

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

LETITIA JAMES, New York City Public Advocate,

Petitioner-Appellant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent-Respondent.

Index No. 2015-2774

ORDER TO SHOW CAUSE

Upon reading the annexed Affirmation of Matthew D. Brinckerhoff, counsel for Petitioner-Appellant Letitia James as Public Advocate for the City of New York, dated April 14, 2015, and the Memorandum of Law in Support of Appellant's Motion for a Preference and for Coordinated Briefing and Argument, and upon all prior proceedings relevant to this action, it is hereby:

ORDERED that the District Attorney, Daniel Donovan, or his representative, shall appear and show cause before the Second Department of the Supreme Court Appellate Division, 45 Monroe Place, Brooklyn, New York 11201 on the 17th Day of April at 9:30 a.m., or as soon thereafter as counsel can be heard, why an order should not be issued:

1. Directing that this appeal, No. 2015-2774, along with three additional appeals from the same consolidated order of the Supreme Court, Richmond County (annexed to the Affirmation of Matthew D. Brinckerhoff as Ex. A) –*New York Civil Liberties Union v. Donovan* (No. 2015-2774), *Legal Aid Society v. Donovan* (No. 2015-2774), *Staten Island Branch of the NAACP, et al. v.*

Donovan, (No. 2015-2774) shall be coordinated and heard on the same schedule; and

2. Granting a preference for the hearing of this and related appeals as follows:
 - (a) Appellants' briefs and records to be filed no later than May 4, 2015; (b) Respondent's brief(s) to be filed no later than May 25, 2015; (c) Appellants' reply briefs to be filed no later than June 1, 2015; (d) argument to be heard in this and related appeals no later than June 25, 2015; and
3. Such other and further relief that may be appropriate; and it is further

ORDERED that service of a copy of this Order and the papers upon which it is based be made on or before the 14th day of April 2015, by email or hand delivery of such papers to the Office of the District Attorney Daniel Donovan, Richmond County, 130 Stuyvesant Place, Staten Island, New York 10301.

ENTER:

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

LETITIA JAMES, New York City Public Advocate,

Petitioner-Appellant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent-Respondent.

Index No. 2015-2774

AFFIRMATION OF MATTHEW D. BRINCKERHOFF

MATTHEW D. BRINCKERHOFF, an attorney duly admitted to practice law in the Courts of the State of New York, and counsel for Petitioner-Appellant Letitia James, Public Advocate for the City of New York hereby affirms under penalty of perjury, the following:

1. I am a member of Emery Celli Brinckerhoff & Abady LLP, counsel for the Public Advocate in this matter. I submit this affirmation in support of the Public Advocate's Order To Show Cause, pursuant to CPLR 5521(a); 22 NYCRR § 670.7(b)(2), seeking an order: (1) directing that this appeal, No. 2015-2774, along with three additional appeals from the same consolidated order of the Supreme Court, Richmond County (attached as Ex. A) – *New York Civil Liberties Union v. Donovan* (No. 2015-02774), *Legal Aid Society v. Donovan* (No. 2015-02774), *Staten Island Branch of the NAACP, et al. v. Donovan*, (No. 2015-02774) shall be coordinated and heard on the same schedule; and (2) granting a preference for the hearing of this and related appeals as follows: (a) Appellants' briefs and records to be filed no later than May 4, 2015; (b) Respondent's brief(s) to be filed no later than May 25, 2015; (c) Appellants' reply

briefs to be filed no later than June 1, 2015; and (d) argument to be heard in this and related appeals no later than June 25, 2015.

2. Counsel for the Respondent, Richmond County District Attorney Daniel Donovan, has been contacted regarding this application and does not oppose the request for a calendar preference.

3. As required by 22 NYCRR § 670.5(d), attached as Ex. A is the Public Advocate's Notice of Appeal and the final decision and order being appealed.

