SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Application of the New York Civil Liberties Union, Petitioner, For an Order Pursuant to C.P.L. § 190.25(4) directing the public disclosure of the transcript of grand jury proceedings and of certain evidence presented to the grand jury regarding the death of Eric Garner.	Hon. William E. Garnett Index No. 80307/14

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF APPLICATION FOR AN ORDER PURSUANT TO CPL § 190.25(4)

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Dated: January 16, 2015
New York, New York

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PRELIMINARY STATEMENT

Petitioner New York Civil Liberties Union (NYCLU) respectfully submits this Memorandum of Law in reply to the submission by the District Attorney and in further support of its application for the release of (1) the transcript of the grand jury proceedings in the Eric Garner matter; (2) the legal instructions the grand jury received; (3) a comprehensive list of the evidence presented to the grand jury, with detailed descriptions thereof; and (4) certain physical and documentary evidence in that matter. Disclosure of that material is warranted because, consistent with the requirements of C.P.L. § 190.25(4), the NYCLU has articulated a "compelling and particularized" need for it, and the public interest in disclosure significantly outweighs the public interest in maintaining grand jury secrecy.

In arguing for the public disclosure of these particular grand jury documents, Petitioner, in its opening brief, recognized the presumption in favor of grand jury secrecy but asserted that such a presumption can be overcome where, as here, there is a "compelling and particularized" justification for disclosure and where the public interest in disclosure significantly outweighs the more narrow and, in this case, limited interests in continued secrecy. In support of these assertions, Petitioner argued that Justice Rooney has already recognized a "compelling and particularized" interest in disclosing Garner grand jury information to the public at large. Such a conclusion rested upon Justice Rooney's view that it is critically important to maintain public confidence in the criminal justice system and his observation that

> the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness, and impartiality, at a crucial moment in the nation's history, where public confidence in the evenhanded application of these core values among a diverse citizenry is being questioned.

Matter of Application of the Dist. Attorney of Richmond County, Index No. 80294/14, Slip Op. at 3 (Sup. Ct. Richmond 2014). Petitioner further asserted that this compelling interest was not adequately addressed in the modest release of information mandated by Justice Rooney. Indeed, the NYCLU observed that public confidence can only be meaningfully addressed if the community is provided with sufficient information so that it can understand how and why the grand jury reached the decision that it did. The release of the grand jury minutes is critical to that understanding.

The NYCLU's Memorandum of Law further asserted that, beyond the restoration of public confidence in the criminal justice system, there was an equally compelling justification for disclosure as a result of the public conversation that has now emerged in connection with the Garner matter. That conversation involves a public discussion about the fairness of grand juries and about the continuing need for grand jury secrecy in these types of cases. The Garner grand jury proceeding is central to that conversation. Disclosure of the minutes will allow that public conversation to proceed with a more informed understanding of the way that the grand jury functions and the advantages and disadvantages of grand jury secrecy in cases such as this.

Finally, the NYCLU argued that the interests that generally support grand jury secrecy are either non-existent or severely diminished under the particular circumstances of this case.

On January 2, 2015 the Richmond County District Attorney (D.A.) served the NYCLU with papers opposing that application in its entirety. The District Attorney argues that disclosure of the grand jury record in this case would violate Criminal Procedure Law Section 160.50, (D.A. Mem. at 1); that the New York Civil Liberties Union lacks "standing" to pursue the claim for disclosure (D.A. Mem. at 3); that there is no "compelling or particularized need" sufficient to "overcome the presumption of confidentiality" (D.A. Mem. at 7 (internal quotation marks

omitted)); and that the public interest in secrecy outweighs the need for disclosure. Each of these arguments advanced by the District Attorney is without merit. Each will be addressed, in turn, in the Argument below.

ARGUMENT

I. C.P.L. § 160.50 DOES NOT PROHIBIT THE RELEASE OF THE GRAND JURY MATERIALS.

In its Memorandum of Law, the District Attorney first argues that the C.P.L. § 160.50 bars disclosure of the grand jury minutes and documents sought in this case. The District Attorney's argument turns upon two claims: first, that C.P.L. § 160.50 governs the application for grand jury materials rather than C.P.L. § 190.25, because this is a case where the grand jury filed a dismissal of the charges against an accused; and second, that the NYCLU is not a party that can seek disclosure under C.P.L. § 160.50 because it "is not among those categories of persons or agencies for whom unsealing is available." (D.A. Mem. at 2.) The first claim is incompatible with well-established precedent from the New York Court of Appeals and other courts. The second claim ignores a recent Court of Appeals decision rendered in the past year. *New York State Comm'n on Judicial Conduct v. Rubinstein*, 23 N.Y.3d 570 (2014).

When an application is made to release grand jury materials in a case resolved in favor of the accused, courts in New York routinely and consistently apply the standards imposed by C.P.L. § 190.25(4) without considering C.P.L. § 160.50 at all. *Matter of Dist. Attorney of Suffolk County*, 58 N.Y.2d 436 (1983) is a leading case on releasing grand jury materials under C.P.L. § 190.25(4), and is highly instructive on the issue of the applicability of Section 160.50 here. There, as in this case, the grand jury did not return any indictments covering the substance of its investigation. 58 N.Y.2d at 440. As such, the case was resolved in favor of the accused in the

same way that this one was.[1] Despite that resolution, the Court in *Suffolk County* did not apply C.P.L. § 160.50, or even refer to it. Moreover, the Court of Appeals held that C.P.L. § 190.25(4)'s "compelling and particularized" standard applies regardless of who makes the application. *See id.* at 444 ("Without contesting the validity of this rule, the District Attorney nonetheless counters with the contention that it is applicable only when private, rather than public, litigants seek Grand Jury materials. But the cases brook no such distinction."). The D.A.'s suggestion that C.P.L. § 160.50 applies to applications for grand jury minutes under C.P.L. § 190.25(4) is inconsistent with that holding.

Subsequent to the *Suffolk County* decision, courts have repeatedly applied C.P.L. § 190.25(4) – and not C.P.L. § 160.50 – in cases seeking disclosure of grand jury documents, even in circumstances where the criminal proceedings were resolved in favor of the accused. *See, e.g.*, *Police Comm'r of City of New York v. Victor W.*, 37 A.D.3d 722 (2d Dept. 2007) (applying the compelling and particularized need standard of C.P.L. § 190.25(4) in an application for grand jury minutes, without addressing C.P.L. § 160.50 in the context of that application, where the petitioner had nevertheless also originally sought to unseal the *trial* minutes under C.P.L. § 160.50); *Taran v. State*, 140 A.D.2d 429 (2d Dept. 1988) (reviewing the propriety of grand jury disclosures without considering C.P.L. § 160.50, even though all charges associated with that proceeding had been resolved in favor of the accused); *Ruggiero v. Fahey*, 103 A.D.2d 65 (2d Dept. 1984) (applying the *Suffolk County* test to an application by a private litigant for the minutes of a grand jury proceeding that did not result in indictment, without making any reference to C.P.L. § 160.50); *People v. Bonelli*, 36 Misc.3d 625 (Sup. Ct. Richmond 2012) (making no reference to C.P.L. § 160.50 in determining whether release of grand jury minutes

[1] It is true that three respondents were indicted for perjury on the basis of their grand jury testimony. *Id.* But, even if that is a salient distinguishing characteristic, such charges against one of the respondents were dismissed, thus ultimately implicating C.P.L. § 160.50 (under the D.A.'s theory) in any event. *See id.* at 440 n.2.

was appropriate after the criminal defendant had been acquitted of all charges stemming therefrom).

