

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)

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PRELIMINARY STATEMENT

The basis for the Public Advocate's petition to inspect grand jury materials from the investigation into the death of Eric Garner is simple and compelling. The public needs to know whether something went terribly wrong in this particular grand jury proceeding, as is almost universally assumed based on very limited concrete information, and, if so, whether specific legislation, investigation, or policy change will help remedy the problem and ensure the integrity of the system. This is a paradigmatic scenario where grand jury materials should be disclosed. Without more information about the Garner proceeding, the public and public officials are left to tinker with the essential machinery of the grand jury in the dark, based on an untested presumption that something went gravely awry, and even, if that presumption is proved correct, without the details necessary to craft a legislative response tailored to actual rather than perceived problems.

The public interest here is compelling, particularized, and indeed extraordinary. At issue is the fundamental operation of the State's grand jury system and the role of local district attorneys in cases of alleged police misconduct. In addition to the Public Advocate, the Governor, state legislators, and various New York City officials have advanced sweeping legislation and policy proposals that are a direct response to concerns prompted by the Garner grand jury proceeding. Legislators representing nearly 20 million New Yorkers, who want to

legislate responsibly, have submitted an amicus brief urging that this Court grant the Public Advocate's petition. *See* Br. Amici Curiae for the Black, Puerto Rican, Hispanic, and Asian Legislative Caucus of the New York State Legislature (“Legislative Caucus Br.”).

Understanding as much as possible about what occurred in the Garner grand jury proceeding is essential to every aspect of the far-reaching reforms under consideration. The public need for access is compelling because it is based on need to evaluate and determine whether systemic reform of the State's criminal justice system is warranted, and if so, to ensure that any such reform is appropriate targeted to address actual, not just perceived, problems. The public need is particularized because the many reform proposals currently under consideration are all direct responses to the widespread conclusion –based on nothing more than two videos, the return of a no true bill determination, and a skeletal outline of the length of that proceeding and number witnesses – that the conclusion of the Grand Jury cannot be reconciled with a fair process. The nature of what occurred in the grand jury proceeding will directly impact policymakers' positions on which measures should be adopted or whether there should be any change to the status quo at all. There is simply no substitute for the grand jury materials themselves. The *Garner* case, not some other case and not some generalized desire or perceived need for reform, has been the catalyst for every proposal. Only the

Garner grand jury materials can provide crucial information and insight to both test the presumption and ensure that any responses are appropriately balanced and targeted.

The District Attorney's brief evades the central legal questions in this appeal. Like the court below, the District Attorney has failed to join issues and address the actual compelling and particularized needs advanced by the Public Advocate. First, Respondent has wholly disregarded the diverse legislation that has arisen in the wake of the grand jury's determination and the importance of the grand jury materials to these unprecedented proposals for reform. He repeats the same error made by the Supreme Court in presuming that the Public Advocate must show some sort of specific, personal stake in the grand jury minutes in order to demonstrate a compelling and particularized need. Contrary to Respondent's contentions, this novel standard does not derive from the case law; it contradicts the relevant precedent. Second, the District Attorney sidesteps the Public Advocate's investigatory authority under the New York City charter, noting, apropos of nothing, that the Public Advocate does not have direct authority over the criminal justice system. Like the court below, however, Respondent misconstrues the Public Advocate's authority to conduct investigations and disregards the binding precedent holding that a petitioner need not have authority over criminal justice matters in order to obtain grand jury materials.

The Public Advocate and District Attorney do, however, agree that the Public Advocate sought four limited categories of information that should be disclosed to the public: (1) all grand jury instructions, (2) all questions by grand jurors, (3) the testimony of Officer Pantaleo, and (4) all non-testimonial evidence presented to the grand jury. The court below failed to even address or acknowledge the limited nature of the disclosure sought. The District Attorney, however, “concede[s that] those suggested limitations pose less risk to the future effectiveness of grand juries.” Resp.’s Br. at 53.

Despite this agreement, a troubling double standard underlies the District Attorney’s brief. Respondent argues that, as District Attorney, he has special standing and should be the exclusive arbiter of when and whether to move for disclosure of grand jury materials. This argument finds no support in the case law and betrays a profound misunderstanding of the precedent on grand jury disclosure. The District Attorney attempts reconcile the lower court’s decision to grant the District Attorneys’ petition and its finding that there is a compelling and particularized need for disclosure, with the same court’s decision denying the Public Advocate’s application. It cannot be done.