4. Attached as Ex. B is the Affirmation of Corey Stoughton.

5. Attached as Ex. C is the Affirmation of Natalie Rea.

6. Attached as Ex. D is the Affirmation of James I. Meyerson.

7. Based on the foregoing, the Public Advocate respectfully requests this Court to grant her motion for coordinated hearing, along with the related appeals, and a calendar preference, pursuant to CPLR 5521(a) and 22 NYCRR § 670.7(b)(2).

8. Counsel for the Public Advocate may be contacted via fax at (212) 763-5001, via e-mail at mbrinckerhoff@ecbalaw.com or odanjuma@ecbalaw.com, and via phone at 212-763-5000.

9. No prior application has been made for the relief sought by this motion.

Dated: April 14, 2015
New York, New York


Matthew D. Brinckerhoff

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

LETITIA JAMES, New York City Public
Advocate,

Petitioner-Applicant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

Index No. 080304-14

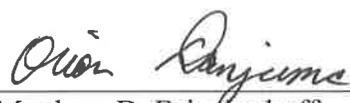
NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioners hereby appeal to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department from the Decision and Order of Justice Garnett, in the above-captioned action, dated March 19, 2015, duly entered in the office of the Richmond County Clerk on March 19, 2015, and served with a Notice of Entry by U.S. mail on April 1, 2015.

Petitioners appeal from the whole Decision and Order, and from all parts thereto, both on the law and on the facts. Annexed hereto is a completed Request for Appellate Division Intervention - Civil (Form A) and a copy of the Decision and Order appealed from.

Dated: April 2, 2015
New York, New York

EMERY CELLI BRINCKERHOFF &
ABADY LLP

By: 
Matthew D. Brinckerhoff
Orion Danjuma

600 Fifth Ave., 10th Floor

New York, New York 10020
(212) 763-5000

Jennifer Levy, Esq
General Counsel - Litigation
New York City Public Advocate
1 Centre Street, 15th Floor North
New York, NY | 10007
(212) 669-2175

*Attorneys for New York City Public
Advocate Letitia James*

To: Daniel M. Donovan, Jr.
Richmond County District Attorney
Attention: Anne Grady, Esq.
130 Stuyvesant Place
Staten Island, NY 10301
(718) 876-6300

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

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

<p>Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.</p> <p>In the Matter of the Investigation into the Death of Eric Garner, LETITIA JAMES, New York City Public Advocate, Petitioner-Applicant, -against- DANIEL DONOVAN, Richmond County District Attorney, Respondent</p>	<p style="text-align: center; background-color: #cccccc;">For Court of Original Instance</p> <hr/> <p style="text-align: center;">Date Notice of Appeal Filed</p>
<p style="text-align: center; background-color: #cccccc;">For Appellate Division</p>	

