

To be argued by
Matthew D. Brinckerhoff
(15 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION – SECOND DEPARTMENT

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)

Richmond County
AD No. 2015-02774

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)

BRIEF FOR APPELLANT – NYC PUBLIC ADVOCATE

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CPLR 5531 STATEMENT

1. The index number of the case in the court below is: 080304/14.
2. The full names of the original parties were Letitia James, New York City Public Advocate, against Daniel Donovan. Appellant's co-petitioners below were the Legal Aid Society, The New York Civil Liberties Union, The Staten Island Branch of the National Association For the Advancement of Colored People and the New York State Conference Branches of the NAACP, and NYP Holdings, Inc., a/k/a, The New York Post.
3. This action was commenced in Supreme Court, Richmond County.
4. This action was commenced by Order to Show Cause filed on December 10, 2014.
5. This is an appeal from a Decision and Order, rendered March 19, 2015, denying appellant's request to unseal certain portions of the grand jury proceedings related to the investigation of the death of Eric Garner.
6. Appellant and co-appellants have been granted permission to appeal based on a Joint Appendix.

TABLE OF CONTENTS

PAGE NO(s):

TABLE OF AUTHORITIES ii-

PRELIMINARY STATEMENT..... - 1 -

BACKGROUND - 2 -

 A. The Role of the Public Advocate - 4 -

 B. Legal Standard for Unsealing Grand Jury Materials..... - 6 -

ARGUMENT -9-

 PROCEDURAL HISTORY - 9 -

 1. There is a Compelling, Particularized, and Extraordinary Public Interest in Disclosure of Materials from the Garner Grand Jury Proceeding..... - 10 -

 A. There Is a Compelling and Particularized Need for the Garner Grand Jury Materials to Inform Pending Legislation and Reform Measures - 10 -

 B. The Supreme Court Misconstrued the “Compelling and Particularized” Standard for Disclosure of Grand Jury Materials - 17 -

 C. The Supreme Court Erred in Disregarding the Public Advocate’s Investigative Authority Under the New York City Charter..... - 21 -

 D. The Granting of District Attorney Donovan’s Petition Established a Compelling and Particularized Need for Public Disclosure of the Garner Grand Jury Materials - 30 -

II. The Di Napoli Balancing Test Tips Decidedly In Favor of Disclosure of Grand Jury Materials- 32 -

III. The Supreme Court Erred By Wholly Disregarding the Four Categories of Grand Jury Materials Proposed for Public Disclosure.....- 34 -

IV. The District Attorney Is Judicially Estopped From Arguing That There Is No Compelling And Particularized Need For Disclosure.....- 35 -

CONCLUSION- 38 -

TABLE OF AUTHORITIES

PAGE NO(s):

STATE CASES:

<i>Aiani v. Donovan</i> , 98 A.D.3d 972 (2d Dep't 2012).....	-19-, - 33 -
<i>All Terrain Properties, Inc. v. Hoy</i> , 265 A.D.2d 87 (1st Dep't 2000).....	- 36 -
<i>Anonymous v. Anonymous</i> , 137 A.D.2d 739 (2d Dep't 1988).....	- 36 -
<i>Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.</i> , 274 A.D.2d 1 (1st Dep't 2000).....	- 6 -
<i>Green v. Giuliani</i> , 187 Misc.2d 138 (Sup. Ct. N.Y. Cty. 2000).....	- 6 -
<i>Green v. Safir</i> , 174 Misc.2d 400 (Sup. Ct. N.Y. Cty. 1997).....	- 5 -, - 26 -
<i>Hirschberg v. Bd. of Sup'rs</i> , 251 N.Y. 156, 170 (1929).....	- 20 -
<i>Kelley v. McGee</i> , 57 N.Y.2d 522 (1982).....	- 23 -
<i>Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.</i> , 61 A.D.3d 13 (2nd Dep't 2009).....	- 13 -
<i>Mancheski v. Gabelli Grp. Capital Partners</i> , 39 A.D.3d 499 (2nd Dep't 2007).....	- 7 -
<i>Matter of City of Buffalo</i> , 57 A.D.2d 47 (1977).....	-27-, - 35 -
<i>Matter of Crain</i> , 139 Misc. 799 (N.Y. Cnty. 1931).....	- 28 -

<i>Matter of Dist. Attorney of Suffolk Cnty.,</i> 86 A.D.2d 294 (1982).....	-11-, -17-, - 19 -
<i>Matter of Quinn (Town of Mt. Pleasant),</i> 267 A.D. 913 (2d Dep't 1944).....	- 19 -
<i>Matter of Scotti,</i> 53 A.D.2d 282 (4th Dep't 1976).....	- 26 -
<i>Outlet Embroidery Co. v Derwent Mills,</i> 254 NY 179 (1930).....	- 13 -
<i>People v. Behan,</i> 37 Misc. 2d 911, 235 N.Y.S.2d 225 (Cnty. Ct. Onondaga Cnty. 1962)...	- 27 -
<i>People v. Cipolla,</i> 184 Misc. 2d 880 (Sup. Ct. Rensselaer Cty. 2000)	- 7 -, - 8 -, - 9 -, - 33 -
<i>People v. Di Napoli,</i> 27 N.Y.2d 229, 234 (1970).....	<i>passim</i>
<i>People v. Lester,</i> 135 Misc.2d 205 (Sup. Ct. Bronx Cty. 1987).....	- 29 -
<i>People v. Werfel,</i> 82 Misc. 2d 1029 (Sup. Ct. Queens Cty. 1975).....	- 8 -
<i>People v. Wesley,</i> 73 N.Y.2d 351 (1989).....	- 36 -
<i>Persing v. Coughlin,</i> 214 A.D.2d 145 (4th Dep't 1995).....	- 13 -
FEDERAL CASES:	
<i>Floyd v. City of New York,</i> 959 F. Supp. 2d 540 (S.D.N.Y. 2013)	- 24 -
<i>Globe Newspaper Co. v. Superior Ct.,</i> 457 U.S. 596 (1982).....	- 7 -
<i>Republic of Philippines v. Westinghouse Elec. Corp.,</i> 949 F.2d 653 (3d Cir. 1991)	- 7 -

STATUTES:

C.P.L § 190.25(4).....- 8 -
Charter of the City of New York (“Charter”) § 24(f).....- 5 -
N.Y. Crim. Pro. Law § 190.25(4)(a)..... - 2 -, - 4 -, - 8 -
NYC Charter §24(h).....- 21 -

CASES:

PRELIMINARY STATEMENT

Through this appeal, the Public Advocate seeks grand jury minutes and other materials from the inquiry into the death of Eric Garner. The grand jury's decision not to return an indictment against a police officer following Eric Garner's death has prompted an extraordinary public debate along with sustained calls for reform. New York's criminal justice system is now at a crossroads, as public officials contemplate whether and how to implement key changes.