Astonishingly, the District Attorney contends that “the only segment of the public” with a legitimate interest in release of grand jury materials “are the people of Richmond County,” the District Attorney’s political constituency. Resp.’s . Br.

at 25. In the District Attorney's view, the citizens of Richmond County "are not represented by any of the Applicants" including the Public Advocate. *Id.* This position is as regrettable as it is shocking. The Public Advocate was elected by the entire electorate of New York City, including Richmond County, and serves as a *direct representative* of all the citizens of New York City, including Richmond County. Even setting aside this rather basic error, there is no legal support of any kind that suggests that the pertinent public interest is somehow cabined to the county where a grand jury investigation took place. To the contrary, the cases are replete with grand jury disclosures granted on matters of broad statewide concern similar to the grand jury and police practices reform catalyzed by this case. *See People v. Di Napoli*, 27 N.Y.2d 229, 233-34 (1970) (ordering disclosure of grand jury minutes to assist Public Service Commission in setting statewide utility rates).

Finally, the District Attorney believes that disclosure of grand jury materials is unnecessary because, in his view, the Public Advocate and other officials have already made up their mind that the grand jury was wrong. This misses the point. Contrary to the District Attorney's intimations, the Public Advocate does not seek to confirm her belief that the Garner grand jury failed. Instead, the Public Advocate seeks to test the nearly universal belief that the grand jury failed, and if the materials ultimately support that view, to ensure that any legislative or policy

reforms are appropriately tailored and targeted to address the reason for that failure.

It goes without saying that the Garner grand jury proceeding was highly atypical. Most grand jury investigations do not continue for nine weeks. Nor do grand jurors traditionally hear from fifty witnesses or review five dozen exhibits when considering whether to return an indictment. While this all raises serious concerns, it does not, standing alone, allow for the kind of confident response and targeted reform that will benefit the entire system. Public officials *cannot* reach an informed decision about what happened and what reform measures are appropriate because they do not know what occurred. In the absence of transparency, public officials are put in the position of having to assume a conflict of interest when local prosecutors investigate misconduct by police.

The Public Advocate has offered a pragmatic approach to the release of grand jury minutes in this exceptionally important case. She seeks public disclosure of four limited categories of information that do not interfere with central rationale for grand jury secrecy. Any request to access grand jury materials will present competing interests that must be balanced. But denying relief outright would set a dangerous precedent that policymakers cannot examine grand jury materials when they are attempting to reform the grand jury system itself. Such a decision would close the door to critical and compelling information necessary for

legislative and administrative reform when that information is most needed. The denial of the Public Advocate's petition should be reversed.

ARGUMENT

I. JUSTICE GARNETT ERRED BY DISREGARDING THE COMPELLING AND PARTICULARIZED NEED FOR DISCLOSURE ADVANCED BY THE PUBLIC ADVOCATE

A. The Public Advocate Has Established a Particularized Need for Disclosure Well Beyond Generalized Public Interest

The lower court improperly denied the Public Advocate's application because it equated this case with those where petitioners sought grand jury minutes solely to inform the public or address public outcry. Justice Garnett based his denial of the petitions on the analysis in three cases: *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436 (1983) ("*Suffolk County II*") (disclosure of grand jury materials denied for RICO lawsuit to address alleged corruption), *Matter of Hynes*, 179 A.D.2d 7 60 (2d Dep't 1992) (disclosure of grand jury materials denied in case where vehicular homicide of young boy sparked community riots), and *In re Carey*, 45 Misc. 3d 187 (Sup. Ct., Wyoming Cnty. 2014) (disclosure of grand jury materials denied where Attorney General sought to release unredacted report of grand jury investigation into 1971 Attica prison riots). *See* JA.13-15. The District Attorney relies on the same cases in his brief. Resp.'s Br. at 32-36.

In each case, the court concluded that while there was a generalized public interest in the case, the petitioner had failed to demonstrate a particularized need

for access to the grand jury materials. *See Suffolk County II*, 58 N.Y.2d at 445 (“a public interest is to be found in the county’s efforts to recover civil damages from those who allegedly defrauded its taxpayers . . . [b]ut, absent was anything to indicate that the Grand Jury minutes were essential to the pursuit of this interest.”); *Hynes*, 179 A.D.2d at 760 (holding that goal of “curb[ing] the community unrest which erupted when the Grand Jury failed to indict the driver of the automobile” was insufficient on its own to establish a compelling or particularized need); *In re Carey*, 45 Misc. 3d at 210-11 (“It may well be that the release of the grand jury evidence . . . might add to the public’s understanding of the course of the Attica investigation and prosecution. . . . Those observations, however, do not by themselves override the law’s general policy of preserving grand jury secrecy.”).