<p>Case Type</p> <input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input checked="" type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<p>Filing Type</p> <input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR 5704 Review
<p>Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.</p>			
<p>A. Administrative Review</p> <input type="checkbox"/> 1 Freedom of Information Law <input type="checkbox"/> 2 Human Rights <input type="checkbox"/> 3 Licenses <input type="checkbox"/> 4 Public Employment <input type="checkbox"/> 5 Social Services <input type="checkbox"/> 6 Other	<p>D. Domestic Relations</p> <input type="checkbox"/> 1 Adoption <input type="checkbox"/> 2 Attorney's Fees <input type="checkbox"/> 3 Children - Support <input type="checkbox"/> 4 Children - Custody/Visitation <input type="checkbox"/> 5 Children - Terminate Parental Rights <input type="checkbox"/> 6 Children - Abuse/Neglect <input type="checkbox"/> 7 Children - JD/PINS <input type="checkbox"/> 8 Equitable Distribution <input type="checkbox"/> 9 Exclusive Occupancy of Residence <input type="checkbox"/> 10 Expert's Fees <input type="checkbox"/> 11 Maintenance/Alimony <input type="checkbox"/> 12 Marital Status <input type="checkbox"/> 13 Paternity <input type="checkbox"/> 14 Spousal Support <input type="checkbox"/> 15 Other	<p>F. Prisoners</p> <input type="checkbox"/> 1 Discipline <input type="checkbox"/> 2 Jail Time Calculation <input type="checkbox"/> 3 Parole <input type="checkbox"/> 4 Other	<p>L. Torts</p> <input type="checkbox"/> 1 Assault, Battery, False Imprisonment <input type="checkbox"/> 2 Conversion <input type="checkbox"/> 3 Defamation <input type="checkbox"/> 4 Fraud <input type="checkbox"/> 5 Intentional Infliction of Emotional Distress <input type="checkbox"/> 6 Interference with Contract <input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process <input type="checkbox"/> 8 Malpractice <input type="checkbox"/> 9 Negligence <input type="checkbox"/> 10 Nuisance <input type="checkbox"/> 11 Products Liability <input type="checkbox"/> 12 Strict Liability <input type="checkbox"/> 13 Trespass and/or Waste <input type="checkbox"/> 14 Other
<p>B. Business & Other Relationships</p> <input type="checkbox"/> 1 Partnership/Joint Venture <input type="checkbox"/> 2 Business <input type="checkbox"/> 3 Religious <input type="checkbox"/> 4 Not-for-Profit <input type="checkbox"/> 5 Other	<p>E. Miscellaneous</p> <input type="checkbox"/> 1 Constructive Trust <input type="checkbox"/> 2 Debtor & Creditor <input type="checkbox"/> 3 Declaratory Judgment <input type="checkbox"/> 4 Election Law <input type="checkbox"/> 5 Notice of Claim <input checked="" type="checkbox"/> 6 Other	<p>G. Real Property</p> <input type="checkbox"/> 1 Condemnation <input type="checkbox"/> 2 Determine Title <input type="checkbox"/> 3 Easements <input type="checkbox"/> 4 Environmental <input type="checkbox"/> 5 Liens <input type="checkbox"/> 6 Mortgages <input type="checkbox"/> 7 Partition <input type="checkbox"/> 8 Rent <input type="checkbox"/> 9 Taxation <input type="checkbox"/> 10 Zoning <input type="checkbox"/> 11 Other	<p>H. Statutory</p> <input type="checkbox"/> 1 City of Mount Vernon Charter §§ 120, 127-f, or 129 <input type="checkbox"/> 2 Eminent Domain Procedure Law § 207 <input type="checkbox"/> 3 General Municipal Law § 712 <input type="checkbox"/> 4 Labor Law § 220 <input type="checkbox"/> 5 Public Service Law §§ 128 or 170 <input checked="" type="checkbox"/> 6 Other
<p>C. Contracts</p> <input type="checkbox"/> 1 Brokerage <input type="checkbox"/> 2 Commercial Paper <input type="checkbox"/> 3 Construction <input type="checkbox"/> 4 Employment <input type="checkbox"/> 5 Insurance <input type="checkbox"/> 6 Real Property <input type="checkbox"/> 7 Sales <input type="checkbox"/> 8 Secured <input type="checkbox"/> 9 Other	<p>I. Wills & Estates</p> <input type="checkbox"/> 1 Accounting <input type="checkbox"/> 2 Discovery <input type="checkbox"/> 3 Probate/Administration <input type="checkbox"/> 4 Trusts <input type="checkbox"/> 5 Other		

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court:

County:

Dated:

Entered:

Judge (name in full):

Index No.:

Stage: Interlocutory Final Post-Final

Trial: Yes No If Yes: Jury Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? Yes No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? Yes No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus

Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal from each and every portion of the Decision and Order denying movant's petition to unseal certain grand jury materials related to the investigation into the death of Eric Garner.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

1. Did the court below misconstrue and misapply the legal standard for unsealing grand jury materials?
2. Did the court below err in determining that movant had not met the threshold standard for unsealing the requested materials?
3. Did the court below misconstrue the role of the Public Advocate under the New York City Charter and the significance of the requested materials for official investigations and proposals?