The question for this Court is whether that policy discussion must take place without an understanding of what occurred in the Garner grand jury proceeding itself. The Public Advocate seeks access to grand jury materials on the grounds that they are essential to informing prospective legislation and official investigations. Though grand jury proceedings are generally secret, New York's case law and statutory framework contemplates numerous cases where grand jury minutes should be disclosed in the public interest.

Despite ample precedent permitting disclosure, the court below denied the Public Advocate's petition in its entirety. The court below erred in concluding that the Public Advocate had not demonstrated a compelling or particularized need for the grand jury materials. There is a quintessentially compelling and particularized need for information that may impact reform of core aspects of our criminal justice

system. And none of the considerations supporting grand jury secrecy would be undermined by the disclosure contemplated by the Public Advocate.

BACKGROUND

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.

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, District Attorney Donovan 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. JA.65.

On December 10, 2014, the Public Advocate moved for an order under § 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. 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.

The Supreme Court initially ordered that all petitions for Garner grand jury materials 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 the petition be unsealed. On December 17, 2014, Justice Rooney recused himself from further consideration of the petitions. The cases were reassigned to Justice Garnett and consolidated for argument.

In her reply to the district attorney's opposition to her petition, the Public Advocate clarified that she was seeking 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.

The trial court heard oral arguments on February 5, 2015. In a March 19, 2015 Decision and Order, the lower 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. The Role of the Public Advocate

The New York City Charter—the constitution of New York City government — provides for the Office of the Public Advocate to serve as an essential “watchdog” over all government activities. Under the Charter, the Public Advocate is the elected official empowered and charged with overseeing all City agencies, including investigating any shortcomings or failures in the provision of services to New York City residents.

Courts have described the Public Advocate as “an independent public official to monitor the operations of City agencies with the view to publicizing any inadequacies, inefficiencies, mismanagement and misfeasance found, with the end goal of pointing the way to right the wrongs of government.” *Green v. Safir*, 174

Misc.2d 400, 403 (Sup. Ct. N.Y. Cty. 1997), *aff'd*, 255 A.D.2d 107 (1st Dep't 1998), *leave to appeal denied*, 93 N.Y.2d 882 (1999). The Charter vests the Public Advocate with the authority and responsibility to review systemic complaints relating to city services and programs, and investigate and attempt to resolve such complaints, “[i]n addition to other duties and responsibilities” Charter of the City of New York (“Charter”) § 24(f).

The Public Advocate must work with City agencies and make “specific recommendations” in an effort to resolve complaints and systemic problems. Charter § 24(g). Where a City agency does not act to resolve the concern, the Public Advocate is authorized to issue a formal report to the City Council and the Mayor, “describ[ing] the conclusions of the investigation and mak[ing] such recommendations for administrative, legislative, or budgetary action, together with their fiscal implications, as the public advocate deems necessary to resolve the individual complaint or complaints or to address the underlying problems discovered in the investigation.” *Id.*

The Public Advocate possesses independent capacity to bring suit “to implement the power set forth in the Charter.” *Green v. Safir*, 174 Misc.2d at 406. The Public Advocate also has broad and express authority under the Charter to petition for a formal “summary inquiry into any alleged violation or neglect of duty

in relation to the property, government or affairs of the city.” Charter § 1109; see also *Green v. Giuliani*, 187 Misc.2d 138, 152 (Sup. Ct. N.Y. Cty. 2000).

The Charter expressly grants the Public Advocate authority to review the documents of City agencies for the purposes of investigating and resolving complaints. Section 24(j) provides that “[t]he 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” under the Charter. In *Green v. Safir*, the court approved the Public Advocate’s petition for access to the New York City Police Department’s private personnel files for the purposes of investigating patterns involving the failure to discipline officers for misconduct. 174 Misc.2d at 406. The *Green v. Safir* court held that examination of confidential documents fell within the powers and duties of the Public Advocate and reasoned that “[m]isconduct by those invested with police power is now, and always has been, an area of concern to government.” 174 Misc.2d at 403.

B. Legal Standard for Unsealing Grand Jury Materials

In evaluating the propriety of unsealing grand jury materials, the analysis must begin with an understanding of the public’s underlying constitutional and common law right to access court documents and proceedings. See *Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dep’t 2000);

see also Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605–606 (1982).

“There is a presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the ‘the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud.’” *Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501 (2nd Dep’t 2007) (citing *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991)).

The Public Advocate’s application for disclosure addresses the same concerns identified by *Mancheski*: ensuring the actual and perceived fairness of the judicial system and reducing the possibility of injustice, conflict of interest, or fraud in grand jury proceedings. The “presumption of public access to judicial documents . . . exists, in part, because public monitoring of the courts is an essential feature of democrati[c] control and accountability.” *People v. Cipolla*, 184 Misc. 2d 880, 881 (Sup. Ct. Rensselaer Cty. 2000) (ordering the unsealing of grand jury minutes to petitioning newspaper publisher) (internal quotation marks and citation omitted).¹

¹ The court below failed to recognize the fundamental principle of public access to the courts from the outset. When the Public Advocate submitted her petition to unseal Garner grand jury materials, Justice Rooney, prior to his recusal from the case, directed her to file the petition in secret. JA.87. Intervention from the Second Department was required before the Public Advocate could disclose the mere fact that she sought access to grand jury materials even though her petition contained no secret or confidential information. JA.88.