The District Attorney goes so far as to suggest that this case presents “circumstances identical to those” in *Hynes*. Opp. Resp.’s Br. at 34. Justice Garnett did the same: “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.” JA.17.

Justice Garnett’s analysis is invalid because the Public Advocate has not “merely asked for disclosure for distribution to the public.” *Suffolk County, Hynes*, and *In re Carey* do not control because the Public Advocate’s petition is not simply intended to satisfy public curiosity or attention to this case. Nor does she suggest

that the unsealing of grand jury materials should turn on whether a case is sufficiently high profile. Instead, the Public Advocate has identified a specific set of compelling and particularized needs for disclosure that go well beyond generalized public interest. Information from this grand jury proceeding is needed to evaluate and inform pending legislation, conduct official investigations, and reform police practices, all of which are a direct outgrowth of the Garner grand jury's determination. None of the petitioners in *Suffolk County*, *Hynes*, or *In re Carey* offered anything resembling such a showing in support of their application for disclosure. The authority the lower court and the District Attorney rely upon simply does not apply to the Public Advocate's application.

The District Attorney believes that grand jury disclosure in this case is unwarranted because, "the public's interest in this case is certainly no greater than that implicated –and found wanting –in *Suffolk County*'s would-be RICO lawsuit against corrupt officials." Resp.'s. Br. at 33. "Nor," he contends, "are the public interest arguments for disclosure more compelling than those found unpersuasive by the Fourth Department in *Matter of Carey*." *Id.* The District Attorney is wrong. The petitions for disclosure were not denied in *Suffolk County* and *Carey* for lack of a sufficiently compelling public interest. To the contrary, the Second Department's *Suffolk County* decision expressly determined that, "[u]ndoubtedly, the county demonstrated that a public interest was involved in its efforts to obtain

civil damages from those who had allegedly defrauded the county.” *Matter of District Attorney of Suffolk County*, 86 A.D.2d 294, 299 (2d Dep’t 1982) (“*Suffolk County I*”), *aff’d*, 58 N.Y.2d 436, 448 (1983). “More than this, however, was not shown.” *Id.*; *see also Matter of Carey*, 68 A.D.2d 220, 229 (4th Dep’t 1979) (“public’s access to knowledge and the confidence it has in the conduct of public officials are matters of first importance in a democratic society”).

Strong public interest in a grand jury proceeding is a necessary condition but not a sufficient condition for release of grand jury materials. The courts in *Suffolk County II*, *Hynes*, and *In Re Carey* concluded that the petitioners had met the first prong of the test: stating a compelling public interest. Their applications failed because they did not identify any particularized need. *See Suffolk County II*, 58 N.Y.2d 436 at 445 (“[A]bsent was anything to indicate that the Grand Jury minutes were essential to the pursuit of [the identified public] interest”). Justice Garnett erred because he ignored the particularized needs highlighted by the Public Advocate and concluded erroneously that she had provided none. This Court should reverse.

B. There is a Compelling and Particularized Need for Disclosure Because the Content of the Grand Jury Materials Will Directly Affect Legislative Proposals for Reform.

The Public Advocate’s petition should have been granted because information about the Garner grand jury proceeding is of direct and critical

importance to pending legislative measures that would dramatically alter New York's grand jury system. In her opening brief, the Public Advocate provided a summary of proposed legislation under consideration. *See* Public Advocate Br. at 12-16. An *amicus* brief filed by state legislators in support of the Public Advocate's appeal emphasizes that the compelling and particularized need for access to the Garner grand jury materials "is not speculative; rather, it is an actually present necessity." Legislative Caucus Br. at 5.

i. The need for disclosure is compelling.

The proposed statutory reforms handily satisfy, virtually by definition, the compelling public interest prong of the disclosure test. The Garner grand jury materials are sought to aid the now ongoing process of grand jury reform that is itself a direct response to the work of the Garner grand jury. Although there is no case that has considered this precise circumstance, that is because *no court* has ever confronted an application for disclosure in aid of responsibly evaluating the adequacy of *the grand jury system itself*. In *Suffolk County I*, the Second Department highlighted "legislative investigation" as an illustrative example of a proper basis supporting an application for disclosure of grand jury materials. 86 A.D.2d at 299.

