Public Advocate has not demonstrated a “compelling and particularized need” for disclosure of the grand jury minutes.

Although the Public Advocate is a citywide elected official, the Advocate has no direct role in the criminal justice system. The New York City Charter, in Chapter 2, entitled, “Council” describes the work of the Public Advocate. Specifically, in section 24, the Public Advocate is permitted to participate in the discussions of the City Council but may not vote. The Advocate’s primary function is to receive complaints about, and monitor, city agencies.

By section 24 (k), the Public Advocate must refer any criminal complaint to the Department of Investigation "or . . . to the appropriate prosecutorial attorney or other law enforcement agency." Thus, the Advocate has no explicit role in the city's criminal justice system. To the contrary, the Public Advocate is mandated to refer criminal complaints to other authorities. Clearly, by the provisions of the City Charter, the Public Advocate's role in criminal matters is severely circumscribed.

Our criminal justice system is a state, not city, system. The same procedures including those for the grand jury obtain throughout the state. Thus, the City Council of which the Public Advocate is a non-voting member cannot enact laws which would alter the New York State grand jury system.

Counsel for the Public Advocate argued that these minutes are needed to make recommendations and issue reports regarding police conduct including the use of excessive force. The Advocate's request for the minutes in this one, solitary case is undermined by the fact that the Public Advocate has a myriad of sources for reviewing police actions.

Besides the tape in this case, the Public Advocate, as a monitor of city agencies, has access to the records of the Department of Investigation, the Civilian Complaint Review Board, the Police Department and the City's Law Department which litigates federal lawsuits against police officers charged with the use of excessive force and other misconduct. Thus, the Public Advocate has a plethora of sources from which the Advocate can glean evidence to support her positions regarding the policing of the criminal law in New York City.

The Public Advocate has no "compelling and particularized need" to gain access to the minutes of the grand jury in this one case to fulfill her Charter responsibilities. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. The Public Advocate's position in the constellation of public officials makes the Advocate no different from any other public official who argues for change in the administration of justice in New York State.

THE LEGAL AID SOCIETY

The Legal Aid Society has not shown a “compelling and particularized need” for the disclosure of the grand jury minutes.

In its brief, the Society asserted, presumably to show a need for disclosure, that it had represented Eric Garner. As a matter of law, that representation ended upon his death. *See e.g., People v Drayton*, 13 NY3d 902 (2009); *People v Mintz*, 20 NY2d 770 (1967).

The Society further contended that other of its clients had been adversely impacted by the events surrounding the death of Eric Garner. Nevertheless, at oral argument, no effect on other clients was articulated or quantified. The court took the Society’s position at oral argument to be that the Society needed the grand jury minutes for future reference in representing clients whose cases will be presented to a grand jury and as a strategic resource.

Clearly, none of these arguments established a “compelling and particularized need” for the release of these minutes.

THE NYCLU & THE NAACP

The NYCLU and the NAACP have both contended that the disclosure of the grand jury minutes is necessary to foster transparency and demonstrate fairness to the public. The statutory phrase “compelling and particularized need” cannot be conflated by ignoring a demonstrable “need” by simply arguing that disclosure *per se* is compelling. Under the law, a compelling interest in a case is not a “compelling and particularized need.”

Therefore, these movants have not established a “compelling and particularized need” for the minutes. *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992); *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

THE NEW YORK POST

Finally, the entity which owns the New York Post has also failed to demonstrate a “compelling and particularized need” for the minutes. The newspaper would merely publish all, or part of, the minutes and might use them as grist for its editorial mill.

The Court has not found any case in which the testimony and evidence adduced in a grand jury has been disseminated to the public by the media.

Journalistic curiosity is simply not a legally cognizable need under the law.

CONCLUSION

Compelling and Particularized Need

Each of the movants has failed to establish that it has the required "compelling and particularized need" for the grand jury minutes. In every case cited at oral argument or in the motion papers in which disclosure was granted, there existed a clear nexus between the movant's need and the grand jury minutes.

In summary, the movants in this case merely ask for disclosure for distribution to the public. This request is not a legally cognizable reason for disclosure.

What would they use the minutes for? The only answer which the court heard was the possibility of effecting legislative change. That proffered need is purely speculative and does not satisfy the requirements of the law.

Balancing Interests

The second part of the analysis would be the balancing of interests which attach to grand jury proceedings. Of course, this balancing process begins only after a movant has satisfied the "compelling and particularized need" requirement. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444.

