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July 16, 2015

Hon. Eric Schneiderman  
New York State Attorney General  
120 Broadway  
New York, NY 10271

Dear Attorney General Schneiderman:

First and foremost, I assure you without qualification that all District Attorneys in New York State will seek to do everything within their lawful power so that all incidents involving the death of a civilian will be properly, fully and fairly investigated and, if appropriate, prosecuted. This will happen whether the civilian death occurs within the next minute, during the duration that Executive Order 147 is in place, or if the order is replaced by another framework.

It should be plain to even a casual observer that the issuance of Executive Order 147 has created a number of complex practical and legal issues that your office and all District Attorneys must analyze and address. This is the first time in the history of New York that the Governor has chosen to remove the powers and duties of all 62 elected District Attorneys by executive order. We should be able to agree that it is wise to be cautious in fully considering the impact this broad, unprecedented order may have on the ability of each of our offices to exercise lawful jurisdiction and authority in the initial stages of an investigation and prosecution.

To be absolutely clear – the District Attorneys Association of the State of New York has not refused to meet to discuss the legal or practical issues created by the executive order. Because of the extraordinary nature of the superseder order we have, unsurprisingly, taken a few days to solicit the views of the elected District Attorneys from all across this state and to draft a letter for the purpose of framing some of the issues about which we have substantial concern. We believe this process will help focus our discussions, not obstruct them. Accordingly, I suggest that we agree upon a time on Friday, July 17, 2015, for our representatives to meet or to participate in a conference call to begin discussions about these issues.

I have received your “Designation,” a copy of which was apparently sent to all 62 District Attorneys on July 13, 2015, purporting to assign certain investigative duties to the local District Attorneys in the preliminary stages after an event occurs that is covered by the Executive Order. Given the express terms of Executive Order 147, we have substantial concerns about the lawfulness of the Designation. Some of these concerns are briefly set forth below. But beyond these substantial legal concerns remains the obvious logical inconsistency of superseding all 62 elected District Attorneys due to a perceived conflict of interest and loss of confidence, only to immediately designate them to perform crucial tasks at the most critical time in the investigation of one of these controversial incidents.

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The jurisdiction to investigate and prosecute all crimes in each District Attorney's county, codified in County Law §700, has been altered by Executive Order 147 to remove from its ambit the prosecution of all law enforcement officers who were responsible for the death of an unarmed civilian. We question whether the Attorney General has the power to direct the District Attorneys to perform any act. Moreover, the Directive requiring the District Attorneys to conduct a preliminary investigation serves to amend the Executive Order, an amendment that can be authorized only by the Governor himself. And, of course, any direction to the District Attorneys to involve themselves in any part of an investigation into the death of an unarmed civilian at the hands of a law enforcement officer defeats the stated purpose of the order itself. Finally, the designation would attempt to hand off the fundamental duty assigned to the Attorney General by the Governor – the duty to insure purportedly unbiased investigation and prosecution of law enforcement officials in certain cases – to the District Attorneys.

The Executive Order removed all jurisdiction from the District Attorneys and vested it in the Attorney General. In this regard, the language is clear: "[s]uch appointment of a special prosecutor will supersede in all ways the authority and jurisdiction of a county district attorney to manage, interpret, prosecute or inquire about such incidents." (Paragraph 6); and "[t]he special prosecutor's jurisdiction will displace and supersede the jurisdiction of the county district attorney where the incident occurred." (Paragraph 8; emphasis added). But despite the purported lack of confidence in District Attorneys, the Attorney General's first act, through the Designation, seeks to return jurisdiction in the preliminary stages, to the District Attorneys. It directs them, among other things, to question witnesses, draft search warrants, preserve evidence, and support the investigation of the incident. This is in direct contravention of the executive order itself, which states that the District Attorney may not even inquire about the incident.

We, like the Attorney General, are bound by the order as issued. The ability of the Attorney General to assign any part of the investigation to the superseded officer is of dubious legality and is likely to result in challenges to the use of any information obtained by the District Attorneys. Only an amendment of the order by the Governor can return any function to the District Attorneys. This being the case, a decision by a District Attorney not to act would not be one freely and easily made, as you suggest in your letter of July 15, 2015; it would be made only because of a concern that anything the superseded District Attorney might do would taint a prosecution irrevocably.

Indeed, the logic justifying the executive order itself would belie any suggestion that the elected District Attorneys can have any involvement in the investigation of these tragic cases. If that justification is to be ignored at the preliminary stage, it must be the Governor who does it. The Governor explained that he was acting because "there have been recent incidents involving the deaths of unarmed civilians that have challenged the public's confidence and trust in our system of criminal justice; and... public concerns have been raised that such incidents cannot be prosecuted at the local level without conflict or bias, or the public perception of conflict or bias." These concerns obviously exist at the preliminary stage of investigations, just as they do later in the process. That being the case, only the Governor can decide when the concerns that led him to issue Executive Order 147 can be set aside in any particular investigation.

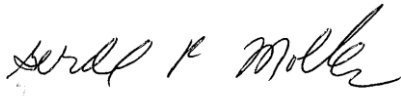
In your letter of July 15, 2015, you maintain that §63(2) and the Executive Order itself authorizes the Attorney General to direct the District Attorneys to do whatever he

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requests. With all due respect, this simply reads the statute more broadly than is appropriate. Among other things, §63(2) certainly does not authorize a designation that violates both the letter and the spirit of Executive Order 147.

This brief discussion illustrates the complexity of the issues with which our offices are confronted. But despite our legal concerns about your initial proposal, DAASNY stands ready to review and discuss with your staff both our concerns and any revised proposals that you suggest.

Respectfully Yours,



Gerald Mollen  
President, DAASNY  
District Attorney, Broome County