In the seminal *People v. Di Napoli* case, the Public Service Commission was granted access to grand jury materials to determine appropriate statewide rates for

public utilities. 27 N.Y.2d 229, 238 (1970). *Di Napoli* stands, in part, for the proposition that broad public policy reform represents a compelling public interest favoring disclosure of grand jury materials. The Court of Appeals lifted the veil of grand jury secrecy because the “charges to consumers” for public utilities “depend[ed] upon” the content of sealed grand jury minutes. *Id.* at 235. Here too, the need for – and the content of – grand jury reform proposals depends upon information from the Garner grand jury proceeding.

The Court of Appeals has also permitted a petitioner to pierce the veil of grand jury secrecy when a District Attorney was charged with “wrongfully protect[ing] the accused whom it was his duty to prosecute.” *People ex rel. Hirschberg v. Bd. of Sup'rs of Orange Cnty.*, 251 N.Y. 156, 167 (1929). A central concern prompted by the Garner grand jury proceeding is whether there is an inherent conflict of interest when prosecutors investigate police officers with whom they cooperate to secure convictions. Public officials have a legitimate concern that prosecutors may conduct grand jury investigations that shield law enforcement officers from liability. While *Hirschberg* involves facts that are distinct from this case, *Hirschberg* establishes that a District Attorney “cannot seek shelter behind that rule of secrecy to prevent inquiry into” the performance of his or her duties. *Id.* at 170. *See also Application of FOJP Serv. Corp.*, 119 Misc. 2d 287, 292 (Sup. Ct. 1983) (“It is manifest that there is a substantial public interest”

in investigating allegations of corruption because the “very integrity of the judicial process and advocacy system is involved.”).

ii. The need for disclosure is particularized.

In order to establish a particularized need for access to grand jury materials, a petitioner should “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.” *Suffolk I*, 86 A.D.2d at 299. The Public Advocate has presented that showing here.

As detailed in the Public Advocate’s opening brief and the Amicus Brief filed by the Legislative Caucus, a broad array of proposals aimed at grand jury reform have been stimulated in the wake of the grand jury’s determination in the Eric Garner case. *See, e.g.*, Legislative Caucus Br. at 6-9. While there are many competing and overlapping initiatives, prospective legislation falls into three rough categories: (1) appointment of special prosecutors to conduct a grand jury investigation when police officers kill or injure civilians while on duty; (2) increased judicial oversight of grand jury proceedings in cases where an officer has killed or assaulted a civilian, and (3) greater transparency and easier access to grand jury minutes in certain cases.

The Garner grand jury materials are critical to informing public officials which proposals, if any, should be adopted because the decision of the Garner grand jury is the undeniable catalyst for each and every proposal:

- The jury charges and instructions

The jury charge and all general instructions provided by prosecutors to the grand jury are crucial to evaluating whether there was a conflict of interest or whether increased judicial oversight of grand jury proceedings is warranted. If prosecutors failed to advise the jury of the elements of criminally negligent homicide, this could be indicative of an effort to shield the accused officer from criminal liability. That information would support proposals to establish a special prosecutor to investigate alleged offenses by police officers. If the charge and instructions show that the grand jury received erroneous instructions on the law, that information would support proposals that a judge be physically present and preside over the grand jury investigation in cases involving a law enforcement officer killing or assaulting a civilian.

- Non-testimonial evidence

The exhibits and non-testimonial evidence are similarly critical to the evaluation of legislative reform. This case is unique in that a videotape of Eric Garner death has been widely disseminated. In order to understand how

the grand jury reached its determination not to return an indictment, lawmakers must have access to any other video, exhibits, or demonstratives that were presented. This non-testimonial evidence is needed to give context to the videotape that is already public. If the grand jury considered additional evidence that supported Officer Pantaleo's innocence, public officials need to know before legislation is enacted.

- Officer Pantaleo's testimony

Officer Pantaleo testified on his own behalf at length. He has stated publicly that he wants the public to know what took place in the grand jury proceeding. If the exculpatory evidence in this case came primarily from Officer Pantaleo, that would impact legislative proposals to establish a special prosecutor.

- Questions by grand jurors

Because much of the proposed reform focuses on special prosecutors, it is essential for public officials to know what role the grand jurors themselves played in the investigation. Did they independently request that individuals testify on behalf of the accused or did they passively accept the presentment offered by prosecutors? The questions asked by the grand jury in the Garner proceeding will be essential to evaluating proposals that grand jurors write reports summarizing their reasoning when they do not return an indictment.