Assuming for the sake of argument that one of the movants had established a "compelling and particularized need" for disclosure, the balancing of interests would not have justified disclosure. The disclosure of minutes would have undermined the overriding

concern for the independence of our grand juries. *Id.*

In *People v DiNapoli*, 27 NY2d 229, 235 (1970), the Court of Appeals suggested five factors for the court to consider¹. Only three are arguably applicable in this case.

The shadow of a federal criminal investigation looms over these proceedings. Presumably, if the United States Department of Justice proceeds, the same witnesses and evidence will be examined. Revealing the minutes of the state grand jury may place witnesses in jeopardy of intimidation or tampering if called to a federal grand jury or to a federal trial. Witnesses might be approached to adjust or alter their testimony if perceived to have been too favorable or unfavorable to any of the parties.

In addition, those who were not charged by the grand jury have a reputational stake in not having their conduct reviewed again after the grand jury had already exonerated them.

Most important to the integrity and thoroughness of the criminal justice system is the assurance to witnesses that their testimony and cooperation are not the subject of public comment or criticism. This concern is particularly cogent in "high publicity cases" where the witnesses' truthful and accurate testimony is vital. It is in such notorious cases that witnesses' cooperation and honesty should be encouraged - not discouraged - for fear of disclosure.

Ironically, if courts routinely divulged grand jury testimony, disclosure would largely impact serious and newsworthy cases. It was contended that disclosure in a case such as this would be no different from disclosure after a defendant had been indicted. This argument does not justify disclosure. When a defendant is charged with a crime, the secrecy of the grand jury is trumped by the defendant's constitutional right to confront the witnesses against him (US Constitution, Sixth Amendment) and the defendant's statutory right to discovery

¹ "Those most frequently mentioned by courts and commentators are these: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely."

pursuant to Article 240 of the Criminal Procedure Law. These mandates would compel a limited disclosure. However, when no charges are voted by a grand jury, these rights do not come into play. Thus, this argument fails.

Finally, the decision of the grand jurors in this case was theirs alone, after having heard all of the evidence, having been instructed on the law and having deliberated. Their collective decision should not be impeached by unbridled speculation that the integrity of this grand jury was impaired in any way.

FINAL CONCLUSION

In this case, based on the arguments of the movants and the current state of the law, a decision in favor of the movants would constitute an unjustified departure from the plain statutory language of CPL 190.25 (4) (a) and case law. The movants argue for a "sea change" in the law governing the disclosure of grand jury minutes. If such a dramatic change is warranted, that change should be effected by the state legislature. The judiciary is not the branch of government for statutory repeal or amendments.

CPL 190.25 (4) (a), as interpreted in countless cases over many years, would have been judicially repealed or modified if courts succumb to the temptation to order disclosure in unique or high-publicity cases without reference to clear legal precedent. The law's uniformity would be lost and the law would vary from court to court. The *ad hoc* release of grand jury minutes would be based on a judge's subjective decision that a case was of singular importance or notoriety. If current, clearly articulated law governing the disclosure of grand jury minutes were abandoned each time a grand jury decision resulted in controversy, the law would have been changed by a judge. The rules of law established for the determinations of these motions would have been judicially amended and, in cases like

this one, the exception would have swallowed the rule². *Matter of Carey*, 45 Misc3d 187, 213 (Sup Ct, Wyoming County 2014).

It bears repeating that under the law, a “compelling interest” in a case is not a “compelling or particularized need.” If every newsworthy case were deemed compelling and, thus, justified disclosure, the veil of grand jury secrecy would be lifted and every citizen’s right to have fellow citizens, sitting on a grand jury, check the power of the police and the prosecutor without pressure from outside influences - real or perceived - would be imperiled.

Again, in summary, each movant has not established a “compelling and particularized need” for the release of the grand jury minutes and, if that legally-required showing had been made, disclosure, on balance, would not have been warranted.

Thus, the motions for disclosure are denied³.

This opinion shall constitute the decision and order of the court.

ENTER


HON. WILLIAM GARNETT, J.S.C.

² “At an even more basic level of analysis, this Court must point out that, if the public’s right to know could be a paramount or overriding consideration here, there would not exist a general rule of grand jury secrecy in the first place. Nor, if the supposed societal benefit of maximizing the public’s awareness could by itself trump all other considerations, would there exist a legal presumption against disclosure of grand jury evidence, let alone a rule providing that such presumption may be overcome only by a showing of a particularized and compelling need for disclosure. To adopt the Attorney General’s position in this case would be to effectively displace the presumption against disclosure of grand jury evidence with a presumption favoring the earliest and widest public revelation of grand jury material, at least in the most important and notorious cases.”