“Juxtaposed to” the principle of open access to court documents “is the fact that a presumption of confidentiality attaches to the record of Grand Jury proceedings.” *Cipolla*, 184 Misc. 2d at 881. New York Criminal Procedure Law § 190.25(4) establishes a rebuttable presumption that grand jury proceedings “are secret” and subject to seal. Despite the statutory presumption, courts have consistently held that the “secrecy of grand jury minutes is not absolute.” *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970). The statute itself permits grand jury minutes (1) to be disclosed to the public with a “court order,” and (2) to be “independently examined by . . . such . . . persons as the court may specifically authorize.” C.P.L. § 190.25(4).

In determining whether disclosure should be permitted, a trial “court must balance the competing interests involved[:] the public interest in disclosure against that in secrecy.” *Di Napoli*, 27 N.Y.2d at 234. As one court explained, the test is: “Would the public interest best be served by permitting disclosure at this time?” *People v. Werfel*, 82 Misc. 2d 1029, 1031 (Sup. Ct. Queens Cty. 1975).

The Court of Appeals has established a two-prong test to determine whether grand jury materials should be unsealed pursuant to § 190.25(4)(a). First, a petitioner seeking disclosure shall “demonstrate a compelling and particularized need for access” to grand jury materials sought. *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436, 444 (1983). Second, courts will weigh five factors

when reviewing whether the public interest outweighs the rationale for grand jury secrecy: (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. *Di Napoli*, 27 N.Y.2d at 235.

ARGUMENT

When it denied the Public Advocate's petition, the court below erred in several respects. First, the court misconstrued the legal standard governing the unsealing of grand jury materials and misapplied the relevant precedent. Second, the court overlooked the fact that the Public Advocate sought public disclosure of four limited categories of grand jury materials. The court did not apply the legal test for unsealing grand jury materials to any of the four types of materials identified. Third, the court failed to recognize or give effect to the court's prior determination that there is a compelling and particularized need in public disclosure of materials from the Eric Garner grand jury proceeding. Finally, when

the legal test is properly applied, the balance of interests in grand jury secrecy tips decidedly in favor of disclosure in this case.

I. There is a Compelling, Particularized, and Extraordinary Public Interest in Disclosure of Materials from the Garner Grand Jury Proceeding

The Public Advocate has demonstrated a compelling, particularized, indeed extraordinary public interest in disclosure of materials from the Eric Garner grand jury proceeding. If there can be a case where disclosure of grand jury materials would be permissible to support official policymaking and legislative reform, this is that case. In denying the Public Advocate's petition, the Supreme Court applied an improper analysis which would result in a blanket prohibition on the disclosure of grand jury materials in high profile cases. This Court should reverse and grant the Public Advocate's petition for access to the identified materials.

A. There Is a Compelling and Particularized Need for the Garner Grand Jury Materials to Inform Pending Legislation and Reform Measures

The Public Advocate's petition met and exceeded the requisite showing of a compelling and particularized need for access to grand jury materials. A party seeking disclosure of grand jury materials should demonstrate how "the minutes of a particular Grand Jury [will] 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 Dist. Attorney of Suffolk*

Cnty., 86 A.D.2d 294, 299 (2d Dep't 1982) *aff'd*, 58 N.Y.2d 436 (1983). This requirement does not mean that a party must prove that access to grand jury proceedings are "indispens[able]," but rather of central importance to measures taken in the public interest. *Id.*; *see also Di Napoli*, 27 N.Y.2d at 238 (agency was not required to "conduct its own investigation at the expenditure of considerable time and money and make a record of its own rather than avail itself of the existing record resulting from the grand jury inquiry").

In *Suffolk County*, the Court of Appeals clarified that government officials cannot obtain grand jury materials merely by invoking the public interest generally. *Suffolk County* rejected a petition by a district attorney seeking to use grand jury transcripts in connection with a civil suit alleging a kickback conspiracy. 58 N.Y.2d at 446. In petitioning to unseal the transcripts, the district attorney had offered "no more than his assistant's conclusorily worded statement that the 'transcripts are required and necessary in the interests of justice' to take 'the profit out of kickbacks and payoffs and bribery.'" *Id.* at 441. The Court of Appeals held that "just any demonstration will not suffice" to override the presumption of grand jury secrecy. *Id.* at 444. A petitioner must provide some particular purpose for the grand jury materials rather than relying on general assertions that disclosure will be in the public interest.

Here the Supreme Court erred in concluding that the Public Advocate had offered no such reason. The Garner grand jury minutes are plainly essential to pending legislation proposing fundamental changes to New York's criminal justice system. The Garner case has prompted a virtually unprecedented reevaluation by officials and members of the public of the manner in which the police engage with communities of color, the nature and function of the grand jury system, and the role of district attorneys in investigating allegations of police misconduct. A range of proposals for legislation and policy change have emerged as a direct response to the grand jury's decision not to indict and are currently under active consideration.

In her request to unseal filed on December 10, 2014, the Public Advocate highlighted her role in proposing the appointment of a special prosecutor to investigate police killings of civilians. Under the current system, law enforcement officers rely on district attorneys to prosecute their cases. There is broad public concern that this arrangement presents an inherent conflict of interest for prosecutors charged with investigating potential criminal conduct by members of a local police force. Such a conflict could potentially be eliminated if only independent special prosecutors with no institutional relationship with the local police department investigated and prosecuted police misconduct.

Since December, 2014, the number of proposed reform measures has increased significantly highlighting the compelling public interest in this issue. A

selection of the current proposals is provided below. Because many of these measures were introduced after the initial petition for access to the Garner grand jury materials, Appellant requests that this Court take judicial notice of these proposals. *See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19 (2nd Dep't 2009) (recognizing judicial notice of broad categories of information including "legislative proceedings" (citing *Outlet Embroidery Co. v Derwent Mills*, 254 NY 179, 183 (1930)); *Persing v. Coughlin*, 214 A.D.2d 145, 149 (4th Dep't 1995) ("[A]n appellate court may, in its discretion, take judicial notice for the first time on appeal of a fact which was not brought to the attention of the trial court, and may do so even for the purpose of reversing the judgment." (citations omitted)).