- Grand jury testimony and minutes

It is essential for the Public Advocate to review the grand jury minutes themselves to determine the propriety of proposed legislative reform. In evaluating whether a special prosecutor is warranted, it is critical to know whether exculpatory evidence was presented to the grand jury and what amount of the presentation focused on exculpation. What role did police officers play in the testimony provided to the grand jury? Under what circumstances were the officers granted immunity? The Public Advocate would need to review the testimony to determine if the grand jury received accurate information about police practices on excessive force or the use of chokeholds to detain suspects. This information is essential to determining whether something went wrong in the Garner investigation and how policymakers should craft their reform efforts.

These reasons vastly exceeds the perfunctory showing offered by the district attorney in the *Suffolk County* cases. See *Suffolk County II*, Matter of Dist. Attorney of Suffolk Cnty., 58 N.Y.2d at 441 (“Supporting this application in essence was no more than [the district attorney’s] 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.’”). The need for public disclosure here is compelling, particularized, and

extraordinary. The court below should be reversed. The Public Advocate's petition should be granted.

C. Justice Garnett Erred By Imposing a Novel Requirement That a Petitioner Must Have a Unique Stake in Disclosure

In order to overcome the presumption of grand jury secrecy, the Public Advocate must demonstrate how disclosure will “advance the actions or measures taken . . . *to insure that the public interest has been, or will be, served.*” *Suffolk I*, 86 A.D.2d at 299 (emphasis added). The court below mistakenly concluded that a petitioner must establish a sort of unique standing and prove that she “has a greater stake in the disclosure than does any other citizen.” JA.11. The Supreme Court appears to have disregarded the legislative measures identified by the Public Advocate on the grounds that she cannot directly enact statewide legislation. The District Attorney took the same position, arguing that “[t]he role of the New York City Public Advocate in opining on such legislation is surely no greater than that of others who are already actively involved in the debate.” Opp. Br. at 43.

Justice Garnett and the District Attorney's analysis is incorrect; a party need not demonstrate a greater, personalized stake in disclosure. The case law confirms that the relevant interest is not the party's unique stake but the public interest in disclosure. *See, e.g., Di Napoli*, (“[T]here was ample basis for the conclusion that the inspection *will serve the public interest* and that the reasons for the rule of secrecy no longer exist.”) (emphasis added); *Suffolk I*, 86 A.D.2d at 299

(petitioners must meet the compelling and particularized need test “*to insure that the public interest has been, or will be, served*”) (emphasis added).

The District Attorney cites *Melendez v. City of New York*, which stated that the decision to grant a petition for disclosure of grand jury materials “may turn on who the applicant is, what he seeks and the purpose for which he seeks it.” 109 A.D.2d 13, 20 (1985). But the District Attorney misreads this precedent which in fact supports the Public Advocate’s position. The *Melendez* court rejected the application *because of* the greater, personalized stake disclosure: “A further factor which militates against disclosure here is that relief is sought by private litigants to *promote their own personal interests.*” *Id.* at 20 (emphasis supplied). Justice Garnett’s novel requirement would turn the test on its head and favor private litigants who almost always have a personal heightened stake in the grand jury materials they seek.

The law actually supports the opposite approach, prioritizing not the petitioner’s stake but whether disclosure will advance a *public* 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”); *People v. Carignan*, 76 Misc. 2d 515, 516 (Sup. Ct. 1973) (“The

strongest argument of the movant is that there is *a public interest . . .* that individuals who are victims of a crime be encouraged to come forward and relate any information concerning such crime to the proper authorities without fear of false arrest suits) (emphasis added).

Justice Garnett's legal error is further illustrated by the District Attorney's successful application to unseal materials from the Garner grand jury proceeding. District Attorney Donovan sought an order permitting him to disclose limited summary information about the Garner grand jury investigation, such as the length of the proceeding and number of witnesses. The District Attorney's petition was granted. It cannot be said that the District Attorney had any "greater stake" in this information. To the contrary, the District Attorney had a far lower stake because he already knew the number of witnesses and length of the proceeding. The only possible use would be release it to the public. The District Attorney's successful petition was not predicated on any greater, personalized stake but in the public interest that would be advanced by disclosure.

Certain public interests are uniquely defined in terms of the public official with statutory authority to carry out a duty in the public interest. *See, e.g., Application of Scotti*, 53 A.D.2d 282, 287 (4th Dep't 1976) (Deputy Attorney-General was specially authorized to disclose certain grand jury materials to Superintendent of State Police and Commissioner of Department of Correctional

Services for purposes of departmental disciplinary action). In those cases, it matters who the movant is because, he or she is the only party with authority to carry out the duty.