³ The NAACP’s motions to recuse and to refer the matter to the Grievance Committee of the Appellate Division of the Supreme Court for the Second Judicial Department are denied as meritless.

EXHIBIT B

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D46118
O/hu

_____AD3d_____

Argued - June 16, 2015

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2015-02774

DECISION & ORDER

In the Matter of Letitia James, etc., appellant,
v Daniel Donovan, etc., respondent-respondent.
(Index No. 80304/14)

In the Matter of Legal Aid Society, appellant,
v Daniel Donovan, etc., respondent-respondent.
(Index No. 80296/14)

In the Matter of New York Civil Liberties Union,
appellant, v Daniel Donovan, etc., respondent-respondent.
(Index No. 80307/14)

In the Matter of NYP Holdings, Inc., etc., petitioner,
v Daniel Donovan, etc., respondent.
(Index No. 80308/14)

In the Matter of Staten Island Branch of National
Association for Advancement of Colored People,
etc., et al., appellants, v Daniel Donovan, etc.,
respondent-respondent.
(Index No. 80009/15)

Jennifer Levy, New York, N.Y., and Emery Celli Brinckerhoff & Abady, LLP, New
York, N.Y. (Matthew D. Brinckerhoff and Orion Danjuma of counsel), for appellant
Letitia James, as Public Advocate for the City of New York (one brief filed).

July 29, 2015

Page 1.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

Seymour W. James, Jr., New York, N.Y. (Natalie Rea of counsel), for appellant Legal Aid Society.

Arthur Eisenberg and Corey Stoughton, New York, N.Y., for appellant New York Civil Liberties Union.

James I. Myerson and Laura D. Blackburne, New York, N.Y., for appellants Staten Island Branch of National Association for Advancement of Colored People and New York State Conference of Branches of National Association for Advancement of Colored People.

Daniel L. Master, Jr., Acting District Attorney, Staten Island, N.Y. (Morrie I. Kleinbart and Anne Grady of counsel), for respondent-respondent.

Stoll, Glickman & Bellina, LLP, Brooklyn, N.Y. (Andrew B. Stoll of counsel), for The Black, Puerto Rican, Hispanic, and Asian Legislative Caucus of the New York State Legislature, amicus curiae.

Sylvia Gail Kinard and Tobias Pinckney, Brooklyn, N.Y. (Elizabeth Roberts and Kevin Ferere on the brief), for Medgar Evers College Legal Pathways Program, amicus curiae.

Bruce D. Brown, Gregg P. Leslie, and Tom Isler, Washington, D.C., for Reporters Committee for Freedom of the Press, amicus curiae, and Davis Wright Tremaine, LLP, New York, N.Y. (Laura R. Handman of counsel), for Advance Publications, Inc., American Society of News Editors, Association of Alternative Newsmedia, Bloomberg, L.P., BuzzFeed, Cable News Network, Inc., Center for Investigative Reporting, Courthouse News Service, Daily News, L.P., Dow Jones & Company, Inc., First Amendment Coalition, First Look Media, Inc., Investigative Reporting Workshop at American University, The McClatchy Company, MediaNews Group, Inc., The National Press Club, National Press Photographers Association, The New York Times Company, News 12, Newsday, LLC, North Jersey Media Group, Inc., NYP Holdings, Inc., Online News Association, Radio Television Digital News Association, Reuters America, LLC, The Seattle Times Company, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post, amici curiae (one brief filed).

In separate proceedings to unseal and release grand jury minutes and evidence based on CPL 190.25(4)(a), Letitia James, as Public Advocate for the City of New York, the Legal Aid Society, the New York Civil Liberties Union, and the Staten Island Branch of the National Association for the Advancement of Colored People and the New York State Conference of Branches of the National Association for the Advancement of Colored People separately appeal, as

July 29, 2015

Page 2.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

limited by their respective briefs, from so much of an order of the Supreme Court, Richmond County (Garnett, J.), dated March 19, 2015, as denied each of their respective petitions.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

These appeals arise out of the death of Eric Garner on July 17, 2014, and a grand jury's decision not to return an indictment against the target or targets of its investigation. After impaneling a grand jury to hear evidence concerning the circumstances of Garner's death, the District Attorney of Richmond County (hereinafter the District Attorney), based on CPL 190.25(4)(a), petitioned the Supreme Court, and was granted permission, to disclose to the public limited information regarding the nature and scope of the grand jury proceedings. The District Attorney did not seek, at that time, the disclosure of any grand jury testimony or exhibits. The Supreme Court permitted disclosure regarding the period of time during which the grand jury sat, the number and types of witnesses who testified, and the number and types of exhibits admitted into evidence. The Supreme Court also disclosed the relevant principles of law on which the grand jurors were instructed, and that the grand jury, in conformity with CPL 190.60 and 190.75, voted to file its findings of dismissal. Rather than quelling public debate about the grand jury proceedings, the limited disclosure instead engendered a call for full disclosure of the minutes of the grand jury's proceedings, and the exhibits and instructions provided to the grand jury.