- The Chief Judge of the State of New York, Jonathan Lippman, has proposed legislation that would implement fundamental changes to the functioning of the grand jury system in cases involving homicide or felony assault of civilians by police officers. In such cases, a judge would be required to be physically present to preside over the grand jury investigation and would "provide legal rulings, ask questions of witnesses, decide along with the grand jurors whether additional witnesses should be called to testify, preclude inadmissible evidence or improper questions, and provide final legal instructions before the grand jury deliberates." *See State of the Judiciary 2015 Address* (Feb. 17, 2015), available at <http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf>. In announcing this legislation, Judge Lippman also proposed statutory language to further clarify the "presumption" developed from case law "in favor of the court disclosing the records of a grand jury proceeding that has resulted in no charges, in cases where the court finds that the public is generally aware that the matter is the subject of grand jury proceedings; the identity of the subject of the investigation has already been disclosed or the subject consents to disclosure; and disclosure of the proceedings advances a significant public

interest.” *Id.* Judge Lippman noted that “[i]n cases of significant public interest,” when a jury does not indict, “secrecy does not further the principles it is designed to protect but, in fact, significantly impedes fair comment and understanding of the court process.” *Id.*

- On February 4, 2015, District Attorney Donovan testified before a State Senate hearing in favor of limited grand jury reform, including that grand juries create a report summarizing their conclusion in all cases where they chose not to return a true bill against a defendant. The District Attorney further supported the appointment of a monitor in cases where a grand jury fails to indict. However, he opposed more significant changes to the grand jury system or the presumption of secrecy. *See* Colby Hamilton, *Donovan backs limited grand jury reforms*, Capital New York (Feb. 4, 2015), available at <http://www.capitalnewyork.com/article/albany/2015/02/8561655/donovan-backs-limited-grand-jury-reforms>.
- On January 27, 2015, Governor Andrew Cuomo unveiled a plan in his State of the State Address to appoint monitors when grand juries do not indict police officers who have killed civilians. Manhattan District Attorney Cyrus Vance Jr. and Brooklyn District Attorney Kenneth Thompson endorsed this plan, suggesting it would add a “level of scrutiny” to police-civilian violence cases that would enhance public confidence in the criminal justice system. *See* Joel Stashenko, *DA Group Aligns With Cuomo Proposal on Grand Juries*, *N.Y. Law Journal* (Feb. 26, 2015), available at <http://www.newyorklawjournal.com/id=1202718976693/DA-Group-Aligns-With-Cuomo-Proposal-on-Grand-Juries?slreturn=20150309142203#ixzz3VJgrE26c>.
- The Senate and the State Assembly have both introduced bills that would strip local district attorneys of prosecutorial authority in cases involving alleged crimes committed by the police. On February 25, 2015, a similar measure—Bill A5524a—was introduced in the State Assembly by Assemblyman Keith Wright. The legislation would also require the appointment of an independent special prosecutor to investigate alleged crimes committed by police officers, supplanting district attorneys and presenting covered cases to grand and trial juries.
- On December 8, 2014, New York State Attorney General Eric T. Schneiderman requested that Governor Andrew Cuomo issue a temporary

standing Executive Order authorizing the Attorney General to investigate the circumstances surrounding the death of any unarmed person at the hands of law enforcement officer and where warranted, initiate criminal prosecutions against such officers. See Letter from Eric T. Schneiderman to Andrew M. Cuomo (Dec. 8, 2014), available at <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf>. The Attorney General advanced this proposal as direct result of the failure to return an indictment by the Garner grand jury and “because of the current crisis in our State’s criminal justice system,” citing the “urgency of the need for reform.” *Id.*

- On December 8, 2014, State Senator Martin Golden stated that he opposed any substantive measures to alter New York’s grand jury system, stating: “The system worked. The grand jury acted appropriately.” However, Golden said that he remained open to changing the statutory limits on the disclosure of grand jury information to the public. *See* Fredric U. Dicker, *GOP-controlled Senate to veto Cuomo’s cop proposals*, N.Y. Post (Dec. 8, 2014), available at <http://nypost.com/2014/12/08/gop-controlled-senate-to-veto-cuomos-cop-proposals/>.
- On December 5, 2014, State Senator Diane Savino and Assemblyman Matthew Titone announced that they planned to introduce legislation requiring New York prosecutors to release transcripts of witness testimony without judicial consent. *See* Josefa Velasquez, *After Garner, S.I. lawmakers propose transparency bill*, Capital New York (Dec. 5, 2014) available at <http://www.capitalnewyork.com/article/albany/2014/12/8558016/after-garner-si-lawmakers-propose-transparency-bill>.

The contents of the Garner grand jury proceedings bear directly upon the proposed legislation, policy implementation, and reform measures currently being discussed by lawmakers. These measures fall roughly into three different categories: (1) appointment of special prosecutors or monitors to investigate police killings, (2) stripping local district attorneys of authority to prosecute crimes committed by officers, and (3) changes to the statutory presumption regarding

grand jury secrecy. Access to the Garner grand jury materials is necessary so that lawmakers and the public may adequately determine which pending proposals are needed and whether certain measures should be amended, altered, or abandoned.

The legislative process will be significantly impaired without access to information from the very grand jury proceedings that prompted concerted efforts at reform. Many of the proponents and opponents of those measures base their opinions on what they surmise transpired in the Garner grand jury proceeding. It is critical that this public policy debate be informed by concrete 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.