This is not a valid basis for Justice Garnett to have disregarded the public interest in proposed legislative measures identified by the Public Advocate. Debate over legislative proposals is necessarily a public, collective process. No one public official has a monopoly or special standing to ensure that an informed debate over proposed legislation occurs.

Indeed, the Legislative Caucus has directly requested that the Public Advocate's petition be granted. To the extent that an imprimatur from the state legislature is required for the Court to consider pending legislative proposals in evaluating the Public Advocate's petition, this approval has now been secured. It makes little sense from a judicial economy perspective to require that one of these state legislators make the identical application for disclosure that the Public Advocate submitted in order to inform the current legislative debate.

D. Under the New York City Charter, the Public Advocate Has the Authority to Investigate and Report on the Activities of the Office of the District Attorney and the NYPD

The District Attorney asserts that the purview of the Public Advocate is limited, by the terms of the Charter, to "city agencies *established by* the Charter." Resp.'s Br. at 36. He is wrong. No such limit exists in the language of the

Charter. In fact, the Charter defines “city agency” as “a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, *the expenses of which are paid in whole or in part from the city treasury.*” N.Y.C. Charter § 1150(2).

As the District Attorney acknowledges, the expenses of the offices of the City’s district attorneys are paid by the City, N.Y. City Charter § 1125, County Law § 928, 930, 931. They are thus “city agencies” for the purposes of the Charter. For this reason, the district attorneys are subject to oversight by the New York City Comptroller¹, the Conflicts of Interest Board (N.Y.C. Corp. Counsel Op. 4-95), the Equal Employment Practices Commission² and, by the same reasoning, the Public Advocate.

The Respondent’s limited reading of the definition of “city agency” has been rejected by the Court of Appeals. In *Goldin v. Greenberg*, 49 N.Y.2d 566 (1980), for instance, the court held that the Board of Education, created by state statute, was a “city agency” subject to the subpoena powers of the New York City

¹ See e.g. Audit No. FM10-111A of the Manhattan district attorney’s office conducted by the New York City Comptroller, *available at* https://comptroller.nyc.gov/reports/audit/?r=03-24-10_FM10-111A, last visited on May 31, 2015.

² See the Equal Employment Practices Commission’s statement of jurisdiction, *available at* http://www.nyc.gov/html/eepc/html/about/eepc_jurisdiction.shtml, last visited May 31, 2015.

Comptroller pursuant to the City Charter. *See also Maloff v. City Comm. on Human Rights*, 38 N.Y.2d 329 (1975)(holding that the Board of Education, though created by State statute, is a “city agency” subject to the Commission on Human Right’s oversight). Similarly, the Health and Hospitals Corporation has been held to fall under the Charter definition of “city agency,” though it was created by state statute, because of its receipt of city funding. *People v. Butt*, 113 Misc.2d 538, 453 N.Y.S.2d 128 (A.D. 2d Dep’t 1981).

The Public Advocate has the power and the duty to investigate and report on the activities of city agencies and programs, N.Y.C. Charter § 24(f), 24(h), and to initiate a summary inquiry into any alleged neglect or violation of duty in relation to the “affairs of the city.” N.Y.C. Charter § 1109. This is true even when the matters under investigation are usually protected from disclosure by operation of law. *Green v. Safir*, 255 A.D.2d 107, 679 N.Y.S.2d 383, *lv. den’d*, 93 N.Y.2d 882 (1999) (holding that the personnel files of police officers typically confidential under the City Charter must be disclosed to the Public Advocate).

The power to investigate, recommend, and inquire into the affairs of the city does not, as the Respondent asserts, represent an “assault on our state constitution.” Opp. Br. at 39. The Public Advocate does not purport to have the authority to remove a district attorney from office, nor to have the power to commence criminal proceedings against employees of the district attorney. She is not asserting

oversight over matters ordinarily left to prosecutorial discretion. In *Goldin v. Greenberg, supra*, the Court of Appeals opined that subjecting the Board of Education to the City Comptroller's investigatory powers did not give that office jurisdiction over matters of pedagogy. Similarly, here, the Public Advocate merely seeks information that is entirely consistent with her role under the Charter about the activities of offices that fall under the Charter definition of "city agencies," the office of the District Attorney and the NYPD.