None of the cases the D.A. cites is to the contrary, as none applies C.P.L. § 160.50 to a petition for the release of grand jury materials.[2] And in its Memorandum of Law, the D.A. cites cases that actually demonstrate the inapplicability of the proposition that it urges. For example, in arguing that there is no compelling need justifying disclosure, the D.A. cites *In re Hynes*, 179 A.D.2d 760 (2d Dept. 1992). (D.A. Mem. at 7.) But in that case, too, the Second Department evaluated whether disclosure was appropriate pursuant to the *Suffolk County* "compelling and particularized" interest standard, and without considering C.P.L. § 160.50, even though the grand jury proceeding did not result in an indictment. *Hynes*, 179 A.D.2d at 761. Accordingly, under established judicial precedent, Section 160.50 does not apply in considering whether and when to release grand jury minutes pursuant to 190.25(4), and, therefore, Section 160.50 does not serve as a basis for limiting the parties that can seek disclosure.

Moreover, even if, *arguendo*, C.P.L. § 160.50 were to apply to this application for disclosure of grand jury minutes, the provision would not foreclose the NYCLU's petition in this case. The Court of Appeals has recognized that the limitations imposed by C.P.L. § 160.50 on individuals and entities that can seek disclosure will be relaxed in "extraordinary circumstances." *Rubenstein*, 23 N.Y.3d at 581. (internal quotation marks and citations omitted). Such

[2] Petitioner's counsel is aware of only one case – which is not cited by the D.A. – that grappled with the interplay between C.P.L. § 160.50 and Section 190.25(4), and that applied Section 160.50 to deny disclosure. But that case, *Application of the Attorney General Authorizing the District Attorney of Suffolk County to Release Grand Jury Testimony and Exhibits*, 101 Misc.2d 36 (Sup. Ct. Suffolk 1979) is outdated, is inconsistent with subsequent New York Court of Appeals and Second Department precedent discussed above, and was decided by a court with no precedential authority here. Critically, the Court in that case determined that Section 190.25(4) does not "expand" courts' disclosure power, but rather "merely note[s] the Court's power as an available resource in appropriate circumstances." *Id.* at 39. But, that determination is incompatible with the Court of Appeals subsequent recognition that C.P.L. § 190.25(4) *does* serve as its own source of statutory authority to disclose grand jury materials. *See Lungen v. Kane*, 88 N.Y.2d 861, 863 (1996) (observing that in granting disclosure of grand jury material under C.P.L. § 190.25(4), the lower court had "rendered a ruling within its *statutorily invested* power") (emphasis added). Further, the Court in *Application of the Attorney General* recognized the "inherent discretionary power of the court," even under 160.50, to order disclosure in "appropriate cases." 101 Misc.2d at 40.

"extraordinary circumstances" are satisfied where, as here, "compelling and particularized" interests support the application.

II. THE NYCLU HAS STANDING TO PURSUE THE DISCLOSURE IT SEEKS.

In its Memorandum of Law, the D.A. next claims that the NYCLU lacks standing to assert the "compelling and particularized" interests that support its application. (D.A. Mem. at 3.) The D.A. cites no legal authority for that proposition. Nor does the D.A. attempt to explain its rationale. Instead, it turns immediately to the uncontroversial and irrelevant contention that those appearing before the grand jury would have standing to oppose disclosure if they sought to intervene in this action. (*See id.*)

The D.A.'s "standing" argument is wrong. By its terms, C.P.L. § 190.25(4) does not impose limits on those that may seek grand jury minutes, nor does the case law interpreting that provision do so. To the contrary, as long as the "compelling and particularized" need standard is met, any person or entity may seek grand jury minutes. And, the Court of Appeals in *Di Napoli*, quoting the predecessor statute to C.P.L. § 190.25(4), made clear that "a copy of the minutes may be furnished to '*any* . . . person . . . upon the written order of the court.'" *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970) (emphasis added). In *Di Napoli*, the Court of Appeals upheld the disclosure of grand jury minutes to a state commission as an appropriate exercise of discretion. *Id.* at 238. And, following *Di Napoli*, courts consistently recognize the capacity of agencies and organizations to seek disclosure of grand jury minutes. *See, e.g.*, *Roberson v. City of New York*, 163 A.D.2d 291 (2d Dept. 1990) (reaching the merits of the New York City Housing Authority's application for grand jury minutes); *People v. Cipolla*, 184 Misc. 880 (Rensselaer County Ct. 2000) (granting disclosure to a news organization). Accordingly, the NYCLU has standing to bring this action. (*See* Eisenberg Aff., ¶ 2 & Exs. A, B.)

III. THE NYCLU HAS SHOWN COMPELLING AND PARTICULARIZED NEEDS FOR DISCLOSURE.

In its "Memorandum of Law in Support of Application for an Order Pursuant to C.P.L § 190.25(4)," the NYCLU articulated two separate, but related, justifications for disclosure. Each justification is compelling and particularized, and thus either independently justifies disclosure.

First, the NYCLU argued that a more comprehensive disclosure of what went on in the grand jury room is critical if public confidence is to be restored in the justice system in general and the grand jury system in particular. (Mot. At 2-4). After the widespread public disclosure of a video account of the events resulting in the death of Eric Garner, much of the New York City community remains truly baffled by the failure of the Garner grand jury to impose any criminal charges against any of the officers involved in those events. (*See* Eisenberg Aff., ¶ 4 & Ex. D.) Public confidence in the grand jury system remains damaged. (*Id.* at ¶ 6 & Ex. F.) Restoring public confidence in the justice system is a "compelling" interest.

Second, the NYCLU argued that a more comprehensive disclosure is required to inform the policy debate that has arisen about the functioning of grand juries and the need for secrecy in these types of cases and in general. (*Id.* at 4-5; *see also* Eisenberg Aff., ¶¶ 3, 5, 7 & Exs. C, E., G.)

The D.A. failed even to acknowledge, much less respond to, those two interests. And, as such, it has advanced no reason why the Court should not find that the NYCLU has made the requisite threshold showing. Instead, the D.A. mischaracterizes the NYCLU's application as one for public disclosure for its own sake, and responds primarily by discussing and defending the general rule of grand jury secrecy. (*See* D.A. Mem. at 4 ("[P]etitioner's argument that the public interest is served by disclosure of grand jury minutes is one best directed to the Legislature, which, quite the contrary, determined many decades ago that the public interest is best served by

grand jury secrecy.").) This misses the point. The NYCLU has never disputed that there are important reasons for maintaining grand jury secrecy in the vast majority of cases, nor has it argued that such reasons should be cast aside lightly. But this is a unique case coming at a critical moment in time, and the highly unusual circumstances here justify the disclosures the NYCLU seeks.

Further, this case is not about restoring confidence in elected officials, as were the cases the D.A. cites in opposition. (*See* D.A. Mem. at 6-7 (discussing *In re Carey*, 68 A.D.2d 220, 229 (4th Dept. 1979) and *In re Hynes*, 179 A.D.2d 760 (2d Dept. 1992)).) It is about the something much more fundamental – the integrity and effectiveness of the justice system itself. While applications under C.P.L. § 190.25(4) implicating such issues are unquestionably rare, there is precedent for the proposition that the need for public disclosure is compelling and particularized when existential concerns about the justice system arise. That was the exact holding in *People v. Cipolla*, in which the Court explained that where "the integrity of the grand jury system as well as county government is at question . . . disclosure [of grand jury materials] to the public in order to maintain the integrity of the grand jury process and county government creates a compelling interest for disclosure." 184 Misc.2d 880, 882 (Rensselaer County Ct. 2000). The D.A. ignores this precedent, completely failing to address *Cipolla* in the context of the compelling and particularized interest requirement.[3]

[3] The D.A., instead, claims that the NYCLU "relies heavily on [*Cipolla*], which permitted [public] disclosure on the basis that the materials were already, in effect, disclosed" in support of the NYCLU's contention that the *Di Napoli* factors favor disclosure in this case. (D.A. Mem. at 8.) Even if that were a faithful reading of *Cipolla*, and it is not, it misrepresents the NYCLU's Motion. The NYCLU cited *Cipolla* only once, and exclusively for the proposition that the compelling and particularized need requirement is met here. (Mot. at 2.) The NYCLU neither cited nor alluded to *Cipolla* in arguing that the balance of *Di Napoli* factors weighs in favor of disclosure. (*See* Mot. at 5-8.) While previous disclosures in *Cipolla* may have informed the Court's balancing analysis, that had no bearing on the threshold question of whether a compelling and particularized interest was shown. *See Suffolk County*, 58 N.Y.2d at 444 ("[W]ithout the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance.").

