SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

ERIC SCHNEIDERMAN, Attorney General of the State of New York and Special Prosecutor Pursuant to Executive Order No. 147,

Petitioner,

Index No.

For a Judgment Pursuant to CPLR Article 78,

RJI No.

- against-

JOEL ABELOVE, District Attorney, Rensselaer County,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF THE PETITION

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224-0341
Telephone: 518-776-2608
Fax: 518-915-7738
(Not for service of papers)

Alvin L. Bragg, Jr.
Chief, Special Investigations and Prosecutions Unit
Leslie B. Dubeck
Counsel
Andrew W. Amend
Senior Assistant Solicitor General, of Counsel
Adrienne J. Kerwin
Assistant Attorney General, of Counsel

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PRELIMINARY STATEMENT

By Executive Order 147, the Governor appointed the Attorney General as the sole prosecutor in New York State for certain civilian deaths caused by law enforcement officers. The Executive Order expressly extinguished the jurisdiction of district attorneys in these matters and left to them "only the powers and duties designated to" them by the Attorney General. The Executive Law and Court of Appeals precedents unquestionably establish that the Governor may supersede district attorneys in this manner.

Rensselaer County District Attorney Joel E. Abelove (DA Abelove) flagrantly violated Executive Order No. 147. On Sunday, April 17, 2016, a police officer shot and fatally wounded Edson Thevenin, a civilian, in Troy, New York (the "Incident"). Within *five days*, DA Abelove made a grand jury presentation, and the grand jury returned a no true bill. DA Abelove's rush to the grand jury flouted at least four lawfully-issued directives by the Attorney General pursuant to Executive Order 147.

Three of the four directives related specifically to the Incident. Under the Executive Order, the Attorney General may investigate "where, in his opinion, there is a significant question as to whether the civilian was armed and dangerous at the time of his death." Assistant Attorneys General notified DA Abelove at least three times, both orally and in writing, that the Attorney General believed that the Incident raised such a significant question.

The fourth directive was in a "Designation" letter from the Attorney General to all county District Attorneys issued less than a week after Executive Order 147 was issued. Pursuant to the Executive Order, the Designation specified certain powers and duties to be performed by the District Attorneys. It also expressly and unequivocally required District Attorneys to get prior authorization from the Attorney General to make grand jury presentations where a civilian was "unarmed" or where there is a significant question whether a civilian was "armed and dangerous."

DA Abelove's conduct not only violated Executive Order 147, it also flew in the face of the public concerns that led to its issuance. Executive Order 147's stated purpose is to address public concern about "conflict or bias" or "the perception of conflict or bias" that may arise when a local district attorney investigates an officer from a local police department. DA Abelove's attempted five-day, end-run around Executive Order 147 reinforces and exacerbates these public concerns. *See* Petition Exh. 7. His conduct also stands in sharp contrast to the professional conduct of other district attorneys who—while perhaps not agreeing with the appointment of the Attorney General under Executive Order 147—have worked cordially and collaboratively with the Attorney General.

In sum, DA Abelove's actions were—and are—taken without jurisdiction. Accordingly, the Attorney General seeks an order (1) prohibiting

DA Abelove from continuing to purport to exercise jurisdiction to investigate or prosecute matters arising from the Incident, and (2) compelling DA Abelove to produce to the Attorney General materials in his possession relating to the Incident.

STATEMENT OF THE CASE

A. The Attorney General's Jurisdiction

By Executive Order 147, dated July 8, 2015, and pursuant to Executive Law § 63(2), Governor Andrew M. Cuomo appointed the Attorney General as Special Prosecutor to exercise exclusive prosecutorial powers with regard to certain incidents—to wit: (1) "matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer" and (2) "instances where, in [the Attorney General's] opinion, there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death." *See* Petition Exh. 1 (Executive Order 147).

For such incidents, the Executive Order directs that the Special Prosecutor shall: (a) appear before any grand jury conducting "proceedings, examinations, and inquiries" regarding the incident; (b) "have the powers and duties" in section 63(2) of the Executive Law; and (c) "possess and exercise all the prosecutorial powers necessary to investigate, and if warranted, prosecute the incident." *Id.* The local district attorney "shall have only the

powers and duties designated to him or her by the special prosecutor as specified in subdivision 2 of section 63 of the Executive Law." *Id.*

Section 63(2) provides that whenever required by the Governor, the Attorney General shall investigate and conduct criminal actions and proceedings. In these matters, the Attorney General "shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform." N.Y. Exec. Law § 63(2). Further, "in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general." *Id.*[1]

On July 13, 2015, the Attorney General issued "Designation #1 Pursuant to Executive Order #147 and New York Executive Law 63(2)" to require that the local District Attorneys take specified and delimited actions for any incident in which the death of a civilian is caused by a law enforcement officer and the civilian either was "unarmed" or "there is a significant question as to whether the civilian was armed and dangerous."

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[1] *Matter of Johnson v. Pataki*, 91 N.Y.2d 214, 223 (1997) ("We have long held that Article IV, § 3 of the Constitution and Executive Law § 63(2) together provide the Governor with discretionary authority to supersede the District Attorney in a matter"); *People v. Weiner*, 63 A.D.2d 722, 722 (2d Dep't 1978) (for incident falling within scope of an appointment pursuant to Executive Law § 63(2), "the District Attorney of Kings County was required to obtain [the Special Prosecutor's] authorization before presenting the case against defendant to a Grand Jury").