The importance of the grand jury materials to pending efforts at legislative reform plainly satisfies the "compelling and particularized need" requirement. The Supreme Court committed error in summarily rejecting the Public Advocate's petition on the grounds that "the possibility of effecting legislative change . . . is purely speculative and does not satisfy the requirements of the law." JA.60(9). To the contrary, legislative change is not speculative but a chief public priority as

detailed above. Furthermore, the Second Department has explicitly highlighted “administrative inquiry” and “legislative investigation” as examples of measures that can satisfy the compelling and particularized need test. *See Matter of Dist. Attorney of Suffolk Cnty.*, 86 A.D.2d at 299 (“[A] party seeking disclosure [must] demonstrate 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.” (emphasis added)).

B. The Supreme Court Misconstrued the “Compelling and Particularized” Standard for Disclosure of Grand Jury Materials

For grand jury materials to be disclosed, a petitioner must demonstrate that the materials advance a compelling and particularized *public* interest. The Supreme Court applied the wrong standard when it denied the Public Advocate’s petition due to a misinterpretation of the “compelling and particularized” requirement described in *Suffolk County*. The lower court confused a *petitioner’s* need for disclosure with the *public’s* interest in grand jury materials. In essence, the court held that the determination of whether a petition should be granted turns on the identity of the movant rather than the role of the grand jury materials in advancing a public interest. This was error.

In evaluating the *Suffolk County* case, the Supreme Court’s Decision and Order interpreted the test as requiring that “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.” JA.54(3) (emphasis added). “[A] movant must have *a strong reason for disclosure unique to that movant.*” JA.55(5) (emphasis added).

Measured against this standard, the lower court found the Public Advocate’s petition lacking because she does not have direct authority over New York’s criminal justice system and cannot directly enact legislation. JA.57-58(6-7). In effect, the Supreme Court concluded that the Public Advocate was simply the wrong party to request grand jury materials for the purposes identified in her petition: “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.” JA.58(7).

This denial of the Public Advocate’s petition rests on a misinterpretation of the “compelling and particularized” requirement. *Suffolk County* and subsequent decisions did not purport to consider whether the movant had a “greater stake in the disclosure” of grand jury materials, JA. 54(3), but rather whether disclosure of the materials advances a compelling public interest. In *Suffolk County*, the Court of Appeals evaluated the District Attorney’s petition on this basis: “True, *a public interest* is to be found in the county’s efforts to recover civil damages from those who allegedly defrauded its taxpayers. But, absent was anything to indicate that

the Grand Jury minutes were essential to the pursuit of *this interest*.” 58 N.Y.2d at 445 (emphasis added). The Second Department’s prior decision in *Suffolk County* employed the same rationale: “[I]n seeking release of Grand Jury minutes upon a claim that they are *necessary for the enforcement of a public interest*, it must be shown . . . that the minutes of the Grand Jury proceedings are requisite to a successful effort to protect or vindicate *that interest*.” *Matter of Dist. Attorney of Suffolk Cnty.*, 86 A.D.2d 294, 299 (1982), *aff’d*, 58 N.Y.2d 436 (1983) (emphasis added). Neither court contemplated whether the district attorney was the only person with authority to petition for disclosure. The question was instead whether the district attorney had provided a sufficient explanation of how the grand jury materials would support an identified public interest. *See also Matter of Quinn (Town of Mt. Pleasant)*, 267 A.D. 913 (2d Dep’t 1944) (disclosing grand jury records to local group of taxpayers).

To be sure, a movant will often have a personal or professional stake in the underlying grand jury materials sought in a petition to unseal. And courts have more frequently granted access to grand jury materials for public officers acting pursuant to their official duties. But the focus of the “compelling and particularized” test is not the petitioner’s stake but vindication of a public’s interest. *See, e.g., Aiani v. Donovan*, 98 A.D.3d 972, 974 (2nd Dep’t 2012) (unsealing grand jury materials not due to movant’s personal identity or

circumstances but because disclosure supports “[a] compelling public interest . . . in assisting those who have been defrauded, and in deterring others who might engage in fraudulent conduct in the future”).

The Court below also overlooked the importance of the nature of the information sought. Unlike those cases in which the subject of a grand jury proceeding is being subjected to a collateral investigation, or where the topic of investigation is being further analyzed, here it is the grand jury proceedings *themselves* that are the subject of the inquiry. And, beyond that, the district attorney’s role in conducting a grand jury investigation into a case in which there is at least the appearance of a conflict of interest.

The Court of Appeals has noted that in cases like this one,

the reasons for refusal to apply the rule of secrecy are peculiarly strong....Any other principle would permit a dishonest, corrupt and vicious district attorney to use the great power of his office and his influence with the grand jury as an engine of oppression and be entirely safe from inquiry under a seal of secrecy which would prevent investigation....That would be perversion and not enforcement of the rule.

Hirschberg v. Bd. of Sup’rs, 251 N.Y. 156, 170 (1929).

The Supreme Court erroneously dismissed the Public Advocate’s petition on the grounds that she is unable to personally enact legislation or vote on the City Council. This is not a legitimate basis for denying the Public Advocate’s petition if disclosure of the Garner grand jury materials will advance a compelling public

interest in legislation sponsored by other officials. Because the Supreme Court applied the wrong standard, this Court should reverse.

C. The Supreme Court Erred in Disregarding the Public Advocate's Investigative Authority Under the New York City Charter

Even if the Public Advocate had the burden of demonstrating a unique stake in disclosure of the Garner grand jury materials, she has readily made that showing here. The Supreme Court erred by misapprehending and minimizing the Public Advocate's investigatory authority under the New York City Charter. The Public Advocate seeks access to grand jury materials pursuant to this authority and the materials would aid her in performing one of her core duties: investigating and resolving systemic concerns regarding New York City agencies. The Public Advocate's petition identified three investigative priorities where materials from the Garner grand jury proceeding would be essential: (1) a summary inquiry into official misconduct by City agencies, (2) an investigation of racially discriminatory police practices, and (3) proposals for officer body cameras.

First, the Supreme Court failed to recognize the unique function and responsibility conferred on the Public Advocate by the New York City Charter. The Charter empowers the Public Advocate to "review the programs of city agencies." NYC Charter §24(h). This includes "the responsiveness of city agencies to individual and group requests for data or information regarding the agencies' structure, activities and operations." *Id.* The results of her review are to

be reported to “the council, mayor and appropriate agency and shall include [] recommendations for addressing the problems identified...” Id.