Remarkably, the D.A. also ignores the fact that Justice Rooney has *already recognized* that one of the two needs articulated by the NYCLU justifies public disclosure of Eric Garner grand jury information under the *Suffolk County* test. Before recusing himself in this matter, and in response to the D.A.'s own motion for disclosure of some grand jury materials, Justice Rooney, as noted above, observed that there was a need for disclosure because "the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness, and impartiality, at a crucial moment in the nation's history, where public confidence in the evenhanded application of these core values among a diverse citizenry is being questioned." *Matter of Application of the Dist. Attorney of Richmond County*, Index No. 80294/14, Slip Op. at 3 (Sup. Ct. Richmond 2014).

Although the D.A.'s application for grand jury disclosure remains sealed, the D.A. must have argued that there was some "compelling and particularized" need for public disclosure of grand jury information. *See Suffolk County*, 58 N.Y.2d at 444 (holding that the standard applies when a D.A. seeks the release of grand jury material). Because the D.A. has, thus, necessarily already admitted that some public interest in disclosure is "compelling and particularized," the only appropriate inquiry now is why additional disclosure does not further advance that interest.

Justice Brandeis once observed, "sunlight is said to be the best of disinfectants." Brandeis, "What Publicity Can Do," *Harpers Weekly* (1913). Yet, the District Attorney never explains why the already-disclosed statistical information regarding the grand jury could be found to advance a "compelling and particularized" interest in maintaining public confidence in the criminal justice system, and yet even more transparency would fail to advance that interest.

The justifications for disclosure urged by the NYCLU are not only sufficiently important to be "compelling" under *Suffolk County*, they are also "particularized," because there is no

alternate source of the information sought and there is no other information that would be equally effective in the pursuit of these compelling interests. The Court of Appeals in *Suffolk County* made clear that the particularization inquiry turns on whether the grand jury minutes are essential to address the compelling interest raised. It found that the D.A. had not established particularization because it did not "explain why the liberal discovery devices available under the Federal Rules of Civil Procedure would not suffice" to obtain the information sought, and thus found that the D.A. had failed to explain "what made it impossible for the District Attorney to establish his case without resort to the minutes." *See* 58 N.Y.2d at 446. Unlike in *Suffolk County*, the information the NYCLU seeks in the grand jury minutes is not available anywhere else. The D.A. does not claim otherwise, nor could it. The public's shaken confidence in the justice system is firmly rooted in confusion over the grand jury's decision not to indict Officer Pantaleo. Thus, the public's confidence cannot be restored without real insight into what happened in the grand jury room, just as the policy debate cannot effectively respond to the problems with the grand jury system this case exposes – if any – without considering how this particular case was decided. Moreover, the NYCLU's application is narrowly tailored to seek only that which is responsive to those two needs, and provides for redactions or withholdings where appropriate.

IV. THE BALANCE OF INTEREST WEIGHS IN FAVOR OF DISCLOSURE.

In its Motion, the NYCLU argued that the balance of interests weighs in favor of disclosure for each of the four categories of information it seeks. In its response, however, the D.A. fails to address or acknowledge those separate categories and the differing applicability of the *Di Napoli* factors to them. Instead, the D.A. focuses entirely on how wholesale public disclosure of the grand jury minutes would adversely affect the witnesses who testified and

discourage witnesses in future proceedings. (*See* D.A. Mem. at 8-12.) Regardless of how persuasive that argument is with respect to the grand jury minutes themselves, it is not apparent – and the D.A. does not explain – how a concern for present and future witnesses militates against disclosure of the D.A.'s instructions to the grand jurors on the law, a detailed exhibit list, or certain documentary and physical exhibits themselves. Such disclosures would partially address the NYCLU's compelling and particularized needs here without implicating any of the interests in grand jury secrecy that the Court of Appeals detailed in *Di Napoli*. *See* 27 N.Y.2d at 235.[4] The NYCLU argued this in its Motion, (Mot. at 6-7), and the D.A. does not and cannot argue otherwise. Thus, at a minimum, these three categories of grand jury information should be released.

The D.A.'s witness-focused objections are also insufficient to prevent a comprehensive disclosure of the grand jury minutes. They implicate only the fifth *Di Napoli* factor, *see id.*, and at least one court has held that grand jury records should not be withheld on the basis of that factor alone when there is a public interest in disclosure. In *Application of FOJP Serv. Corp.*, 119 Misc.2d 287 (Sup. Ct. New York 1983), the Court explained that "[t]he chilling effect factor alone cannot prevent disclosure where an obvious public interest is served by disclosure" because "it is reasonable to anticipate that [grand jury] testimony may be put to further use in the public's interest." *Id.* at 685 (citing *Di Napoli* and *Application of Scotti*, 53 A.D.2d 282, 288 (4th Dept. 1979)).

[4] The *Di Napoli* considerations weighing in favor of secrecy are (1) to prevent a soon-to-be-indicted defendant from fleeing; (2) to protect against interference by the subjects of investigation in the deliberations of grand jurors; (3) to prevent "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) to protect "an innocent accused from unfounded accusations if in fact no indictment is returned;" and (5) to assure "prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely." *Id.*

Moreover, the two claims the D.A. makes in support of its witness-based argument are without merit. First, it maintains that the minutes should be withheld because the D.A.'s office promised grand jury witnesses that their testimony would be secret. (D.A. Mem. at 3 (averring that several grand jury witnesses "testified with *full assurances* of the secrecy of grand jury proceedings") (emphasis added); *see also id.* at 11-12.) If the D.A. told witnesses that grand jury secrecy is absolute, except that it may later be used for impeachment purposes at trial, as the D.A. suggests it did, (*see id.* at 12 (referring to "assurances" of secrecy "except as provided by C.P.L. § 240.45")), that was improper. As discussed above, the law allows disclosure in some circumstances. The D.A. was not authorized to promise witnesses protection beyond that which the law allows. The fact that some witnesses were given a mistaken impression about the secrecy of their testimony should not change the calculus under *Di Napoli*.

Second, the D.A. suggests that the safety of some grand jury witnesses may be compromised if the minutes are released. (*See* D.A. Mem. at 10-11.) In support of this contention, the D.A. declares that some "news outlets reported that a [Ferguson] grand jury witness was killed during the riots following the grand jury announcement in retribution for his testimony favorable to the officer." (*Id.* (citing Wesley Lowery, *Police investigating death of man whose body was found after protests in Ferguson last week*, Washington Post, December 2, 2014, *available at* http://www.washingtonpost.com/news/post-nation/wp/2014/12/02/police-investigating-death-of-man-whose-body-was-found-after-protests-in-ferguson-last-week).) The D.A. immediately goes out to concede, however, that "the bona fides of those news reports are highly questionable." (*Id.* at 11.) While witness safety is indisputably a critically important consideration, baseless speculation about witness safety should not override the strong public policy justifications for releasing the grand jury minutes in this case. Petitioner has suggested

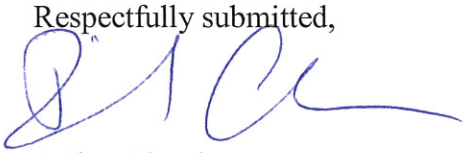
that witness names should be redacted from any transcript that is to be disclosed. Such redactions should address concerns about retaliation against witnesses.

CONCLUSION

For the reasons set forth above, the Court should exercise its discretion to order the release of the grand jury materials requested.

Dated: New York, New York
January 16, 2015

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

In the Matter of the Application of the New York Civil Liberties Union,

Petitioner,

For an Order Pursuant to C.P.L. § 190.25(4) directing the public disclosure of the transcript of grand jury proceedings and of certain evidence presented to the grand jury regarding the death of Eric Garner.

