SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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In re :

THE INVESTIGATION INTO THE DEATH OF :
ERIC GARNER

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BRIEF FOR AMICUS CURIAE
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York ("DAASNY") submits this brief as amicus curiae in the above captioned proceeding in opposition to the petitions of The Legal Aid Society, the New York Civil Liberties Union, NYP Holdings, Inc., a/k/a The New York Post, and The New York City Public Advocate, for an order pursuant to section 190.25(4), authorizing and mandating the disclosure of the minutes of a Grand Jury proceeding, and other evidence presented to the same Grand Jury.

STATEMENT OF AMICUS CURIAE

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout the State of New York, the Special Narcotics Prosecutor of the City of New York, the Inspector General of the Justice Center, and the nearly 2900 assistants in those offices. Members of the Association are responsible for the enforcement, on a local level, of the penal laws of this State and the representation of the People of this State in criminal matters arising within their individual counties. The manner of the enforcement and interpretation of these laws of general application are plainly matters of

concern statewide and enactment of any law that might impact any District Attorney is of broad concern to all the members of the association. The responsibility and concomitant implications for statewide enforcement of the penal law places DAASNY in a unique position to brief the Court as to the disclosure of "the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding" in contravention of the otherwise applicable requirements that such matters remain secret under section 190.25(4)(a) of the Criminal Procedure Law and section 215.70 of the Penal Law.

FACTUAL AND LEGAL BACKGROUND

According to the papers filed with this Court, on July 17, 2014 Eric Garner died while being taken into police custody. On December 4, 2014, a Richmond County Grand Jury, after hearing from fifty witnesses, including twenty-two civilians, and after receiving sixty exhibits as evidence, and following instructions on the relevant principles of law, returned a No True Bill and filed its dismissal of the matter under the terms of sections 190.60 and 190.75 of the Criminal Procedure Law.

Thereafter, the Legal Aid Society, the New York Civil Liberties Union, NYP Holdings, Inc., a/k/a The New York Post, and The New York City Public Advocate (collectively referred to hereinafter as "petitioners") each separately petitioned this Court seeking orders under section 190.25(4), authorizing and mandating the disclosure of the minutes of the Grand Jury proceeding, and other evidence presented to the Grand Jury.

The District Attorney of Richmond County has opposed these applications. The District Attorneys Association of the State of New York files this Brief as *amicus curiae,* in support of the position of the Richmond County District Attorney.

ARGUMENT

THE DISCLOSURE SOUGHT HERE WOULD UNDERMINE THE ABILITY OF GRAND JURIES THROUGHOUT THE STATE TO FAIRLY AND COMPLETELY INVESTIGATE ALLEGATIONS OF CRIME AND OTHER WRONGDOING, PARTICULARLY IN MATTERS WITH BROAD PUBLIC INTEREST.

Each applicant argues, in one form or another, that there should be wholesale disclosure of the evidence presented to the Grand Jury because there exists "immense public interest" in this case (Memorandum of Law of NYP Holdings, Inc., a/k/a The New York Post at 3), and an asserted "need to restore public confidence in our criminal justice system" (Affirmation of Arthur Eisenberg, Esq.[NYCLU] ¶ 4; *see also* Affirmation of Christopher P. Pisciotta, Esq. [LAS], ¶ 13). These precise arguments have been soundly and repeatedly rejected by the courts of this state as a basis for the disclosure of grand jury materials. *See e.g., In re Carey,* 68 A.D.2d 220, 229 (4th Dept. 1979); *In re District Attorney of Suffolk County*, 86 A.D.2d 294, 298 (2d Dept. 1982)("a party seeking disclosure will not satisfy his burden by simply asserting, or even showing, that a public interest is involved"), *aff'd*, 58 N.Y.2d 436 (1983); *In re Hynes*, 179 A.D.2d 760 (2d Dept. 1992)(argument that "release will both curb the community unrest which erupted when the Grand Jury failed to indict and restore confidence in the Grand Jury system and in [the District Attorney's] office . . . [did] not constitute the compelling and particularized need necessary to overcome the presumption of confidentiality which attaches to Grand Jury proceedings").

That members of the public are particularly interested in the matter investigated by the grand jury or that some question its outcome is no basis upon which to order disclosure. In rejecting an application to disclose grand jury evidence and testimony concerning the horrific 1971

events at the Attica Correctional Facility, the Fourth Department observed that "[t]he 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. The cases demonstrate, however, that such considerations are customarily present in applications of this nature to a greater or lesser degree . . . They do not necessarily justify disclosure." *In re Carey*, 68 A.D.2d at 229.