Issues Continued:

- 4. Did the court below err in failing to independently evaluate different categories of requested grand jury materials, including non-testimonial information?
- 5. Was the compelling and particularized need for public access to grand jury materials previously established via the Richmond County District Attorney's prior successful petition to unseal?
- 6. Did the court below err in refusing to recognize that the Richmond County District Attorney was judicially estopped from arguing that there was no compelling and particularized need for unsealing the Garner grand jury materials ?

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Letitia James	Petitioner-Applicant	Petitioner-Appellant
2	Daniel Donovan	Respondent	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Matthew D. Brinckerhoff/Emery Celli Brinckerhoff & Abady LLP

Address: 600 Fifth Avenue, 10th Floor

City: New York State: NY Zip: 10020 Telephone No.: (212) 763-5000

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Orion Danjuma/Emery Celi Brinckerhoff 7 Abady LLP

Address: 600 Fifth Avenue, 10th Floor

City: New York State: NY Zip: 10020 Telephone No.: (212) 763-5000

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Jennifer Levy/New York City Public Advocate

Address: 1 Centre Street, 15th Floor North

City: New York State: NY Zip: 10020 Telephone No.: (212) 763-5000

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Anne Grady/Richmond County District Attorney

Address: 130 Stuyvesant Place

City: Staten Island State: NY Zip: 10301 Telephone No.: (718) 876-6300

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

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.

P R E S E N T:

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 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.

E N T E R


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 DEPARTMENT

LETITIA JAMES, New York City Public Advocate,

Petitioner-Appellant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent-Respondent.

Index No. 2015-2774

**AFFIRMATION OF COREY STOUGHTON IN SUPPORT OF MOTION FOR
PREFERENCE**

COREY STOUGHTON, an attorney duly admitted to practice law in the Courts of the State of New York, and counsel for Petitioner-Appellant New York Civil Liberties Union in the related case of *New York Civil Liberties Union v. Donovan* (No. 2015-02774), hereby affirms under penalty of perjury, the following:

1. I submit this affirmation in support of the Public Advocate's Order To Show Cause, pursuant to CPLR 5521(a) and 22 NYCRR § 670.7(b)(2), seeking an order: (1) directing that the above-captioned appeal be coordinated and heard on the same schedule as the related appeal in *New York Civil Liberties Union v. Donovan* (No. 2015-02774) as well as the additional related cases appealed by the Legal Aid Society and the Staten Island Branch of the NAACP; and (2) granting a preference for the hearing all those appeals as follows: (a) Appellants' briefs and records to be filed no later than May 4, 2015; (b) Respondent's brief(s) to be filed no later than May 25, 2015; (c) Appellants' reply briefs to be filed no later than June 1, 2015; and (d) argument to be heard in this and related appeals no later than June 26, 2015.

2. The New York Civil Liberties Union joins this motion for the reasons stated in the Memorandum of Law submitted by the Public Advocate in support of her motion.

Dated: April 14, 2015
New York, New York

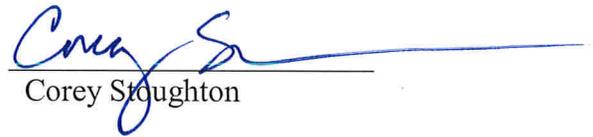

Corey Stoughton

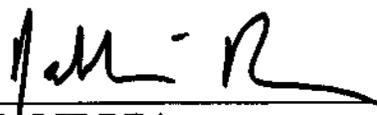
Exhibit C

record of the grand jury proceedings related to the investigation into the death of Eric Garner. In the Matter of the Investigation into the death of Eric Garner v. Daniel Donovan, Index Nos. 080304/2014, 080296/2014, 080307/2014, and 080009/2015.