----------x

Hon. William E. Garnett
Index No. 080307/14

AFFIRMATION IN FURTHER SUPPORT OF APPLICATION FOR RELEASE OF ERIC GARNER GRAND JURY MATERIALS

ARTHUR EISENBERG, a member of the bar of the State of New York, hereby affirms under penalty of perjury,

1. I am the Legal Director of the New York Civil Liberties Union (NYCLU) and I submit this affirmation in reply to the opposition papers submitted in this matter by the District Attorney of Richmond County; in further support of the application by the NYCLU for an order, pursuant to CPL § 190.25(4), for the release of grand jury materials in the Eric Garner matter; and to provide documentary support for matters that are raised in Petitioner's Reply Memorandum of Law in support of its application.

2. The New York Civil Liberties Union is a not-for-profit organization devoted to safeguarding the civil rights and civil liberties of New Yorkers. Attached hereto as Exhibit A is the NYCLU's Certificate of Incorporation. Attached hereto as Exhibit B is a letter from the Internal Revenue Service showing that the New York Civil Liberties Union is a 501(c)(4) organization.

3. Attached hereto as Exhibit C is James C. McKinley, Jr. and Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. Times, Dec. 7, 2014.

4. Attached hereto as Exhibit D is Ken Murray, Kerry Burke, Chelsia Rose Marcius, Rocco Parascondola, *Staten Island Man Dies After NYPD Cop Puts Him in a Chokehold*, Daily News, July 17, 2014.

5. Attached hereto as Exhibit E is Norman Siegel and Ira Glasser, *The Grand Jury's Day is Done*, Daily News, Dec. 7, 2014.

6. Attached hereto as Exhibit F is Martha Minow and Robert Post, *Trust in the legal sytem must be regained*, Boston Globe, Dec. 9, 2014.

7. Attached hereto as Exhibit G is Lorena Mongelli, *Cuomo considers opening up secret grand jury proceedings*, N.Y. Post (Jan. 14, 2014).

Dated: January 16, 2015

Arthur Eisenberg

Arthur Eisenberg
New York Civil Liberties Union
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(212) 607-3324

To: Daniel M. Donovan, Jr.
District Attorney of Richmond County
Office of the Richmond County District Attorney
130 Stuyvesant Place, 7th Floor
Staten Island, NY 10301

Cc: All parties (*by email*)

Exhibit A

BOARD OF [illegible] APPEALS
11 North Pearl St.
Albany, N. Y.

CERTIFICATE OF INCORPORATION

of

NEW YORK CIVIL LIBERTIES UNION, INC.

(Pursuant to the Membership Corporations Law.)

WE, the undersigned, a committee of NEW YORK CITY CIVIL LIBERTIES COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION, an unincorporated association, not organized for pecuniary profit, having been duly authorized to incorporate the said association, and all being of full age, at least two-thirds (2/3) being citizens of the United States, and at least one of them being a resident of the State of New York, desiring to incorporate said association, DO HEREBY CERTIFY:

FIRST: The name of the proposed corporation shall be:

NEW YORK CIVIL LIBERTIES UNION, INC.

SECOND: The purposes for which it is to be formed are:

(a) To function as an affiliate of the AMERICAN CIVIL LIBERTIES UNION, INC., and to take over, carry on, and continue the affairs, property, obligations, business

5509-61-1

and objectives of the unincorporated association known as New York City Civil Liberties Committee of the American Civil Liberties Union.

(b) To safeguard within the Metropolitan area of New York, the rights of free speech, free press, free assemblage, free religion and other civil rights and liberties, and to take all legitimate action in furtherance of such purposes, and such objectives.

(c) To do any and all lawful acts and things which may be necessary, useful, suitable, desirable or proper for the furtherance of, accomplishment or attainment of, any or all of the aforesaid purposes and objects.

(d) To accept, receive, hold, invest and use for the furtherance of any of the purposes and objects of the corporation, gifts, legacies, bequests, devises, grants, funds, benefits or trusts (but not to act as trustee of any trust) and moneys earmarked for special purposes permitted by and in conformity with the aforesaid purposes and objects, all of which from any source whatsoever, and to borrow money for any of the aforesaid purposes and objects.

(e) The corporation shall not engage in any trade or business and shall not be conducted or operated for profit, nor shall any of its funds or property be paid to or inure to be the benefit of any members of the corporation or any individuals having a personal and private interest in the activities of the corporation except as reasonable com-

pensation for services rendered by them to the corporation.

THIRD: The territory in which its operations are principally to be conducted shall be the Metropolitan area of New York.

FOURTH: The office of the corporation will be located in the City, County and State of New York.

FIFTH: The number of its directors shall be not less than fifteen (15) nor more than thirty-five (35).

SIXTH: The names and residences of the directors until the first annual meeting of the corporation and their addresses are as follows:

Names	Addresses
Dr. Sheldon Ackley	270-08 82nd Ave., New Hyde Park, New York.
Alexander P. Blanck	225 Broadway, N. Y. 7, N.Y.
S. John Block	225 Broadway, N. Y. 7, N.Y.
Croswell Bowen	New Yorker Magazine, 25 West 43rd St., N.Y., N. Y.
Nanette Dembitz	530 East 90th St., N.Y. 28, N.Y.
Osmond K. Fraenkel	120 Broadway, N. Y. 5, N.Y.
Tom Gaines	R.D. #1, Stamford, Connecticut.
Victor S. Gettner	285 Madison Ave., N.Y. 17, N.Y.
Robert P. Gottlieb	2145 Ocean Ave., Bklyn, N.Y.
Rev. John Paul Jones	Union Church of Bay Ridge, Ridge Blvd. at 80th St., Bklyn 9
Harry W. Laidler	League for Industrial Democracy, 112 East 19th St., N.Y. 3, N.Y.
Loula Lasker	Hotel Pierre, 5th Ave. & 60th St., N.Y., N.Y.
Annette Smith Lawrence	144 East 24th St., N.Y. 10, N.Y.
Alfred McClung Lee	Brooklyn College, Bedford Ave. & Ave. H, Bklyn 10, N.Y.
Pauli Murray	6 Maiden Lane, N.Y. 7, N.Y.
Harriet F. Pilpel	285 Madison Ave., N.Y. 17, N.Y.

Carl Rachlin	11 West 42nd St., N.Y., N.Y.
Emanuel Redfield	60 Wall St., N.Y. 5, N.Y.
Dr. Arthur J.S. Rosenbaum	Brooklyn Jewish Community Council, 16 Court St., Bklyn, N.Y.
George Rundquist	436 Grant Ave., Bklyn, N.Y.
Rabbi Eugene J. Sack	Congregation Beth Elohim, 8th Ave. & Garfield Pl., Bklyn 16, N.Y.
R. Lawrence Siegel	55 Liberty St., N.Y. 5, N.Y.
Samuel Slaff	70 Pine St., N.Y. 5, N.Y.
Robert Stein	285 Madison Ave., N.Y. 17, N.Y.
Zarah Williamson	217 Broadway, N.Y. 7, N.Y.

SEVENTH: That all of the subscribers to the certificate of incorporation are of full age, that at least two-thirds of them are citizens of the United States; that at least one of them is a resident of the State of New York, and that of the persons named as directors at least one is a citizen of the United States and a resident of the State of New York.

IN WITNESS WHEREOF, we have made, subscribed and acknowledged this Certificate of Incorporation this 9th day of October, 1951.

5502-61-4

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

On this 9th day of October, 1951, before me, personally came and appeared NANETTE DEMBITZ, OSMOND FRAENKEL, VICTOR GETTNER, JOHN PAUL JONES, HARRY W. LAIDLER, LOULA LASKER and EMANUEL REDFIELD, and R. LAWRENCE SIEGEL, to me known and known to me to be the individuals described in and who executed the foregoing instrument; and they, severally, duly acknowledged to me that they executed the same.