The tradition of grand jury secrecy grew out of the struggles between King and Commons that culminated with the Glorious Revolution in 1688 and the subsequent passage of the English Bill of Rights in 1689. A major skirmish in that conflict took place in 1681 in the celebrated *Earl of Shaftesbury Case*. There, the Catholic King Charles II attempted to use the grand jury to indict two of his political enemies, Lord Shaftesbury and Stephen Colledge, for High Treason due to their opposition to Charles II's efforts to re-establish the Catholic Church in England. Mark Kadish, *Behind the Locked Doors of an American Grand Jury*, 24 Fl. St. L. Rev. 1, 9 (1996); George Edward Dazzo, *Opening the Door to the Grand Jury*, 3 D. C. L. Rev. 139, 144 (1995). The King's Counsel insisted that the Grand Jury hear the testimony in open court. Dazzo, *supra* at 144; Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 John Marshall J. of Practice and Pro. 18, 19 (1967). Following the hearing, however, the grand jurors demanded to interview the witnesses in closed chambers, and were granted that right (Calkins, *supra* at 19). The Protestant Grand Jury refused to return an indictment, writing "ignoramus" across the front of it, and giving as a reason only their own consciences (*Id.*). The precedent set in the *Earl of Shaftesbury Case* guaranteed the impartiality of the grand jury and their independence from the Crown. J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 170 (1983).

But secrecy served other purposes as well. Writing shortly after the *Earl of Shaftsbury Case*, John Somers, an attorney who had read law in both England and the Colonies and who would later become Attorney General and thereafter Lord Chancellor of England, described the policies that underlined Grand Jury secrecy. First, secrecy prevented the flight of criminals, who would otherwise know that the law was onto them;[1] Second, secrecy allowed the grand jury to ferret out biased witnesses; Third, secrecy freed jurors from the oversight of judges (who at that time served as representatives of the Crown); Fourth, it helped jurors catch witnesses in lies and protect the innocent; and Fifth, it ensured the integrity of the investigation for future indictment. In short, according to Somers, secrecy protected the innocent accused as well as the innocent victims of crime, and assured that the truth could be discerned. Kadish, 24 Fl. St. L. Rev. at 14-16.

In the run up to the Revolutionary war, colonial grand juries resisted tyrannical acts by the Crown. When John Peter Zenger, editor of the *New York Weekly Journal*, criticized the King's withdrawal of jury trials and other attempts to assert royal control over New York, the Crown attempted to secure an indictment against him for seditious libel. But three successive grand juries refused to return an indictment. *Id.* at 11.

"Viewed as a bulwark against autocratic rule," the Grand Jury and its secrecy gained widespread acceptance in Britain and in the American colonies. Brown, 11 Am. J. Crim. L. at 171. The protections offered by the grand jury process were viewed as so fundamental that the framers of the Constitution guaranteed the right to a grand jury indictment when the Bill of Rights was

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1 Indeed, if a grand juror disclosed to a person indicted for a felony the evidence against him, he was viewed as an accessory to the crime (*See Schmidt v United* States, 115 F2d 394 [6th Cir 1940]; *Goodman v United States*, 108 F2d 516 [9th Cir 1939]).

ratified. Kadish, 24 Fl. St. L. Rev. at 11. As founding father and legal scholar James Wilson opined in 1790, the grand jury was an important popular conduit for government: "a great channel of communication between those who make… the laws and those for whom the laws are made" Richard D. Younger, *The Grand Jury Under Attack*, 46 J. Crim. L. & Criminology 26, 26 (1955).

With the grand jury thus imported into American Law, so was its secrecy. Grand Jury secrecy was universally recognized a desirable end by both state and federal courts in this country throughout the nineteenth century. Indeed, there was remarkably little debate regarding secrecy; what minor debate there was focused on whether witnesses as well as grand jurors should be sworn to secrecy. Many states and federal district courts imposed oaths of secrecy on witnesses. New York, among other states, did not. *See* Brown, 11 Am. J. Crim. L. at 172.

Remarkably, the reasons for grand jury secrecy were not explicated in a judicial opinion until a federal District Court in Maryland did so in 1936 in the *Amazon Chemical* case. There, the court formulated five reasons for secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated;
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> (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
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> (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of these indicated by it;
>
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
>
> (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from

> the expense of standing trial where there was no probability of guilt. It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury.

United States v Amazon Chemical Corp, 55 F.2d 254, 261 (D. Md. 1936).