These appeals involve the subsequent petitions filed by Letitia James, as Public Advocate for the City of New York (hereinafter the Public Advocate), the Legal Aid Society, the New York Civil Liberties Union, and the Staten Island Branch of the National Association for the Advancement of Colored People and the New York State Conference of Branches of the National Association for the Advancement of Colored People (hereinafter together the N.A.A.C.P. petitioners), based upon CPL 190.25(4)(a), to unseal and release the grand jury minutes to themselves and to the general public, including transcripts of testimony, exhibits, information about certain grand jurors, and legal instructions. Each of these petitioners seeks disclosure for the purpose of understanding the grand jury's decision to not return an indictment, promoting transparency in the grand jury process, restoring confidence in the criminal justice system, and engaging in meaningful discussions about reform of the grand jury process and police practices. Certain petitioners proposed limiting the scope of the materials disclosed to the public and redacting any names of, and identifying information about, the witnesses and grand jurors. In the order appealed from dated March 19, 2015, the Supreme Court denied the petitions on the grounds that each of the petitioners failed to establish a "compelling and particularized" need for disclosure and, in any event, the public interest in preserving grand jury secrecy outweighed the public interest in disclosure.

Preliminarily, we note that the disclosure issues raised by the District Attorney in the initial proceeding were different than the issues presented by the current petitions. Accordingly, the determination made in the District Attorney's initial proceeding does not control the instant proceedings (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501). Moreover, the partial

July 29, 2015

Page 3.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

disclosure ordered by Justice Rooney in that proceeding does not, in and of itself, open the door to the disclosure of additional grand jury testimony, exhibits, and information (*see Matter of Carey*, 45 Misc 3d 187 [Sup Ct, Wyoming County], *affd* 68 AD2d 220).

We reject the District Attorney's contention that the subject order is nonappealable. The order appealed from is civil, rather than criminal, in nature, "for although it relates to a criminal [investigation], it does not affect the criminal [investigation] itself, but only a collateral aspect of it," namely, the unsealing and release of the grand jury minutes (*Matter of Hynes v Karassik*, 47 NY2d 659, 661 n 1; *see People v M.E.*, 121 AD3d 157, 159; *People v Anonymous*, 7 AD3d 309, 310; *People v Purley*, 297 AD2d 499, 501).

However, the Public Advocate lacks capacity to maintain a proceeding based on CPL 190.25(4)(a). The issue of legal capacity "requires an inquiry into the litigant's status, i.e. its 'power to appear and bring its grievance before the court'" (*Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242, quoting *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155). The authority of the Public Advocate is expressly limited to that set forth in the New York City Charter. Section 24(f)(4) of the New York City Charter, which enables the Public Advocate, in essence, to oversee city agencies, perform related investigations, and attempt to resolve individual complaints concerning city services, does not extend to allegations of conduct that may constitute a crime. In fact, the Public Advocate is required to forward complaints alleging potential criminal conduct to the New York City Department of Investigation or the appropriate prosecuting attorney or other law enforcement agency (*see NY City Charter* § 24[k]). The Public Advocate's authority is otherwise limited to her intra-city services and agency oversight, which specifically does not include oversight of constitutionally established offices such as county district attorneys and the courts (*see NY Const art XIII*; *NY City Charter* § 24[f][4]; *People v Ianniello*, 21 NY2d 418, 424). We note that no provision of the City Charter expressly authorizes the Public Advocate to commence litigation. Although the First Department has held that section 24(j) of the City Charter impliedly confers upon the Public Advocate the capacity to bring a proceeding under CPLR article 78 to compel a city agency to comply with the Public Advocate's request for records and documents (*see Matter of Green v Safir*, 255 AD2d 107), that holding is inapplicable here. The Public Advocate's capacity to bring the instant proceeding cannot be derived by "necessary implication" from her oversight and investigatory responsibilities as set forth in the City Charter (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d at 159). To the extent that section 24(j) of the New York City Charter authorizes the Public Advocate to be provided with timely access to records and documents of city agencies as necessary to complete her investigations, the grand jury records at issue are not generated by city agencies, and her authority is limited to investigations required of her by the Charter. Further, to the extent our concurring colleague relies upon the definition of "agency" contained in New York City Charter § 1150(2) to suggest that the Public Advocate may engage in the oversight of and obtain records from any public entity that is paid in whole or in part from the City's treasury, such a general definition must yield to the more specific language of New York City Charter § 24(f) and (k), which exempts courts and district attorneys from the Public Advocate's oversight. "Whenever there is a general and a particular provision in the same statute, the general