Mary C. Rains

Notary Public of the State of New York

MARY C. RAINS
NOTARY PUBLIC, STATE OF NEW YORK
No. 43-8413[illegible]
Qual. in Kings Co. Cert. filed in
N. Y. Co. Clerk, Queens & N. Y. Co. Registers
Term expires March 30, 1952

5528-61-5

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

NANETTE DEMBITZ, OSMOND FRAENKEL, VICTOR GETTNER, JOHN PAUL JONES, HARRY W. LAIDLER, LOULA LASKER and EMANUEL REDFIELD and R.LAURENCE SIEGEL, being duly sworn, deposes and says:

That he is one of the subscribers of the foregoing Certificate of Incorporation of the NEW YORK CIVIL LIBERTIES UNION, INC.; that the said Certificate of Incorporation is the incorporation of an existing unincorporated association, namely, NEW YORK CITY CIVIL LIBERTIES COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION; that the purposes set forth in said Certificate of Incorporation are the same as those of the said unincorporated association; that the subscribers of such Certificate of Incorporation constitute all the members of a committee authorized to incorporate such association, by vote, as required by the organic law of the association, for the amendment of such organic law.

That each of the persons who subscribed the foregoing Certificate of Incorporation is of full age, a citizen of the United States and a resident of the State of New York.

That no previous application for the approval of the foregoing Certificate of Incorporation has been made.

Sworn to before me this 9th day of October, 1951:

550 Q-6156

I, EDWARD R. DUDLEY, a Justice of the Supreme Court of the State of New York, in and for the First Judicial Department, do hereby approve the foregoing Certificate of Incorporation of New York Civil Liberties Union, Inc.

Dated: New York, N. Y., October 11, 1951.

Justice of the Supreme Court
of the State of New York.

550-61-7

STATE OF NEW YORK

DEPARTMENT OF LABOR

BOARD OF STANDARDS AND APPEALS

ALBANY, N. Y.

In the Matter of the Application of	:	
NEW YORK CIVIL LIBERTIES UNION, INC.	:	Case No. CI-27-51
For approval of a Certificate of Incorporation pursuant to Section 9-a of the General Corporation Law and Section 11, Subdivision 1-a of the Membership Corporations Law	:	

RESOLUTION

WHEREAS, on October 22, 1951, the Board received an application for approval of a Certificate of Incorporation of the above named organization, and

WHEREAS, the Board in Executive Session on October 30, 1951, gave full consideration to the entire record.

BE IT RESOLVED, that the Certificate of Incorporation of NEW YORK CIVIL LIBERTIES UNION, INC., filed with the Board on October 22, 1951, and acknowledged on October 9, 1951, be and hereby is APPROVED by the Board of Standards and Appeals.

WILLIAM H. ROBERTS
William H. Roberts, Chairman

H. MYRON LEWIS
H. Myron Lewis, Member

GEORGE S. RAYMOND
George S. Raymond, Member

Dated at Albany, N. Y.

October 30, 1951.

5504-61-8

STATE OF NEW YORK
DEPARTMENT OF LABOR

STATE OF NEW YORK)
) SS:
BOARD OF STANDARDS AND APPEALS)

I, WILLIAM H. ROBERTS, CHAIRMAN OF THE BOARD OF STANDARDS AND APPEALS of the New York State Department of Labor, DO HEREBY CERTIFY that I have compared the foregoing copy of decision rendered by, and resolution adopted by the Board of Standards and Appeals with the original thereof, duly filed in the office of said Department on the 30th day of October 1951, and the same is a true and correct copy and transcript of the said decision and resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Department of Labor this 5th day of November 1951,

CHAIRMAN.

5509-61-9

Exhibit B

U. S. TREASURY DEPARTMENT
WASHINGTON 25

NOV 30 1955

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON 25, D. C.
AND REFER TO

T:E:PEO:S
004

NOV 29 1955

New York Civil Liberties Union, Inc.
170 Fifth Avenue
New York 10, New York

Gentlemen:

It is the opinion of this office, based upon the evidence presented, that you are exempt from Federal income tax as an organization described in section 501(c)(4) of the Internal Revenue Code of 1954.

Accordingly, you are not required to file income tax returns unless you change the character of your organization, the purposes for which you were organized, or your method of operation. Any such changes should be reported immediately to the District Director of Internal Revenue for your district in order that their effect upon your exempt status may be determined.

You are required, however, to file an information return, Form 990, annually, with the District Director of Internal Revenue for your district so long as this exemption remains in effect. This form may be obtained from your District Director and is required to be filed on or before the fifteenth day of the fifth month following the close of your annual accounting period.

The District Director of Internal Revenue, Lower Manhattan, is being advised of this action.

Very truly yours,

P. Henry Needham

Chief, Pensions and
Exempt Organizations Branch

Form 0975 (Rev. 10-54)

Exhibit C

The New York Times | http://nyti.ms/1u9B6K3

N.Y. / REGION

Grand Jury System, With Exceptions, Favors the Police in Fatalities

By JAMES C. McKINLEY Jr. and AL BAKER DEC. 7, 2014

The circumstances of the case, like others before it and others that would follow, in Ferguson, Mo., and Staten Island, were familiar. A police officer killed an unarmed man. The officer claimed he acted appropriately. A grand jury declined to bring charges.

But the state's case in Charlotte, N.C., against Officer Randall Kerrick, would not end there. The state attorney general's office, which inherited the case after the local prosecutor recused himself, quickly resubmitted the case to a different grand jury.

Evidence was reheard. Twice as many as witnesses were called. And in January, the second grand jury indicted Officer Kerrick on charges of voluntary manslaughter in the death of Jonathan Ferrell, 24, a former college football player.

The extraordinary steps taken in North Carolina — along with the recent grand jury decisions to bring no charges against white police officers who killed unarmed black men in New York and Missouri — illustrate how the justice system can favor the police, often sThielding them from murder or serious manslaughter charges.

The balance tips toward the police from the start: In most felony cases, an arrest is made and a grand jury indictment follows within a prescribed period of time. But in police fatality cases, prosecutors generally use special grand juries sitting for lengthy periods to investigate and gather evidence before determining if an arrest and indictment are warranted.

Another hurdle is the law itself. Most states give officers wide discretion to use whatever force they reasonably believe is necessary to make an arrest or to protect themselves, a standard that hinges on the officer's perceptions of danger during the encounter, legal scholars and criminologists say.

"The whole process is really reluctant to criminalize police behavior," said Eugene O'Donnell, a former prosecutor who teaches at John Jay College of Criminal Justice in Manhattan. "The grand jurors are, the jurors are, the judges are, the appellate courts are."

The recent decisions to refrain from bringing charges on Staten Island and in Ferguson have sparked protests because, among other things, they seem to defy logic: Shouldn't the cases be heard at trial, many protesters have asked, and be decided by a full jury?

The questions have strengthened calls for wholesale changes in the grand jury system. Some elected leaders in New York have called for special prosecutors, or the attorney general, to investigate all fatal police encounters. Others say the current process should be stripped of its cloak of secrecy.

No precise figures exist for the number of people killed by the police in the United States, but police departments each year voluntarily report about 400 "justifiable police homicides" to the Federal Bureau of Investigation; it is an incomplete count, criminologists say

Rarely do deaths lead to murder or manslaughter charges. Research by Philip M. Stinson, a criminologist at Bowling Green State University, reports that 41 officers were charged with either murder or manslaughter in shootings while on duty over a seven-year period ending in 2011. Over that same period, police departments reported 2,600 justifiable homicides to the F.B.I.

Officer Kerrick was the first Charlotte-Mecklenburg police officer charged in a fatal shooting in more than 30 years. He was one of several officers who responded to a 911 call, placed by a woman who was alarmed by a stranger knocking at her door at 2:30 a.m.

Moments earlier, Mr. Ferrell, a former safety for Florida A&M University, had gotten into a car accident, and his vehicle had crashed into the trees. He had walked a half-mile or so to seek help. Instead, Mr. Ferrell, who was black,

was mistaken for a burglar.