Those five reasons were later adopted by the Supreme Court of the United States and the Court of Appeals of this State as the main reasons underlying the continued policy of secrecy. *See United States v. Procter & Gamble*, 356 U.S. 677, 681, n.6 (1958); *People v. Di Napoli*, 27 N.Y.2d 229, 235 (1970). In addition to those traditional reasons, a sixth has been suggested: secrecy "helps to assure... that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism to which they cannot respond... [and ultimately prevents] subject[ing] grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand jury service." *Butterworth v. Smith*, 494 U.S. 624, 636-37 (1990) (Scalia, J, concurring).

The Supreme Court has "consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Indeed, the Court has flatly held that "[t]o make public any part of [grand jury] proceedings would inevitably detract from its efficacy." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

Among the many reasons for the rule, the one of paramount significance in this case and ones like it is "to encourage all witnesses to step forward and testify freely without fear of retaliation," *United States v. Procter & Gamble*, 356 U.S. at 682, or, as the Court of Appeals has

phrased it, the "assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely." *People v. Di Napoli*, 27 N.Y.2d at 235.

No matter how it is phrased, this critical protection against disclosure is crucial to the effective functioning of the grand jury. *See* Daniel R. Alonso, In Defense of Grand Jury Secrecy, N.Y. Daily News, December 11, 2014. Given its need for the testimony of those with crucial evidence, it can hardly be questioned that "[t]he grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Procter & Gamble*, 356 U.S. at 681; *see also Pittsburgh Plate Glass Co. v. United States*, 360 U.S. at 400 (observing that without the rule "testimony would be parsimonious").[2]

There is no question that witnesses routinely rely on the implicit promise of secrecy when they determine to testify before the grand jury. It should hardly be surprising then, as the Richmond County District Attorney reports, that witnesses in this case testified before the Grand Jury with "full assurances of the secrecy of the grand jury proceedings" (Affirmation of Assistant District Attorney Anne Grady [against LAS application], ¶ 4).

Witness intimidation represents a fundamental threat to the rule of law. It makes it more difficult to detect crimes, because many will go unreported to the police, and to prosecute crimes, because it deprives the prosecution of its lifeblood—credible witness testimony. Both long

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[2] In this regard it is somewhat ironic (though hardly surprising) that one of the applicants seeking disclosure is the publisher of a newspaper, since the press and other journalists routinely assert a need to protect their confidential sources, since otherwise they would not receive information about important matters. Without questioning their important roles, their need to protect their sources cannot be held to be superior to that of a grand jury in protecting the public's interest. Moreover, just as news reporters would find attempts at redaction to protect the sources of the information they report inadequate, the Fourth Department's conclusion with regard to the Attica riots that "it is doubtful that [redaction] could be done successfully given the extensive writing that has occurred on the subject," *In re Carey*, 68 A.D.2d at 228, surely applies here— as it would in virtually any criminal case.

experience and empirical research suggest that witness intimidation is a widespread problem. A small scale study of witnesses in criminal courts in Bronx County revealed that 36% of witnesses who testified had been directly threatened, and 57% of those who had not been threatened nevertheless feared reprisal.[3] But the problem is not confined to big cities; 81% of prosecutors in large jurisdictions and 68% of prosecutors in small jurisdictions report that intimidation is a salient problem.[4] Similarly, a nationwide survey of 3,000 police stations found that 66% of stations reported that witness intimidation by gang members is a "common occurrence."[5] Witness intimidation has been cited as a primary reason when witnesses recant earlier statements at trial.[6]

Research suggests that intimidation is most likely to be carried out against our society's most vulnerable people: children, the elderly, immigrants, and victims of domestic violence.[7] All indications are that witness intimidation, already prevalent, is on the rise.[8]

Sometimes witness intimidation is direct and brazen, as when a defendant showed up to his sentencing wearing a t-shirt that read "Snitches Get Stitches."[9] Other times it is deadly. In Queens, after 61 year old Mildred Green was a witness to a shooting in which four people were injured outside of her workplace, she assisted the police in their investigation and testified at a Grand Jury proceeding. Derrick Kornegay and another individual were later indicted on charges

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[3] Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, Columbia University Department of Economics Discussion Paper Series (Oct. 2007).
[4] Kerry Murphy Healey, Victim and Witness Intimidations: New Developments and Emerging Responses, U.S. Department of Justice: National Institute of Justice (Oct. 1995).
[5] NYS Law Enforcement Council, 2014 Legislative Priorities at 14.
[6] Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge* (2013).
[7] Kelly Dedel, Witness Intimidation, Community Oriented Policing Services (COPS) U.S. Department of Justice, (July 2006) www.cops.usdoj.gov/Publications/e07063407.pdf.
[8] Peter Finn & Kerry Murphy Healey, National Institute of Justice: *Preventing Gang and Drug-Related Witness Intimidation*, U.S. Department of Justice, (November 1996) www.ncjrs.gov/pdffiles/163067.pdf.
[9] NYS Law Enforcement Council, 2014 Legislative Priorities at 14.