July 29, 2015

Page 4.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

does not overrule the particular but applies only where the particular enactment is inapplicable” (McKinney’s Cons Laws of NY, Book 1, Statutes § 238). Therefore, despite the general language in New York City Charter § 1150 defining the term “agency,” the specific proscriptive language of the Public Advocate’s functions, as defined in New York City Charter § 24, cannot be construed as intending to confer upon the Public Advocate any authority to civilly review, oversee, or investigate district attorneys’ offices in the substantive performance of their criminal law-related prosecutorial responsibilities. Accordingly, rather than reaching the merits of the Public Advocate’s petition, the Supreme Court should have denied it on the ground of lack of capacity.

Unlike the Public Advocate, the purpose and capacity of the remaining appellants (hereinafter collectively the appellants) is not expressly limited by the City Charter or other statutory or decisional authorities. The District Attorney’s contention that the appellants lacked “standing” to seek disclosure because they are not among the individuals and agencies specifically enumerated in CPL 160.50(1)(d) is without merit. While it is true that none of the appellants falls within the six statutory exceptions to the sealing provision under CPL 160.50(1)(d), that statute is inapplicable to the extent that the appellants are seeking disclosure based on CPL 190.25(4)(a). Indeed, courts have routinely considered requests for disclosure based on CPL 190.25(4)(a) by individuals and agencies other than those specifically enumerated in CPL 160.50(1)(d) (*see e.g. People v Di Napoli*, 27 NY2d 229; *Matter of Quinn [Guion]*, 293 NY 787; *Matter of Alani v Donovan*, 98 AD3d 972; *Roberson v City of New York*, 163 AD2d 291; *People v Lindsay*, 188 Misc 2d 757 [Cattaraugus County Ct]; *People v Cipolla*, 184 Misc 2d 880 [Rensselaer County Ct]; *Matter of FOJP Serv. Corp.*, 119 Misc 2d 287 [Sup Ct, NY County]). In any event, the list of parties permitted to seek the unsealing of records under CPL 160.50(1)(d) has been expanded in “extraordinary circumstances” (*Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 581 [internal quotation marks omitted]; *Matter of New York State Police v Charles Q.*, 192 AD2d 142, 145 [internal quotation marks omitted]), upon a showing of a “compelling demonstration” (*Matter of New York State Police v Charles Q.*, 192 AD2d at 145 [internal quotation marks omitted]) that disclosure was necessary, which is synonymous with the burden under CPL 190.25(4)(a).

Turning to the merits, “[t]he primary function of the Grand Jury in our system is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to criminal prosecution” (*People v Burch*, 108 AD3d 679, 680, quoting *People v Calbud, Inc.*, 49 NY2d 389, 394). “Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding” (CPL 190.25[4][a]). New York case law recognizing the sanctity of grand jury secrecy dates as far back as the year 1825 (*see Ex parte Tayloe*, 5 Cow 39), and the predecessor statute of CPL 190.25 dates back from at least 1881 (*see Code Crim Proc* §§ 256, 257, 258). So strong are the principles of grand jury secrecy and the policies underlying it that unauthorized disclosure of grand jury evidence is a felony in New York (*see Penal Law* § 215.70). While “secrecy of grand jury minutes is not absolute” (*People v Di Napoli*, 27 NY2d at 234; *see Matter of District*

July 29, 2015

Page 5.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

Attorney of Suffolk County, 58 NY2d 436, 443; *Roberson v City of New York*, 163 AD2d at 291), “a presumption of confidentiality attaches to the record of Grand Jury proceedings” (*People v Fetcho*, 91 NY2d 765, 769).