3. The motion was denied by Decision and Order of the Supreme Court, Richmond County (Garnett, J.), dated and entered March 19, 2015, and The Legal Aid Society, along with the petitioners listed above, is appealing that decision.

WHEREFORE, and for the reasons stated in the papers filed by Letitia James, the New York City Public Advocate, the Legal Aid Society joins in her request for a calendar preference.

Dated: New York, New York
April 13, 2015



NATALIE REA
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Exhibit D

IN THE SUPREME COURT OF THE STATE NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

IN THE MATTER OF THE INVESTIGATION
INTO THE DEATH OF ERIC GARNER,

LETITIA JAMES, New York City Public
Advocates,

AD No. 2015-02774

PETITIONER-APPELLANT

-against-

DANIEL DONOVAN, Richmond County
District Attorney,

RESPONDENT-APPELLEE

AFFIRMATION OF ATTORNEY JAMES MEYERSON ON BEHALF OF THE PETITIONERS-APPELLANTS 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 REFERRED TO COLLECTIVELY AS THE "NAACP") TO JOIN IN THE MOTION OF PETITIONER-APPELLANT LETITIA JAMES, NEW YORK CITY PUBLIC ADVOCATE, FOR A PREFERENCE

James I. Meyerson, being duly admitted to practice law in and before the Courts of the State of New York among others and being duly aware of the penalties for perjury, affirms under penalty of law:

1. I am the attorney for the Petitioners-Appellants 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 referred to collectively as the "NAACP").

2. I am familiar with, and I have participated in, the proceedings that have transpired in the Supreme Court of the State of New York, the County of Richmond with respect to

efforts by the Petitioners-Appellants NAACP and other independently standing parties¹ in those proceedings to have unsealed the secret “specially impaneled” Richmond County grand jury materials related to the July 17, 2014 death of Eric Garner.

3. The NAACP commenced a proceeding in the Supreme Court of the State of New York, Richmond County by way of an Order to Show Cause signed on January 9, 2015 by the Honorable Charles M. Troia, Justice of the Supreme Court of the State of New York, County of Richmond.²

4. Arguments were heard in the above matter and the other identified matters on February 5, 2015 before the Honorable William Garnett, Justice of the Supreme Court of the State of New York, County of Richmond.³

5. On March 19, 2015, the Honorable William Garnett issued a Decision and Order denying the relief sought by the Petitioners-Appellants NAACP and the relief being sought by each of the other identified independently standing and participating parties in the proceedings in the Court below.⁴

¹ Those other party Petitioners are: Letitia James, New York City Public Advocate; The Legal Aid Society; The New York Civil Liberties Union; and NYP Holdings, Inc. a/k/a New York Post. Each of the other independent proceedings instituted in the Court below were commended by Orders to Show Cause. Each of those matters was instituted prior to the commencement of the proceedings instituted by the Petitioners-Appellants NAACP.

Each of the other matters was assigned its own docket number in the Court below independent of the docket number which was assigned to the Order to Show Cause of the Petitioners-Appellants NAACP and independent of the docket number assigned to each of the other proceedings that was commenced.

² The docket number assigned to the matter in the Court below was 080009/21015.

³ The several matters were never formally consolidated by the Court below although they were related in virtually all substantive respects although each brought different perspectives to their respective positions based on the interests of the respective parties. In some practical matter they were *de facto* consolidated even if they were not formally consolidated.

6. The afore-described Decision and Order was entered with the Clerk of the Court on March 19, 2015. The Decision and Order was issued and entered with a caption identifying each of the independent respective matters (each with its own identifying docket number).

7. On April 1, 2015, the Petitioners-Appellants herein filed and served both a Notice of Entry of the March 19, 2015 Decision and Order and a Notice of Appeal to this Court from that Decision and Order.