Further, under § 1109 of the Charter, the Public Advocate retains broad authority to initiate a “summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city.” This formal investigative procedure is presided over by a Justice of the Supreme Court who may direct persons to appear and be examined regarding the subject of the inquiry. In upholding the Public Advocate’s power to bring proceedings under § 1109, the court concluded in *Green v. Giuliani* that the “the language of the [provision] could hardly be broader. It applies to all forms of official misconduct.” 187 Misc. 2d at 150.

The Public Advocate demonstrated a compelling and particularized need for the Garner grand jury materials in order to determine whether a summary inquiry is warranted into official misconduct by the Richmond County District Attorney’s Office, the NYPD, Staten Island precincts, and other related city agencies. The testimony elicited in the Garner grand jury proceedings is critical evidence that will be used to determine whether official misconduct occurred, would shape the scope of an § 1109 inquiry and as impeachment material in a summary inquiry proceeding itself. *See Di Napoli*, 27 N.Y.2d at 237 (finding “use of a witness’

grand jury testimony for impeachment purposes” in a subsequent agency hearing “commonplace and perfectly proper.”).

In summarily dismissing the Public Advocate’s claim for disclosure, the Court below described the criminal justice system as a “state, not city, system.” (JA. 58). The Court failed to recognize that the Richmond County district attorney’s office is a “city agency” under the Charter and is therefore subject to the Public Advocate’s oversight and inquiry, as with any other city agency. The Court of Appeals has spoken on the issue, holding that as a result of the “significant change in the relationship between county and state governments brought about by the home rule provisions in our State Constitution, district attorneys must be considered local officers.” *See Kelley v. McGee*, 57 N.Y.2d 522, 534-535 (1982).

As city agencies, district attorneys are subject to city oversight. They are subject to the City’s conflict of interest rules under the Charter. NYC Corp. Counsel Opinion No. 4-95. They are subject to audit by the City Comptroller. *See Audit Report on the New York County District Attorney's Administration of Deferred Prosecution and Non-Prosecution Agreements*, Audit Number: FM10-111A Release Date: March 24, 2010. They are subject to the City’s Department of Investigations review and they are subject to the Public Advocate’s oversight authority.

Second, a federal court has found the city liable for the unconstitutional use of race in targeting young black and Hispanic men for searches. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013). It is a central priority of the Public Advocate to investigate, address, and eliminate discriminatory enforcement and racial profiling by police officers in any form. The killing of Eric Garner merges into a broad, historical pattern of deadly force employed by white officers in interactions with citizens of color. The evidence presented to the jury is essential to determining what part, if any, race played in death of Mr. Garner and the grand jury proceedings themselves.

Third, Following Eric Garner's death, the Public Advocate proposed that NYPD officers be supplied with video cameras as a means of increasing public safety and curbing police misconduct. New York City has already enacted a pilot program for body cameras. The Garner grand jury materials are of central importance to evaluating this nascent program because Eric Garner's death was filmed and presented to the grand jury. Grand jury materials would help to evaluate the efficacy of body cameras at halting the use of excessive force and ensuring police accountability. Information from the grand jury will help inform whether body cameras must be implemented in conjunction with other reforms in order to achieve the desired effect of increasing public safety.

Courts permit disclosure of grand jury minutes to government officials in furtherance of the public interest. In *Di Napoli*, the New York State Public Service Commission sought to obtain minutes of a grand jury proceeding so that it could evaluate appropriate rates for public utilities. Grand jury proceedings had previously been initiated to examine allegations of bid rigging by various construction companies on public utility contracts. After the allegations came to light, the Public Service Commission began investigating whether consumers had been overcharged for utilities as a result of collusive bidding practices. In accordance with its statutory mandate to fix “just and reasonable rates,” the Commission requested permission to review evidence from the grand jury proceeding “[t]o assist it in its inquiry.” *Di Napoli*, 27 N.Y.2d at 233.

In upholding disclosure to the Public Service Commission, the Court of Appeals noted that revealing grand jury materials to “a governmental investigative body” would not discourage future witnesses from testifying freely in such proceedings. *Id.* “[W]itnesses before [the grand jury] could reasonably have anticipated that some investigating body” might later “procure a copy of the minutes to assist it in such investigation.” *Di Napoli*, 27 N.Y.2d at 236. Given the high profile nature of the grand jury proceeding concerning Mr. Garner’s death, every witness who testified “could reasonably have anticipated,” that their testimony might be subject to later disclosure. Just as in *Di Napoli*, the Public

Advocate seeks to examine the Garner grand jury materials to assist her in performing the core duties entrusted to her by the New York City Charter: the investigation and resolution of citizen complaints.

Numerous cases recognize this interest as legitimate, compelling and particularized, and have thus permitted access to grand jury materials for investigative purposes in materially similar circumstances. For example, in *Matter of Scotti*, the Fourth Department granted a special investigator access to grand jury minutes concerning the investigation into the retaking of the Attica Correctional Facility. 53 A.D.2d 282, 289 (4th Dep't 1976). The court noted that the special investigator "represented the public interest" and "[w]hen in his judgment there is evidence which bears upon the propriety of the conduct of a public employee, which information may not otherwise come to the attention of the employer agency, it is only right and proper for him to act in the public interest and to ask the court to consider his request that the information be transmitted to the agency." *Id.* at 286. This public interest recognized in *Matter of Scotti* is consistent with the Public Advocate's official investigative function under the New York City Charter. *See Green v. Safir*, 174 Misc. 2d 400,403, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. Cnty. 1997) (granting access to records where the Public Advocate sought "to review files of the NYPD to determine whether any patterns exist to the decisions of its Commissioner with respect to police discipline."); *see also People v. Behan*, 37

Misc. 2d 911, 922-23,235 N.Y.S.2d 225 (Cnty. Ct. Onondaga Cnty. 1962) ("The grounds advanced by the District Attorney for keeping inviolate the proceedings of the Grand Jury, impressive though they may be, are outweighed by the public interest involved in the furtherance of the administration of justice, and in the facilitation of the investigation [by government officials into the operations of Onondaga County prisons]."); *Matter of Sera*, 200 Misc. 688 (Cnty. Ct. Kings Cnty. 1951) (permitting police commissioner access to grand jury minutes involving officers in disciplinary proceedings for alleged graft).