The legal standard that must initially be applied to petitions seeking the disclosure of grand jury materials is whether the party seeking disclosure can establish a “compelling and particularized need” for access to them (*People v Robinson*, 98 NY2d 755, 756; see *Matter of District Attorney of Suffolk County*, 58 NY2d at 444; *Matter of Police Commr. of City of N.Y. v Victor W.*, 37 AD3d 722 [internal quotation marks omitted]). Only if the compelling and particularized need threshold is met must the court then balance various factors to determine whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure (see *People v Robinson*, 98 NY2d at 756; *Matter of Lungen v Kane*, 88 NY2d 861, 862-863; *Matter of District Attorney of Suffolk County*, 58 NY2d at 443-444; *People v Di Napoli*, 27 NY2d at 234-235; *Matter of Aiani v Donovan*, 98 AD3d at 973-974; *Matter of Police Commr. of City of N.Y. v Victor W.*, 37 AD3d 722). The decision as to whether to permit disclosure is committed to the trial court’s discretion (see *People v Di Napoli*, 27 NY2d at 234; *People v Eun Sil Jang*, 17 AD3d 693, 694). However, “without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance” (*Matter of District Attorney of Suffolk County*, 58 NY2d at 444).

A party seeking disclosure will not satisfy the compelling and particularized need threshold simply by asserting, or even showing, that a public interest is involved. The party must, by a factual presentation, demonstrate why, and to what extent, the party requires the minutes of a particular grand jury proceeding “to advance the actions or measures taken, or proposed (e.g. legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served” (*Matter of District Attorney of Suffolk County*, 86 AD2d 294, 299, *affd* 58 NY2d 436). “[I]f the supposed societal benefit of maximizing the public’s awareness could by itself trump all other considerations,” there would not exist a “legal presumption against disclosure of grand jury evidence, let alone a rule providing that such presumption may be overcome only by a showing of a particularized and compelling need for disclosure” (*Matter of Carey*, 45 Misc 3d at 213 [Sup Ct, Wyoming County]). Significantly, courts that have permitted disclosure of grand jury evidence have uniformly done so for some purpose other than generalized public interest and dissemination (see *People v Di Napoli*, 27 NY2d 229; *Matter of Quinn*, 293 NY 787; *Matter of Aiani v Donovan*, 98 AD3d at 973-974; *Matter of Scotti*, 53 AD2d 282; *People v Werfel*, 82 Misc 2d 1029 [Sup Ct, Queens County]; cf. *People v Cipolla*, 184 Misc 2d 880).

Despite the intense public interest in this case, which this Court recognizes, the Supreme Court properly determined that the appellants’ reasons do not constitute a compelling and particularized need for disclosure of the requested grand jury materials (see *Matter of District Attorney of Suffolk County*, 58 NY2d 436; *Matter of Police Commr. of City of N.Y. v Victor W.*, 37 AD3d at 722; *Matter of Hynes [Patrolmen’s Benevolent Assn.]*, 179 AD2d 760; *Ruggiero v Fahey*, 103 AD2d 65; *Matter of Carey [Fischer]*, 68 AD2d 220; *Matter of Carey*, 45 Misc 3d 187; *Matter*

July 29, 2015

Page 6.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

of *NYP Holdings*, 196 Misc 2d 708 [Sup Ct, Kings County]; *Matter of Grand Jury Investigation*, 139 Misc 2d 282 [Sup Ct, Bronx County]; *Matter of Third Extraordinary Special Grand Jury, Convened Pursuant to Exec. Orders Nos. 42 & 43 of 1976*, 118 Misc 2d 93 [Sup Ct, Onondaga County]).

While many of the foregoing decisional authorities could be discussed in detail as controlling precedent, the *Matter of Hynes* case merits particular note. *Matter of Hynes* arose out of a well-publicized and highly charged incident in 1991 in Crown Heights, Brooklyn, when a vehicle struck and killed a seven-year-old child. A grand jury declined to indict the driver for any crime, which added considerably to community unrest over the incident. The District Attorney of Kings County sought to release the grand jury's minutes and records to quell the unrest, and to restore confidence in the grand jury system generally and in his office specifically (see *Matter of Hynes [Patrolmen's Benevolent Assn.]*, 179 AD2d at 760). This Court upheld the Supreme Court's denial of the requested disclosure, finding that curbing community unrest and restoring faith in courts and prosecutors did not represent a compelling and particularized need, as is necessary to overcome the presumption of confidentiality attached to grand jury proceedings (see *id.* at 760-761). The similarities between the circumstances of *Matter of Hynes* and those presented here are striking. Although the target of the grand jury proceedings in *Matter of Hynes* was a civilian, and the targets here are public servants, we find that distinction to be without a difference to the resolution of this case.