The court below also gave short shrift to the Public Advocate's investigatory authority on grounds that "the Advocate has no explicit role in the city's criminal justice system." JA. 15. The Court of Appeals and Appellate Division have already rejected this reasoning. 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 DiNapoli*, 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 promote appropriate 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 Di Napoli*, 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”). The case law directly contradicts the position taken by the court below.

II. THE *DI NAPOLI* BALANCING TEST TIPS DECIDEDLY IN FAVOR OF PUBLIC DISCLOSURE OF THE GARNER GRAND JURY MINUTES

The District Attorney largely concedes that the *Di Napoli* factors favor access to the Garner grand jury proceedings given the disclosures actually sought by the Public Advocate. The only factor weighing against disclosure is the

concern related to maintaining the secret identity of grand jury witnesses, which the Public Advocate's proposal directly addresses.

This petition does not seek indiscriminate public disclosure but instead release of four categories of materials: 1) all grand jury instructions, 2) all questions by grand jurors, 3) the testimony of Officer Pantaleo, and 4) all non-testimonial evidence presented to the grand jury. The District Attorney agrees that "those suggested limitations pose less risk to the future effectiveness of grand juries." Resp.'s Br. at 53. However, he worries that the videotape exhibits could facilitate identification of witnesses and officers wearing nametags. In the Public Advocate's view, this concern can be easily remedied. The video exhibits could be disclosed to the public with the faces of witnesses and officers blurred or concealed, as well as any nametag IDs.

Beyond this concern, the District Attorney raises no other objections to the Public Advocate's proposal under the *Di Napoli* balancing test. Indeed, disclosure is warranted where the traditional concerns for grand jury secrecy simply do not apply. *See Aiani*, 98 A.D.3d at 974 (unsealing grand jury materials where "none of the reasons for maintaining secrecy in grand jury proceedings is implicated"). There is widespread public knowledge of this grand jury investigation and its subject. Under, 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. Indeed, Officer Pantaleo has stated to news outlets that he wants the public to know what happened in the grand jury. While the District Attorney raises hypothetical concerns about the potential effect of releasing the requested materials on future grand juries, the “chilling effect factor alone cannot prevent disclosure where an obvious public interest is served by disclosure.”

Application of FOJP, 119 Misc. 2d at 291-92.

III. THE PUBLIC ADVOCATE HAS STANDING TO PETITION FOR ACCESS TO THE GRAND JURY MATERIALS.

The District Attorney argues that the Public Advocate cannot seek disclosure of grand jury materials without demonstrating a concrete injury sufficient to confer standing. The District Attorney is wrong on the law and misapprehends the underlying basis for the Public Advocate’s application.

The Public Advocate has standing to petition to inspect the Garner grand jury materials under both the pertinent statute and common law principles of access to court documents. As courts have recognized for decades, grand jury materials “may be furnished to ‘any . . . person . . . upon the written order of the court.’” *Di Napoli*, 27 N.Y.2d at 234 (citations omitted). C.P.L. 190.25(4) is consistent with this authority and provides for the disclosure of grand jury materials “upon written order of the court.” *See also Matter of Scotti*, 53 A.D.2d at 287 (“The statute expressly authorized the court . . . to release grand jury minutes . . .”).

Furthermore, “[u]nder New York law, there is a broad presumption that the public is entitled . . . access to judicial proceedings and court records” although “public inspection of court records has been limited by numerous statutes.” *Mosallem v. Berenson*, 76 A.D.3d 345, 348-49 (4th Dep’t 2010). “Grand Jury minutes are court records” although C.P.L. § 190.25 and related case law governs the terms of the disclosure of grand jury materials. *Gibson v. Grady*, 192 A.D.2d 657, 657 (2nd Dep’t 1993). It is this statutory framework and common law right of access that give the Public Advocate the standing to petition for disclosure of grand jury materials.

The District Attorney briefly renews an argument made below that C.P.L. § 160.50 bars disclosure of grand jury materials except to entities listed in § 160.50(1)(d).³ The court below properly rejected this argument as baseless. C.P.L. § 160.50(1)(d) applies generally to all court records associated with a criminal proceeding. A party who falls within one of the categories delineated in § 160.50(1)(d) has an automatic right to access the pertinent records. But this does not preclude an application for disclosure of grand jury materials pursuant to

³ The District Attorney’s contention here is somewhat ironic because this theory would bar his own successful application to unseal grand jury materials since he does not fall within the categories delineated in § 160.50(1)(d). *See People v. Diaz*, 15 Misc. 3d 410, 413 (Sup. Ct. 2007) (“[D]istrict attorneys, the Attorney General and even the state police are not law enforcement agencies within the meaning of CPL 160.50 unless their purpose is to further a criminal investigation.”) (citations omitted).