Officers arrived 11 minutes after the call and approached Mr. Ferrell. Police officials said Mr. Ferrell ran toward the officers, who fired a Taser but missed. When he continued to press forward, Officer Kerrick fired 12 bullets, 10 of which struck Mr. Ferrell.

Charles G. Monnett III, a lawyer for Mr. Ferrell's parents, said the indictment would not have come had the state prosecutor not taken the case over from the Mecklenburg County district attorney. "The district attorney's office works way too closely with the local police department and individual officers to be able to objectively look at these cases," he said.

For most felonies, grand jury hearings are swift, bare-bones proceedings. Prosecutors present enough evidence to show it is probable that the defendant, who rarely testifies, committed a crime, and ask the jury to vote for an indictment. Several cases are usually processed in a single day.

But because most prosecutors impanel a special grand jury to investigate police-related deaths, they insulate themselves from the final decision, while appearing to fulfill the public desire for an independent review, legal experts said. The inquiries often go on for weeks or months, with testimony from several witnesses.

The proceeding is transformed into a trial of sorts, behind closed doors but without cross-examination. Prosecutors control what witnesses appear and in what order, legal scholars said.

In most cases, the officer provides his or her account; prosecutors can decide to let an officer's version of events go unchallenged or to discredit it with cross-examination. They can do the same with other witnesses.

"If the prosecutor wants an indictment she or he is probably going to get one because they do have so much control over the grand jury," said Andrew D. Leipold, a law professor at the University of Illinois who is an expert on grand juries. "The accountability for the decision to charge or not to charge rests with the prosecutor, not with the grand jury."

The grand jury investigating the death of Eric Garner on Staten Island sat for nine weeks and heard 50 witnesses, including Officer Daniel Pantaleo, who

was videotaped as he used his arm to choke Mr. Garner from behind during a fight to subdue him. A medical examiner ruled Mr. Garner died because of the compression of his chest and neck during the struggle, but also listed his obesity, asthma and high blood pressure as contributing factors. Mr. Garner said several times that he could not breathe.

Geoffrey P. Alpert, a criminologist at the University of South Carolina who studies the use of force, said police officers are rarely indicted when they express remorse to jurors, admit they made a mistake, and stress that they were following their training, as Officer Pantaleo had. In shooting cases, officers often testify that they perceived a deadly threat and acted in self-defense. This stance can inoculate them even if the threat later turns out to be false.

Pete Hautzinger, the district attorney in Mesa County, Colorado, said the notion prosecutors lead grand juries to a predetermined conclusion is false. Though he rarely uses a grand jury on most felonies, he chose to present evidence to a special grand jury in 2010 against a state trooper, Evan Lawyer, who had shot and killed an unarmed man after he refused to open his front door. The prosecutor said he wanted a "sounding board" to validate his belief that there was enough evidence not only to warrant a trial, but eventually convict the trooper.

"How do ordinary people react to these facts, and what do they think is right here?" he said. Trooper Lawyer was indicted and eventually acquitted at trial.

Even when there is no hint that a victim was armed, it is difficult to bring a homicide charge if the officer claims the death was an accident, legal scholars say. Murder and manslaughter require proof that the officer intended to kill or harm the victim. To bring a second-degree manslaughter charge, one must show that the officer recklessly disregarded the risk inherent in his or her actions. Criminally negligent homicide requires a finding that the officer's actions were "a gross deviation from the standard of care that a reasonable person would observe."

The jury's only guide through the thicket of legal concepts is the

prosecutor. “The notion that average people are going to delve into these complex legal issues and get them right is bizarre,” Professor O’Donnell said. “You are doing a deep dive on issues of justification, criminal negligence and recklessness.”

Still, many prosecutors reject the notion that they control the grand juries’ conclusions. They also point out that the panels have worked for centuries to protect the rights of the accused and shield witnesses who might otherwise not testify.

“It tends to be a much more full exchange about gathering the evidence than individuals on the outside understand or believe,” said Cyrus R. Vance Jr., the Manhattan district attorney. “It is a secret process. Folks don’t know that much about it. But in practice, particularly in long investigations, I think the grand jurors are very active.”

He added: “I’ve had grand jurors which were very aggressive in trying to get me to put in evidence that I had not previously considered to put in.”

Correction: December 11, 2014

Because of an editing error, an article on Monday about the rarity of indictments of police officers through the grand jury system referred incorrectly to a shooting in North Carolina last year when the police killed Jonathan Ferrell, an unarmed black man. Police officers initially fired a Taser at Mr. Ferrell, but missed; the Taser did not strike him. (Later an officer fired 12 bullets at Mr. Ferrell, striking him 10 times.)

Jack Begg, Erik Eckholm and Hannah Fairfield contributed reporting.

A version of this article appears in print on December 8, 2014, on page A1 of the New York edition with the headline: A System, With Exceptions, That Favors Police in Fatalities.

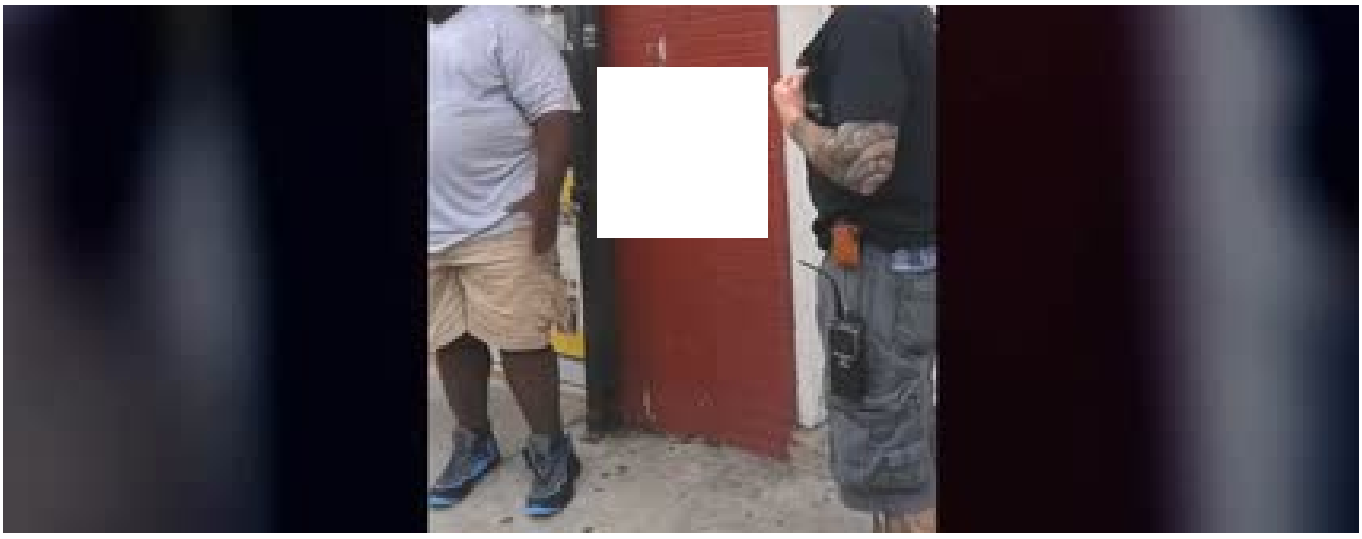
Exhibit D

Staten Island man dies after NYPD cop puts him in chokehold — SEE THE VIDEO

VIDEO EXCLUSIVE: A 400-pound asthmatic Staten Island dad died Thursday after a cop put him in a chokehold and other officers appeared to slam his head against the sidewalk, video of the incident shows.

BY KEN MURRAY , KERRY BURKE , CHELSIA ROSE MARCIUS , ROCCO PARASCANDOLA / NEW YORK DAILY NEWS /

Published: Thursday, July 17, 2014, 10:41 PM / Updated: Wednesday, December 3, 2014, 3:50 PM



A 400-pound asthmatic Staten Island dad died Thursday after a cop put him in a chokehold and other officers appeared to slam his head against the

RELATED STORIES

2 cops pulled off streets, Staten Island DA looking into man's death after NYPD chokehold

sidewalk, video of the incident shows.