of attempted murder stemming from the shooting. After Kornegay learned of Ms. Greene's identity and that she had testified before the grand jury, he and two others murdered her.[10]

Most of the time, intimidation is more subtle. Law enforcement across the state has noted sophisticated structures used to indirectly intimidate witnesses who cooperate with the police. In Schenectady, for example, a man charged with gang-related murders received information concerning the witnesses against him just prior to trial, then put the witnesses' names on Facebook and conspired with others to murder them. P. Nelson, Killers accused of conspiring to murder witnesses, Albany Times Union, December 15, 2011; P. Nelson, More time for Bloods member, Albany Times Union, December 18, 2012.

The tactic of posting witness information on social media sites in an effort to provoke community-wide intimidation has become common for gang members.[11] Those efforts play on the fact that in some communities, "being labeled a snitch carries a price, not just of potential violence, but of ostracism by neighbors and peers."[12] Such tactics are brutally effective: in Rochester, a 21 year old man was shot in front of a night club in sight of 100 witnesses, but not a single one was willing to speak with the police.[13]

Because of the nature of these indirect forms of intimidation, it is exceedingly difficult to prove who was behind them. Even so, police made 1,353 arrests for witness intimidation in the state between 2000 and 2012.[14]

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[10] James, *3 Are Guilty in Slaying of Grand Jury Witness*, The New York Times, July 1, 1988; *People v. Kornegay*, 180 A.D.2d 759 (2d Dept. 1992).

[11] NYS Law Enforcement Council, 2014 Legislative Priorities at 15, describing a case from Erie County. *See also* B. Fitzgerald, Witnesses exposed on the Web, Albany Times Union, May 4, 2014.

[12] NYS Law Enforcement Council, 2014 Legislative Priorities at 19.

[13] *Id.* at 5.

[14] *Id.* at 16.

The most effective way to avoid this type of intimidation, and therefore to encourage witnesses to come forward, is to protect the identities of witnesses and, in particular, maintain respect for the independence and secrecy of grand jury proceedings. Indeed, it is for these exact reasons that the Pennsylvania Supreme Court recently approved the reinstitution of secret grand juries in that state, where they had been abolished as unnecessary in 1976[15] Chief Justice Ronald D. Castille said the change was needed to deal with an entrenched problem of witness intimidation that had grown steadily worse over the last 25 years. Predictably, especially in Philadelphia, the abolishment of secret grand juries in conjunction with the growth of the "no snitching culture" had resulted in a toxic atmosphere where victims and witnesses were routinely subjected to ugly threats in courtrooms and on the streets. Fortunately, only Pennsylvania and Connecticut have experimented with a ban on indicting grand juries. Pennsylvania's recent reversal of course on this subject clearly demonstrates the wisdom of maintaining the secrecy of grand jury proceedings.

The witnesses in this case, and those in other cases where members of the public express views contrary to the evidence the witness can provide, are entitled to the full protection of the law for their service. Given the overwhelming need to maintain the secrecy of grand jury proceedings, both the Court of Appeals and the Supreme Court have agreed that "since disclosure is 'the exception rather than the rule', one seeking disclosure first must demonstrate a compelling and particularized need for access" *In re District Attorney of Suffolk County*, 58 N.Y.2d at 444, *see also United States v. Sells Eng'g,* 463 U.S. 418, 443 (1983) (collecting cases)

[15] McCoy, *Pa. High Court Clears Secret Grand Juries*, The Philadelphia Inquirer, June 22, 2012.

which cannot be met by a simple assertion of a "public interest." *District Attorney of Suffolk County*, 58 N.Y.2d at 445; *see also In re Hynes,* 179 A.D.2d at 760; *cf. Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8 (1986); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 223 (recognizing a strong "public interest in secrecy").

In sum, no adequate basis has been presented as to warrant disclosure of any of the matters before the Richmond County Grand Jury. Indeed, any such disclosure could well irreparably harm the ability of other Grand Juries throughout the state to fairly and fully perform its important duties.

CONCLUSION

For the reasons set forth above, this Court should deny the applications for disclosure.

Respectfully submitted,

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January 16, 2015