8. I am aware that, save for NYP Holdings, Inc. a/k/a New York Post, each of the other independent standing parties in the Court below has filed a Notice of Entry and a Notice of Appeal with respect to the March 19, 2015 Decision and Order.⁵

9. The Petitioners-Appellants NAACP seek to join in the Motion filed with this Court by the Petitioner-Appellant Letitia James, New York City Advocate, for a preference;⁶

⁴ Unlike other of the independently standing parties in the collective proceedings held in the Court below, the Petitioners-Appellants NAACP sought to have Justice William Garnett disqualify himself from presiding and ruling on their matter; and to have him refer the matter to the Presiding Justice of this Court for the re-assignment of the case to another Justice of the Supreme Court within the various counties that comprise the City of New York. The NAACP also sought to have Respondent-Appellee Richmond County District Attorney Daniel Donovan's opposition to the unsealing of the grand jury materials stricken; and, also, to have Richmond County District Attorney Daniel Donovan disqualified from further participation in the matter; and to have the Governor of the State of New York appoint a special counsel to appear and to take a position respecting the Petitioners-Appellants NAACP request for the unsealing of the grand jury materials.

Finally and unlike the other independently standing Petitioners-Appellants, the Petitioners-Appellants NAACP sought to have information unsealed (if at all possible) that would allow them and other of the participants to ascertain whether any of the individuals, who sat on the "specially impaneled" grand jury related to the death of Eric Garner as a result of conduct of several New York City police officers, were retired New York City police officers and/or members of the families or friends of retired or active New York City police officers (without disclosing specific identities of those individuals).

⁵It is understood that the respective appeals to this Court have been assigned the same Appellate Division number by this Court.

and for *all* of the reasons described and set forth and advanced by the Petitioner-Appellant Letitia James.⁷

10. The Petitioners-Appellants NAACP believe that it is in their interest and in the public's interest that this Court grant the preference being sought in the Motion that has been filed by Petitioner-Appellant Letitia James, New York City Public Advocate.

⁶ The NAACP Petitioners-Appellants refer to and incorporate by reference all of the submissions to this Court related to the Motion and in support of the Motion.

⁷ In her moving papers, Petitioner-Appellant Letitia James has advanced as one of the several reasons that the preference should be granted that "...the resolution of this appeal will have a direct bearing on pending legislation and policy reform.

In their submissions to the Court below and unlike the other parties in those independent proceedings, the Petitioners-Appellants NAACP argued that, in addition to the relevance of the unsealing materials to the public discussion and public debate and proposed legislation arising out of the death of Eric Garner and the grand jury proceedings relative thereto, the unsealing of the materials were relevant and necessary to a December 17, 2014 Grievance which had been filed by the Petitioners-Appellants NAACP against Richmond County District Attorney Daniel Donovan with the State of New York Grievance Committee of the Second, Eleventh and Thirteenth Districts regarding the District Attorney's participation in the grand jury process under the Rules of Professional Conduct.

That matter is now pending before the Presiding Justice of this Court from the January 23, 2015 and March 17, 2015 letter-rulings of Grievance Committee Chief Counsel Diana Maxfield Kearse that the Grievance Committee *was not* an "appropriate forum" and *did not have jurisdiction* to consider the Grievance of the Petitioners-Appellants NAACP.

Thus and in addition to the direct bearing that the release of the grand jury materials will have on the public debate and pending legislation, the release of the grand jury materials potentially will have a direct bearing on the matter now pending before the Presiding Justice of the Court; and, therefore and in addition to all of the reasons set forth by Petitioner-Appellant Letitia James, represents still a further justification for the reference.

Wherefore and in light of the foregoing, the Petitioners-Appellants NAACP request that the Court permit the Petitioners-Appellants NAACP join the Motion of Petitioner-Appellant Letitia James for a preference in this matter (and for the reasons set forth therein and, as well, in this Affirmation and in the submissions by the Petitioners-Appellants NAACP in the Court below); and that the Court grant the requested preference.

DATED: New York, New York
April 14, 2015

Respectfully submitted,



/s/ James I. Meyerson

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