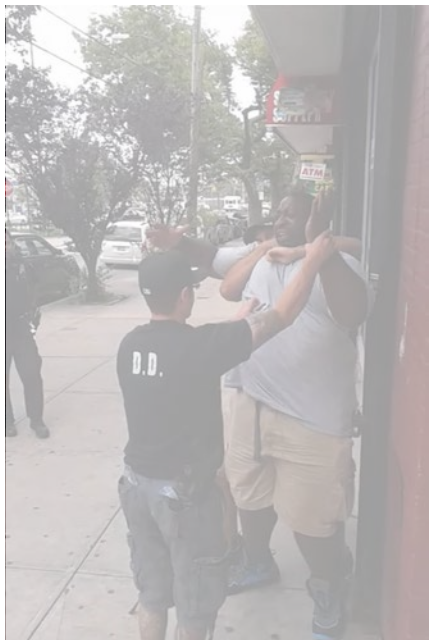
“I can’t breathe! I can’t breathe!” Eric Garner, 43, repeatedly screamed after at least five NYPD officers took him down in front of a Tompkinsville beauty supply store when he balked at being handcuffed.

Within moments Garner, a married father of six children with two grandchildren, stopped struggling and appeared to be unconscious as police called paramedics to the scene. An angry crowd gathered, some recording with smartphones.

“When I kissed my husband this morning, I never thought it would be for the last time,” Garner’s wife, Esaw, told the Daily News.

She got no details from police until after she had gone to the hospital to identify his body, she said.

NEW YORK DAILY NEWS



NEW YORK DAILY NEWS

NEW YORK DAILY NEWS

A 400-pound asthmatic Staten Island dad died Thursday after a cop put him in a chokehold and other officers appeared to slam his head against the sidewalk, according to video of the incident.

Mayor Bill de Blasio postponing Italian family vacation to Saturday so he can 'attend to city business'

“I saw him with his eyes wide open and I said, ‘Babe, don’t leave me, I need you.’ But he was already gone,” she said.

A family friend searching for her in the hospital ran into detectives from the NYPD’s Internal Affairs Division. The friend put them on the phone with her, the grieving widow said.

She spoke with a Detective Howard, who told her, “I’m sorry for your loss,” she said. He said his office was involved “because there is wrongdoing,” she said.

Police officials said Garner had a history of arrests for selling untaxed cigarettes. Cops said they observed him selling his wares Thursday on Bay St. and moved in for an arrest.

NEW YORK DAILY NEWS

NEW YORK DAILY NEWS

Within moments Garner, a married father of six children with two grandchildren, ceased struggling and appeared to become unconscious as police called paramedics to the scene.

An NYPD spokesman would only say the man “was being placed in custody, went into cardiac arrest and died” at Richmond University Medical Center.

But Esaw Garner and other family members said it was a trumped up claim.

“They’re covering their asses, he was breaking up a fight. They harassed and harassed my husband until they killed him,” she said. Garner’s family said he didn’t have any cigarettes on him or in his car at the time of his death.

She said she pleaded with police at the hospital to tell her what happened, but they brushed her off.

“They wouldn’t tell me anything,” she said.

KEN MURRAY/NEW YORK DAILY NEWS

An angry crowd gathered, some recording with smartphones.

Officials confirmed that NYPD Internal Affairs officers launched an investigation Thursday night.

Records show Garner was due in court in October on three Staten Island cases, including charges of pot possession and possession or selling untaxed cigarettes.

Esaw Garner said her husband was unable to work because he suffered from a host of ailments, including chronic asthma, diabetes and sleep apnea.

Garner's mother, Gwen Carr, 65, added, "I want justice."

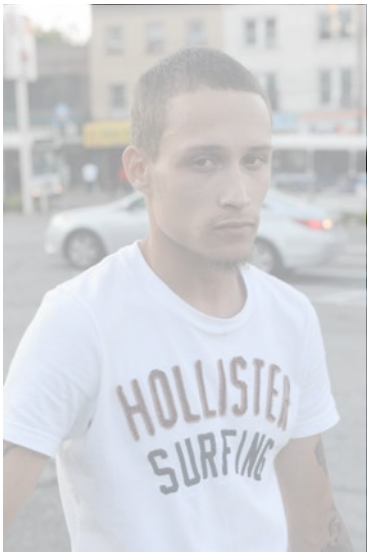
Police said Garner was not armed.

The Staten Island resident was sitting in front of Bay Beauty on Bay St. and Victory Blvd. just before 5 p.m. when two plainclothes cops began questioning him about selling untaxed cigarettes, a video obtained by the Daily News shows.

"I didn't do s---!" the 6-foot-4 Garner, wearing a sweaty T-shirt and khaki

SAM COSTANZA FOR NEW YORK DAILY NEWS

'When I kissed my husband this morning, I never thought it would be for the last time,' Garner's wife, Esaw Garner, told the Daily News. Esaw Garner holds a photo of her late husband with sons Emery (left) and Eric.



KEN MURRAY/NEW YORK DAILY NEWS

Ramsey Orta, 22, shot the shocking footage.

shorts, told the officers from the 120th Precinct when they approached him. "I was just minding my own business.

"Every time you see me you want to mess with me. I'm tired of it. It stops today!" he yelled.

Ramsey Orta, 22, who shot the video, tried to intervene, telling the cops his friend had just broken up a fight between three men and had not been selling cigarettes.

But when backup uniformed officers arrived, the cops moved in to cuff Garner, the video shows.

"Don't touch me, please," he said.

When Garner refused orders to put his hands behind his back, one of the plainclothes cops, wearing a green T-shirt with a yellow No. 99 on the back, got behind him and put him in a chokehold, the footage shows.

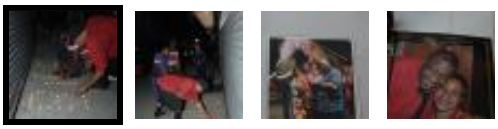
ACQUIRED BY: TOMAS E. GASTON

'He's the nicest guy. I can't believe what I saw. That's no way to do an arrest,' said Douglas, 50, about Garner. Douglas would only give his first name.

A struggle ensued as three uniformed officers joined in on the arrest, knocking the man to the ground.

He screamed, "I can't breathe!" six times before he went silent and paramedics were called.

"They jumped him and they were choking him. He was foaming at the mouth," Orta told The News. "And that's it, he was done. The cops were saying,



SAM COSTANZA

'No, he's OK, he's OK." He wasn't OK."

"They were choking him. He kept saying, 'I can't breathe, I can't breathe! Get off of me, get off of me!' and I didn't hear any more talking after that," said witness Valencia Griffin, 50, of Staten Island. "He died right there."

Another witness, who would only give his first name, Douglas, said he'd known Garner for four years.

"He's a very big man, very intimidating, but he's just a big teddy bear," said Douglas, 50. "He's the nicest guy. I can't believe what I saw. That's no way to do an arrest."

SAM COSTANZA FOR NEW YORK DAILY NEWS

At the video's end, the cop who had choke-held Garner can be seen staring at the camera that was videotaping him.

"This had nothing to do with the fight, this had something to do with something else," the cop said, and walked away.

A law enforcement source said the incident was troubling.

"A guy is dead in our custody. That is always a potential problem," the source said.

With Patri*ck* McCarron and Bill Hutchinson

UPDATE: The Staten Island district attorney is investigating the shocking death of a 400-pound asthmatic dad after a city cop placed him in a chokehold.

Eric Garner, 43, died Thursday after a sidewalk takedown by five NYPD officers making an arrest outside a Tompkinsville beauty parlor.

"My office is working along with the NYPD to do a complete and thorough investigation into the circumstances surrounding Mr. Garner's death," said District Attorney Daniel M. Donovan Jr. in a Friday statement.

Cli*ck* here to read Friday's full story

rparascandola@nydailynews.com

On a mobile device? Click here to watch the video.