In addition, the appellants have failed to demonstrate that relevant information cannot be obtained from sources other than the grand jury minutes to permit lawmakers to fashion legislation, if appropriate, concerning reform of the grand jury process and police practices (see *Matter of District Attorney of Suffolk County*, 58 NY2d at 444-445; *Matter of Third Extraordinary Special Grand Jury, Convened Pursuant to Exec. Orders Nos. 42 & 43 of 1976*, 118 Misc 2d at 97). These sources may include, but are not necessarily limited to, reports and records of news media, and the City's Department of Investigation, Civilian Complaint Review Board, Police Department, and Law Department. The appellants' argument that there is a compelling and particularized need for disclosing the grand jury materials in order to help shape legislative debate at the State Capitol for potential grand jury reform is unpersuasive. The appellants failed to establish how or in what manner these grand jury materials would inform legislative debate beyond the facts that are already publicly known of the case, and beyond reform proposals that are already being discussed on their own merits.

The Supreme Court also properly determined that the Legal Aid Society failed to demonstrate a compelling and particularized need for access to the grand jury minutes for the purpose of ensuring better representation of its current and future clients. The Legal Aid Society did not indicate with any degree of specificity how the minutes or exhibits in this isolated case are necessary to that effort (see *Ruggiero v Fahey*, 103 AD2d at 70; *Matter of District Attorney of Suffolk County*, 86 AD2d at 299; *Matter of Grand Jury Investigation*, 139 Misc 2d at 285).

Moreover, contrary to the appellants' contentions, the instructions given to the grand jury

July 29, 2015

Page 7.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

are entitled to a presumption of confidentiality, since CPL 190.25(4) affords protection to all “matter attending a grand jury proceeding” (CPL 190.25[4][a]), including records that were not even entered into evidence before the grand jury (*see Matter of Aiani v Donovan*, 98 AD3d at 973). Similarly, there is no support for the conclusory contention of the Legal Aid Society and the N.A.A.C.P. petitioners that noncivilian witnesses, namely, police officers and emergency medical technicians, have no expectation of privacy in their grand jury testimony, or that they are not entitled to the same legal protections as civilian witnesses (*see Melendez v City of New York*, 109 AD2d 13, 22-23). Accordingly, the appellants failed to show a compelling and particularized need for disclosure.

Although the appellants failed to make the requisite initial showing, because of the importance of this matter, this Court will reach the issue of whether “the public’s right to know overrides such factors as the chilling effect disclosure might have on future Grand Jury investigations of this nature” (*Matter of Hynes [Patrolmen’s Benevolent Assn.]*, 179 AD2d at 761). The Supreme Court properly determined that the public interest in disclosure was outweighed by the dangers inherent in violating the secrecy of the grand jury proceeding (*see Ruggiero v Fahey*, 103 AD2d at 71-72; *Matter of Carey*, 45 Misc 3d at 209; *Matter of Grand Jury Investigation*, 139 Misc 2d 282).

The most frequently mentioned purposes or rationales for preserving grand jury secrecy include: “(1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely” (*People v Di Napoli*, 27 NY2d at 235; *see People v Seymour*, 255 AD2d 866, 867; *Ruggiero v Fahey*, 103 AD2d at 67-68). It is true that most of the factors enumerated in *People v Di Napoli* (27 NY2d at 235) are not implicated here in light of the fact that the grand jury declined to return an indictment, and that the identities of the target, as well as of certain witnesses who testified before the grand jury, are already publicly known. However, ensuring the independence of the grand jury, preventing the very real or potential danger that disclosure might present to the physical safety of the grand jurors and witnesses, and protecting them from public scrutiny and criticism, all militate in favor of maintaining grand jury secrecy.

Indeed, if pre-indictment proceedings were made public, especially in high profile cases such as this, “[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties” (*Douglas Oil Co. of Cal. v Petrol Stops Northwest*, 441 US 211, 222; *see United States v Sells Engineering, Inc.*, 463 US 418, 424; *Butterworth v Smith*, 494 US 624, 636-637 [Scalia, J., concurring]). We note that in this particular instance, there is reportedly an ongoing federal investigation into the circumstances of the death of Eric Garner, and the disclosure of grand jury minutes here could negatively interfere with the investigative efforts of the United States Department of Justice and the willingness of witnesses to cooperate with those efforts.