The Supreme Court denied the Public Advocate's petition on the grounds that she does not have statutory authority over grand jury proceedings, district attorneys, or the decision to prosecute potential criminal offenses. But that approach disregards the case law holding that no such authority is required for access to grand jury materials. In *Matter of City of Buffalo*, 57 A.D.2d 47, 51 (4th Dep't 1977), the Court permitted the identity of grand jury witnesses to be disclosed to the Mayor of the City of Buffalo in connection with allegations that they had been paid for work they never performed. The Court noted that "[d]isclosure of Grand Jury minutes is not limited to public bodies concerned with the administration of the criminal law ... and has frequently been granted to other public officers and agencies which require the minutes in furtherance of some

official duty to protect an important public interest.” *Id.* at 49 (citations omitted); *see also Di Napoli*, 27 N.Y.2d at 236.

The Public Advocate's application for disclosure is a civil action directed at investigating and evaluating legislative and administrative remedies to ensure the safety of citizens and accountability of law enforcement. The proposals she has advanced unquestionably fall within her authority to investigate systemic problems affecting New York City residents and to propose legislation. No case holds that a party must have authority to bring criminal charges in order to be granted access to grand jury minutes. *See DiNapoli*, 27 N.Y.2d at 236 (“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.”); *Matter of Crain*, 139 Misc. 799 (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”).

Other courts have reached similar conclusions. In *People v. Werfel*, the Department of Investigation sought and gained access to grand jury minutes involving candidates for the judiciary who had previously been charged with criminal offenses. 82 Misc. 2d at 1030. The *Werfel* court permitted the Department of Investigation to examine the full grand jury record so that it could

carry out its official duty “to investigate the background of individuals being considered for sensitive positions within the government of the City of New York.” *Id.* The court noted that disclosure was warranted and squarely within the public interest even though the government investigation concerned a civil matter: “[I]t is clear that the scope of public interest is quite broad and should not be restricted solely to criminal matters. . . . Thus, while the administrative needs of a municipality may be less dramatic than an investigation of crime, both functions are necessary to protect the public.” *Id.* at 1032. As detailed above, the New York City Charter vests the Public Advocate with the authority and duty to work with City agencies to investigate, address, and resolve citizens’ complaints. She also may introduce legislation to address systemic problems and city-wide concerns. Charter § 24(n). The provisions of the Charter outlining the role and responsibilities of the Public Advocate are indicative of the local legislative judgment that deemed her duties as supporting the public interest. Granting the Public Advocate’s application for unsealing and access to the Garner grand jury materials will permit her to do the job entrusted to her by the people of the City of New York and would be consistent with the access granted to investigating government entities. *See People v. Lester*, 135 Misc.2d 205, 207 (Sup. Ct. Bronx Cty. 1987) (“Traditionally, applications to unseal records of criminal proceedings have been made where the underlying incident may provide the basis for . . .

related investigations by government agencies, such as . . . legislative committees.”) (citations omitted).

D. The Granting of District Attorney Donovan’s Petition Established a Compelling and Particularized Need for Public Disclosure of the Garner Grand Jury Materials

The Supreme Court erred by applying an explicit double standard to the Public Advocate and District Attorney Donovan’s separate petitions to unseal grand jury materials. Prior to the Public Advocate’s motion, the District Attorney argued for, and successfully obtained, disclosure of portions of the grand jury proceedings, including the number of witnesses and exhibits, as well as the duration of the investigation. Although the District Attorney’s motion was filed under seal, he appears to have sought disclosure based solely on the substantial public interest in the case. See Affirmation of Anne Grady. JA.93 (“On December 4, 2014, upon a sealed application for disclosure by District Attorney Donovan, this Court, in recognition of the strong public interest in the case authorized in an unsealed order limited disclosure of the grand jury proceedings”).

In its December 4, 2014 Order, the Supreme Court explained that the standards for grand jury disclosure had been met, observing that “the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness, and impartiality, at a crucial moment in the nation's history, where public confidence in

the evenhanded application of these core values among a diverse citizenry is being questioned.” JA.67. In effect, the granting of District Attorney Donovan’s petition establishes that there is a compelling and particularized need for disclosure in light of the acute public interest in the Garner case.

Justice Garnett’s March 19, 2015 Decision and Order rejects the identical public interest when applied to the Public Advocate’s petition. The Supreme Court concludes that, “[i]n 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.” JA.60(9). This description mischaracterizes the Public Advocate’s petition which provided significant information about how grand jury materials would be used to support official investigations and proposed legislation. Furthermore, the Public Advocate sought public disclosure of four limited categories of information that present little risk of compromising the principles underlying grand jury secrecy. But even setting aside this mischaracterization, the Supreme Court stunningly rejects the identical rationale for public disclosure that prevailed for District Attorney Donovan’s petition. This double standard is blatantly inequitable and unsupported by the law.

The proper approach would be for the Court to acknowledge as undisputed between the parties that the threshold test of whether there is a compelling and particularized interest in public disclosure has been met. The Public Advocate has

requested disclosure of public disclosure of different grand jury materials than that of District Attorney Donovan. Whether further disclosure is warranted should be governed by the *Di Napoli* balancing test.

II. The Di Napoli Balancing Test Tips Decidedly In Favor of Disclosure of Grand Jury Materials

In determining whether disclosure should be permitted, a trial "court must balance the competing interests involved[:] the public interest in disclosure against that in secrecy." *Di Napoli*, 27 N.Y.2d at 234. In *Di Napoli*, the Court of Appeals set forth the factors a court must consider when reviewing whether the public interest outweighs grand jury secrecy: (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. 27 N.Y.2d at 235.