Exhibit E

The grand jury's day is done

The secret panels deny fairness and frustrate justice

BY NORMAN SIEGEL , IRA GLASSER / NEW YORK DAILY NEWS / Sunday, December 7, 2014, 4:00 AM

NEW YORK DAILY NEWS

Spilling secrets

Events in Staten Island and Ferguson, Mo., have thrown a long-overdue spotlight on grand juries. In New York, Gov. Cuomo recently called for a review of grand juries, among other things. It's about time.

Grand juries have long been criticized by legal scholars for their secrecy and dubious procedures. But the reasons for such criticisms, and for proposals to abolish or reform grand juries, are not well known publicly.

What is a grand jury, why do we have them and what do they do? The grand jury is a group of citizens convened to screen criminal cases and decide whether there is enough evidence to accuse and bring someone to trial. It is not built to

determine guilt or innocence.

This is an ancient device with origins in medieval England. But the United States is the only common law jurisdiction in the world that still uses it routinely to screen criminal indictments. And even here, many states no longer use grand juries.

In colonial America, the first grand jury was convened in 1635. Back then, they had an important purpose: In the context of growing antagonism between the colonists and the British colonial government, they were a means of interposing citizens between the government and its critics.

Grand juries thus were widely perceived and revered as bulwarks of liberty between citizens and an oppressive government.

They have long since stopped fulfilling that function. Instead, they have become an instrument of the prosecutor, full of unfair procedures carried out in secret. This has been widely recognized in legal circles for decades.

Crucially, grand juries are a unique departure from our standard adversarial tradition — which creates procedural fairness by having lawyers for both sides present their evidence and their legal arguments, cross-examine each other's witnesses and do it all in the light of day, on the record and presided over by a judge whose job is to enforce procedural rules and ensure that proper legal standards are applied.

Grand juries have none of that. Only the prosecutor chooses what evidence to present. Only the prosecutor ordinarily questions witnesses. And only the prosecutor explains the law, and the legal standards to be applied.

No opposing counsel appears. There is no cross-examination. No judge presides.

And it all happens in secret.

Under these circumstances, it is not surprising that grand juries are little more than instruments of prosecutorial discretion.

In Ferguson and Staten Island, these procedural flaws were prominent. Because the proceedings were secret, it is difficult to know precisely what occurred, and that is a large part of the problem. In New York, grand jury proceedings remain secret by law.

Nonetheless, there is reason to think that the Ferguson prosecutor presented evidence in a way that led some grand jurors mistakenly to think that in order to indict they needed to find evidence beyond a reasonable doubt.

And in Staten Island, there was a video showing the police officer engaged in a prohibited chokehold on Garner. Yet we will never know what happened in the grand jury room, because the proceedings were closed, were not subject to arguments and cross-examination by any opposing counsel, nor to rulings by a judge on the correct legal standard to be applied.

What we are left with is seething resentment based on reasonable but unverifiable speculation, and a strong feeling that the fix was in, fair procedures non-existent and justice not served.

There is another way, one that many states already use. Instead of a grand jury, felonies could require a preliminary hearing to decide whether there's enough evidence to justify a trial. The hearing would be held in open court, with a judge presiding, and lawyers on both sides in the normal adversarial process.

This would be a major advance for both fairness and justice. Sometimes people still wouldn't like the result. But this is not about achieving a different result; it is about achieving a fairer process.

And especially in cases like the ones in Ferguson and Staten Island, it is about increasing the possibility of having confidence in the result because we have confidence in the process. In Missouri, state law provides that such a preliminary hearing may be used. But the decision is up to the prosecutor, and he chose the grand jury. It is not hard to see why.

The grand jury is a process left over from another time. It denies fairness and frustrates justice. And it does it all behind closed doors. It's time for it to go.

Glasser and Siegel are, respectively, the retired and former executive directors of the American and New Yor*k* Civil Liberti*e*s Unions.

Exhibit F

OPINION | MARTHA MINOW AND ROBERT POST

Trust in the legal system must be regained

By Martha Minow and Robert Post | DECEMBER 09, 2014

IN THE wake of the recent grand jury decisions in Ferguson and Staten Island, outrage and despair are reverberating across the nation, including at the law schools where we teach. Many of our students are struggling to reconcile their ideals of justice with what they perceive as manifest injustices in the criminal law system.

ELISE AMENDOLA/ASSOCIATED PRESS

Boston Arts Academy student Michael Cordero, 18, attends a march in Boston last week to show solidarity with protesters in Ferguson, Mo.

Law establishes its legitimacy through procedures that are open and fair. Legal procedures create accountability for those who wield power. We ought to determine the law's legitimacy at least in part from the perspective of those who suffer its coercion. When the law's blows fall persistently on the lives and bodies of identifiable groups, and when the procedures we have designed to create legal accountability are short-circuited or fail, our aspiration for a legitimate social order is put at risk.

CONTINUE READING BELOW ▼

If African-American communities come to perceive police as alien and violent oppressors, there can be no hope of establishing a common and viable rule of law. Repeated and pervasive patterns of publicly unjustified and lethal violence against unarmed individuals kill that hope and thus victimize us all.

Police violence may be necessary, but unjustified violence can never be. The justification for violence must be established through full, fair, and open legal procedures. If these procedures are sidestepped or avoided, the legitimacy of the legal system is endangered.

It has become undeniable that existing procedures have fallen short. We need real and specific remedies. These could include mandated responses by police commissioners to recommendations by citizen review boards; establishment of sufficiently resourced state-level agencies empowered to prosecute; and regular and persistent review processes by the Department of Justice for the failure of local and state law enforcement agencies to prevent unjustified, racially based police violence.

As communities struggle to regain trust in particular police departments, there may also be lessons to learn from the use of truth and reconciliation commissions abroad. Such efforts can yield honest disclosures, apologies, and reparations rather than adversarial denials. Even more important, we need to provide the training necessary to prevent unjustified police violence. US Marines are taught, “Never point a weapon at anything you do not intend to shoot.” Our police should have an equally serious understanding of the gravity that must accompany the use of lethal force.

There is no lack of good ideas for structural changes that might improve police conduct and hold police properly accountable. But to implement reforms, people must register, vote, and stay alert that our elected officials remain answerable for the behavior of our police.

As deans of law schools devoted to the rule of law, we work continuously to instill a commitment to the legal system. We regard the rule of law as a precious and fragile resource. But the rule of law requires the legal system to respect procedures necessary to expose and correct its own mistakes. A failing legal system puts us all in a chokehold.

As we mourn the deaths of Eric Garner and Michael Brown, let us remember that the real grand jury is all of us. We must constantly ask how we can narrow the gaping distance between our legal ideals and the practices we countenance. We must struggle

as a society to come to grips with the tragedies that have overtaken us.

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Exhibit G

METRO

Cuomo considers opening up secret grand jury proceedings

By Lorena Mongelli
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Gov. Andrew Cuomo
Photo: Dennis A. Clark

Gov. Andrew Cuomo said Wednesday he's considering proposals to provide the public more information about secretive grand jury proceedings in the wake of the Eric Garner case.

"If the public doesn't trust the justice system, you have a problem. So we have to restore the trust in the justice system," Cuomo said after a press conference at Hofstra University.

In a controversial decision, a Staten Island grand jury in December cleared Officer Daniel Pantaleo in Garner's death based on evidence brought by local District Attorney Dan Donovan, setting off massive protests across the city.

The decision triggered cries to open up the grand jury proceedings to find out how the jurors came to their decision after a video showed the officer taking Garner down with what appeared to be a chokehold.

Cuomo said he's struggling with how to disclose grand jury deliberations while protecting the privacy of witnesses and jurors.

"I'm looking for ways to provide more confidence in the criminal justice system, and secrecy was designed for obvious protections. But the challenge for us is how do you have transparency so people can understand what went on, and it's not a black box . . . that's what we're working on."

Cuomo met Tuesday with Pat Lynch, president of the Patrolmen's Benevolent Association, and Detectives Endowment Association head Michael Palladino to discuss criminal justice issues.