July 29, 2015

Page 8.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

Although the appellants suggest that redacting certain information will cure the impact of disclosure on the grand jury witnesses and jurors by narrowing the scope of certain materials disclosed to the public, under the circumstances of this case, redactions would not serve the purpose of preserving the witnesses' anonymity and thereby protect them from public criticism and scrutiny (*see Matter of Carey [Fischer]*, 68 AD2d at 228). Indeed, the earlier widespread dissemination of two videos capturing the incident would facilitate efforts by the media and the public to identify the source of any testimony disclosed.

The parties' remaining contentions either are without merit or have been rendered academic in light of our determination.

Accordingly, the Supreme Court properly denied the petitions submitted by the appellants to unseal and release grand jury minutes and evidence based on CPL 190.25(4)(a), and properly denied the petition submitted by the Public Advocate, but should have done so on the ground of lack of capacity to maintain this proceeding.

DILLON, J.P., AUSTIN and SGROI, JJ., concur.

LEVENTHAL, J., concurs in the result, and votes to affirm the order insofar as appealed from, with the following memorandum:

I agree with my colleagues in the majority that the order denying the petitions to unseal and release the subject grand jury minutes and evidence based on CPL 190.25(4) should be affirmed insofar as appealed from. I write separately to express my view that the petitioner Letitia James, as Public Advocate for the City of New York (hereinafter the Public Advocate), did not lack capacity to commence and maintain her proceeding.

The Public Advocate, an elected official with the power to sue, is a watchdog over New York City government (*see Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth.* 19 AD3d 284, 285; *Matter of Green v Safir*, 174 Misc 2d 400, 406 [Sup Ct, NY County]). Pursuant to New York City Charter § 24(j), the Public Advocate "shall have timely access to those records and documents of *city agencies* which the public advocate deems necessary to complete the investigations, inquiries and reviews required by this section" (emphasis added). The term "agency" is defined within the New York City Charter as "a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury" (NY City Charter § 1150[2]).

The District Attorney correctly acknowledges that its office is funded by the City of New York (*see NY City Charter § 1125*). Therefore, while the Office of the District Attorney is not

July 29, 2015

Page 9.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN

an arm of the City of New York (see NY Const art XIII; County Law § 700[1]; see also *Matter of Kelley v McGee*, 57 NY2d 522, 535-536), the City Charter provides that the Office of the District Attorney is a city agency for the limited purpose of determining the Public Advocate's capacity to request the subject relief. Furthermore, while the grand jury minutes and evidence at issue are not records of the Office of the District Attorney (see *Matter of Hall v Bongiorno*, 305 AD2d 508, 509), the District Attorney is in control of the grand jury proceedings (see CPL 190.25; *People v Huston*, 88 NY2d 400, 406; *People v Dawson*, 50 NY2d 311, 323) and is the custodian of such material (see *Matter of Temporary State Commn. of Investigation*, 47 Misc 2d 11, 13-14 [Nassau County Ct]).

Moreover, the majority's determination that the Public Advocate lacks capacity to maintain her proceeding is inconsistent with its determination that the other petitioners have such capacity in this matter. As the majority correctly observes, the list of parties permitted to seek the unsealing of records under CPL 160.50(1)(d) has been expanded in "extraordinary circumstances" (*Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 581 [internal quotation marks omitted]; *Matter of New York State Police v Charles Q.*, 192 AD2d 142, 145 [internal quotation marks omitted]) upon a showing of a "compelling demonstration" that disclosure was necessary (*Matter of New York State Police v Charles Q.*, 192 AD2d at 145 [internal quotation marks omitted]). I further believe that this showing, applicable to all of the petitioners, is equivalent to, and coextensive with, a movant's burden under CPL 190.25(4)(a).

Therefore, in my view, the Public Advocate should be permitted to assert and maintain her proceeding so as to set forth her claim that she is empowered to investigate the alleged failure of the District Attorney in this matter by seeking disclosure of the subject grand jury minutes and evidence.

Addressing the merits, however, I agree with the majority's reasoning and determination that, among other things, the petitioners failed to present a compelling and particularized need for access to the subject material. Therefore, the Supreme Court properly denied their petitions.

ENTER:


Aprilanne Agostino
Clerk of the Court

July 29, 2015

Page 10.

MATTER OF JAMES v DONOVAN
MATTER OF LEGAL AID SOCIETY v DONOVAN
MATTER OF NEW YORK CIVIL LIBERTIES UNION v DONOVAN
MATTER OF NYP HOLDINGS, INC. v DONOVAN
MATTER OF STATEN ISLAND BRANCH OF NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE v DONOVAN