C.P.L. § 190.25(4)(a) if the petitioner can meet the *Di Napoli* and *Suffolk County* tests. Indeed, numerous cases cited by all parties to this litigation have permitted disclosure of grand jury materials to parties who are not listed in § 160.50(1)(d). *See, e.g., DiNapoli*, 27 N.Y.2d at 235-36 (disclosure granted to Public Service Commission); *People v. Cipolla*, 184 Misc. 2d at 881 (newspaper granted access to grand jury materials following acquittal of two defenants); *Matter of FOJP Serv. Corp.*, 119 Misc. 2d 287 (Sup. Ct. N.Y. Cnty. 1983) (disclosing grand jury records to nonprofit organization); *People v. Lindsay*, 188 Misc. 2d 757 (Cnty. Ct. Cattaraugus Cnty. 2001) (disclosing grand jury records to movie production company); *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), *aff'd*, 293 N.Y. 787 (1944). *Suffolk County II* itself involved the same procedural scenario as this case; a grand jury failed to return an indictment against individuals on charges of fraud and corruption. 58 N.Y.2d at 440. The Court of Appeals did not deem the application barred by C.P.L. § 160.50.

Courts have instead considered petitions for grand jury materials under § 190.25(4)(a) as independent from C.P.L. § 160.50. *See, e.g., Police Com'r of City of New York v. Victor W.*, 37 A.D.3d 722, 722-23, 830 N.Y.S.2d 323, 323-24 (2nd Dep't 2007) (analyzing “compelling and particularized” need for disclosure under § 190.25(4)(a) separately from petition under § 160.50); *Application of Police*

Com'r of City of New York, 131 Misc. 2d 695, 703, 501 N.Y.S.2d 568, 573 (Sup. Ct. 1986) (“The request to unseal and make available to movant the grand jury minutes requires separate consideration [under § 190.25(4)(a) versus § 160.50].”).

Finally, even outside the context of grand jury materials relevant to this case, the Court of Appeals has recently reconfirmed that courts may order disclosure of sealed court proceedings beyond the circumstances listed in § 160.50, noting that, “[o]ur inquiry does not commence and end with CPL 160.50, for we have recognized that there may be other sources of authority permitting access to sealed records.” *New York State Comm’n on Judicial Conduct v. Rubenstein*, 23 N.Y.3d 570, 580 (2014); *see also Matter of Anonymous*, 95 A.D.2d 763 (2d Dep’t 1983) (permitting disclosure of sealed court proceedings to petitioner even though “clearly petitioner does not fit within any of the categories of individuals or agencies enumerated under the statute which would justify making the records in the instant case available . . .”).

The District Attorney’s arguments pertaining to standing simply do not apply in this case and must be rejected.

IV. THE PUBLIC ADVOCATE MAY APPEAL THE DENIAL OF HER PETITION AS DEMONSTRATED BY AMPLE CASE PRECEDENT

Finally, the District Attorney suggests that Article 450 of the Criminal Procedure Law bars the Public Advocate from appealing the lower court’s denial

of her petition. This contention is meritless. As with all petitions for grand jury materials pursuant to §190.25(4)(a), this a civil suit for inspection of grand jury materials. The authority for the court to order such a disclosure derives from common law common law principles of access to court records. *See, e.g., Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501 (2007); *Mosallem v. Berenson*, 76 A.D.3d at 348. C.P.L. §190.25(4)(a) establishes a presumption of grand jury secrecy but permits a court to issue such an order if the *Di Napoli* and *Suffolk County* tests are met. Decades of precedent establish the propriety of appellate review including when a lower court has denied a petition to inspect grand jury materials. *See, e.g., Aiani*, 98 A.D.3d at 974; *Matter of Quinn [Guion]*, 293 NY 787, 787 (1944); *Hirschberg*, 251 N.Y. 156 at 167.⁴

⁴ While Petitioner-Appellant the Staten Island Branch of the National Association for the Advancement of Colored People joins the Public Advocate has not filed a reply brief, it joins the Public Advocate's and the other Appellants arguments in response to the District Attorney's argument that Justice Garnett's decision, order and judgment is not appealable.

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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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 670.10.3

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