The balance of interests strongly favors public access in this case. The *Di Napoli* factors warranting grand jury secrecy carry little weight after a grand jury proceeding has concluded without bringing charges (or after any charges brought

are fully resolved). *See Cipolla*, 184 Misc. 2d at 882 (“Most of the factors in favor of confidentiality of grand jury minutes relate to pending trials and are therefore inapplicable here”); *see also Aiani v. Donovan*, 98 A.D.3d 972, 974 (2d Dep’t 2012) (unsealing grand jury materials where “none of the reasons for maintaining secrecy in grand jury proceedings is implicated.”). Since the grand jury did not return an indictment, there is simply no risk of flight by the accused, no risk of jury tampering, and no risk of suborning perjury.

Moreover, the central facts leading to the death of Eric Garner were videotaped and are widely available. The identity of the accused, Police Officer Pantaleo, has been extensively reported and is well known. A publicly available audio-visual recording vividly demonstrates the conduct that led to Mr. Garner’s death. Here, the fourth *Di Napoli* factor aimed at protecting innocent accused from unfounded accusations militates *in favor* of disclosing the content of the grand jury proceeding. If exculpatory evidence was provided to the grand jury, it is in the interest of both the public and the accused to disseminate that information. Indeed, the only *Di Napoli* factor that is arguably relevant concerns maintaining the secrecy of grand jury witnesses. However, the Public Advocate sought to address that concern by requesting the redaction of names of grand jury witnesses or information that would identify them.

III. The Supreme Court Erred By Wholly Disregarding the Four Categories of Grand Jury Materials Proposed for Public Disclosure.

The Public Advocate's petition identified four categories of grand jury materials that could be disclosed without deterring future cooperation by potential grand jury witnesses. JA.130. These four categories are: (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.

The Public Advocate requested that other grand jury materials—consisting primarily, if not exclusively, of the testimony of all other grand jury witnesses—be disclosed to the Public Advocate with any names of witness identifying information redacted via the procedures outlined in *Di Napoli*. Grand jury witnesses would then have an opportunity to object to the disclosure of her/his testimony, within 60 days, to notify the court and the parties to this action of any such objection. The Public Advocate would then be permitted to utilize any remaining grand jury materials in connection with her official duties. *See Di Napoli*, 27 N.Y.2d at 238-39.

The Supreme Court erred by completely ignoring the request for public disclosure of these four limited categories of materials. The four categories were

selected because they would help inform lawmakers and the public regarding the reasons the grand jury did not indict without undermining the core principles of grand jury secrecy. Each of these categories should have been evaluated independently to determine whether disclosure was warranted.

In *Suffolk County*, the Court of Appeals advised that a court reviewing a petition under § 190.25(4)(a) could potentially “minimize any invasion of secrecy by narrowing [the disclosure] to the essential.” 58 N.Y.2d at 446; *Matter of City of Buffalo*, 57 A.D.2d 47, 49 (1977) (the lower court granted the city’s corporation counsel access to the names of individuals investigated by the grand jury without permitting inspection of the grand jury minutes). Even if the Supreme Court concluded that the Public Advocate did not merit access to the grand jury minutes, it was incumbent upon the court to consider granting a more limited disclosure.

IV. The District Attorney Is Judicially Estopped From Arguing That There Is No Compelling And Particularized Need For Disclosure

Although the court below denied what it characterized as the Public Advocate’s argument to invoke the doctrine of collateral estoppel, JA.55, the Public Advocate never argued that the District Attorney should be collaterally estopped from opposing the Public Advocate’s petition. Rather, the Public Advocate argued that the doctrine of judicial estoppel bars the District Attorney from arguing that there is no compelling and particularized need for disclosure of grand jury materials in this case. JA.119-122.

Before the Public Advocate filed this action, the District Attorney had already sought and obtained a judgment finding that this case presents a compelling and particularized need for disclosure of grand jury materials on the same grounds that he now opposes the Public Advocate's request. *See* JA.65-69. Judicial estoppel forecloses such a reversal in position by a party in a subsequent legal proceeding.

“Generally, judicial estoppel, also known as estoppel against inconsistent positions, will be applied where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his interests have changed.” *Anonymous v. Anonymous*, 137 A.D.2d 739, 741 (2d Dep't 1988); *see also People v. Wesley*, 73 N.Y.2d 351, 370 (1989) (applying “the principle of judicial estoppel” to the effect that “[t]he State simply cannot have it both ways”). Judicial estoppel “precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.” *All Terrain Properties, Inc. v. Hoy*, 265 A.D.2d 87, 93 (1st Dep't 2000) (quotation omitted). “The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.” *Id.* (quotation omitted).

Here, the District Attorney previously argued for, and successfully obtained, disclosure of portions of the grand jury proceedings, including the number of witnesses and exhibits, as well as the duration of the investigation. *See* JA.93, Affirmation by Grady at ¶ 5 (“On December 4, 2014, upon a sealed application for disclosure by District Attorney Donovan, this Court, in recognition of the strong public interest in the case authorized in an unsealed order limited disclosure of the grand jury proceedings”); *see also* JA.65-68. Having succeeded in urging the Court to find that the strong public interest in this case satisfies the compelling and particularized need standard for disclosure, the District Attorney is judicially estopped from reversing course now and contending otherwise. In its prior ruling, the Court explained that the standards for grand jury disclosure were met, observing that “the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness, and impartiality, at a crucial moment in the nation’s history, where public confidence in the evenhanded application of these core values among a diverse citizenry is being questioned.” JA.67.

The District Attorney may disagree with the Public Advocate about which grand jury materials should be disclosed—and, as further detailed below, the District Attorney appears to have misconstrued the scope of Petitioner’s request for public release of grand jury materials. But the threshold question of *whether* there

is compelling and particularized need for disclosure in this extraordinary case was previously established when the District Attorney made and won this argument.

CONCLUSION

The New York City Public Advocate respectfully requests that the decision of the court below be reversed and that her petition for disclosure of the grand jury materials in the Garner matter be granted.

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