See Petition Exh. 2 ("Designation"). The Attorney General designated the District Attorney "to exercise such powers and perform such duties in your county of jurisdiction as you deem appropriate under the circumstances . . . [including] questioning witnesses, drafting search warrants, preserving evidence, and supporting the investigation of the incident." *Id.* The Designation, however, prohibited the District Attorneys from taking certain investigative steps "without prior authorization" from the Attorney General. The steps requiring prior authorization are "conferring immunity on any witness, eliciting witness testimony in grand jury proceedings, or entering plea or cooperation agreements." *Id.*[2]

B. Death of Edson Thevenin and the Subsequent Investigation

On Sunday, April 17, 2016, at approximately 7:00 a.m., DA Abelove called Assistant Attorney General Paul Clyne (AAG Clyne) to inform him of the Incident. *See* Petition at ¶ 9. During the telephone conversation, DA Abelove told AAG Clyne, in sum and substance, the following:

- Earlier that morning, at approximately 3:15 a.m., Troy Police Department Sergeant Randall French attempted to stop a vehicle driven by Edson Thevenin;

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[2] In 1972, Governor Nelson Rockefeller issued executive orders directing the Attorney General to supersede the five District Attorneys in New York City for investigations relating to corruption in the criminal justice system. *See Matter of Dondi v. Jones*, 40 N.Y.2d 8, 10 (1976). The Special Prosecutor appointed by the Attorney General designated that the District Attorneys could conduct certain investigations. *See* Petition Exh. 8 (Working Agreement at 2.A and 3.A).

- Mr. Thevenin attempted to flee and crashed his vehicle;
- Police cruisers—one at the front and one at the rear—blocked in Mr. Thevenin's vehicle;
- Sgt. French approached Mr. Thevenin's vehicle, and Mr. Thevenin began maneuvering his vehicle backward and forward in an apparent attempt to extricate his vehicle from being struck between the two police cruisers. In the course of doing so, Mr. Thevenin pinned Sgt. French at the legs between Mr. Thevenin's vehicle and one of the police cruisers;[3]
- Sgt. French fired several shots through the windshield, striking Mr. Thevenin, who was pronounced dead shortly thereafter.

Id. AAG Clyne advised DA Abelove that he would respond to the scene of the Incident on behalf of the Office of the Attorney General ("OAG"). *Id.* ¶ 10. AAG Clyne, along with two OAG investigators, arrived at the scene shortly thereafter. *Id.* ¶ 11.

1. Initial Communication Regarding Investigation

At the scene, AAG Clyne indicated that, until the OAG received more information regarding the Incident, the Attorney General would not make a determination whether Mr. Thevenin had been "unarmed"; thus, there was necessarily a significant question about whether Mr. Thevenin had been "armed and dangerous." *Id.* ¶ 12.

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[3] A Times Union article published the next day states that Sgt. French was treated at a nearby hospital and released with "'soft-tissue' injuries." *See* Petition at Exh. 3.

While at the scene, AAG Clyne, acting on behalf of the Attorney General, spoke to DA Abelove and requested that DA Abelove see to it that the Officer involved in the shooting not be compelled to give a statement to Internal Affairs detectives until after OAG investigators had an opportunity to ask the Officer to sit for an interview with OAG investigators. AAG Clyne also advised DA Abelove that the OAG would be in touch to request further information about the Incident, and would also be seeking copies of the medical records for Sgt. French, who received treatment at a local hospital. *Id.* ¶ 13.

2. DA Abelove's Inaccurate Statement to the *Times Union*

The next day, Monday, April 18, a *Times Union* article included a quote reporting that DA Abelove said, "It was relayed to me by Mr. Clyne that the attorney general . . . is not going to be claiming jurisdiction in this case." The same article included a quote reporting that a spokesperson for the Attorney General said, "We're in the preliminary stages of the investigatory process and we'll request information from the DA's office." *Id.* ¶ 14 & Exh. 3.

The statement attributed to AAG Clyne by DA Abelove in the April 18 *Times Union* article does not accurately reflect their conversation at the scene. *Id.* ¶ 15.

After being informed of DA Abelove's quote in the *Times Union* article and the same day the article was published, AAG Clyne contacted DA

Abelove and called to his attention that the statement quoted in the article was untrue. *Id.* ¶ 16. AAG Clyne again informed DA Abelove that the Attorney General did not have enough information to determine that Mr. Thevenin was armed and dangerous at the time of the Incident, in which case the OAG would not have jurisdiction. *Id.* DA Abelove assured AAG Clyne that he had been misquoted and that there was no misunderstanding. AAG Clyne repeated his earlier request for information regarding the investigation and DA Abelove asked that any requests be put in writing. *Id.* ¶ 17.

3. OAG's Written Request to DA Abelove

The next day, Tuesday, April 19, the OAG hand-delivered to DA Abelove's Office a letter requesting information about the Incident (the "Letter"). *Id.* ¶ 18 & Exh. 4. The Letter requested: (1) any radio transmissions about the Incident; (2) any video of the Incident; (3) medical reports concerning Sgt. French; and (4) any statements of civilian witnesses. *Id.* at Exh. 4. The Letter indicated that the OAG sought this information to aid in its determination whether the Attorney General or DA Abelove would ultimately have jurisdiction for this matter. *Id.*

4. DA Abelove's Response

By letter dated Thursday, April 21, 2016, DA Abelove responded to the Letter. *Id.* ¶ 19 & Exh. 5. He acknowledged his understanding that the Attorney General "wishes to continue to pursue its investigation into this

matter." *Id.* Nonetheless, DA Abelove advised that it was his "intent to continue to exercise jurisdiction in this matter" because "his assessment of the facts . . . support the conclusion that Executive Order No. 147 does not apply." *Id.* The letter explained that DA Abelove reached this determination because Mr. Thevenin was driving a car in a manner that made it a dangerous instrument under New York Penal Law § 10(13), which, in DA Abelove's view, meant that Mr. Thevenin was "armed" for purposes of determining whether he was an "unarmed civilian" under Executive Order 147. *Id.*

This letter was not received by the Attorney General until the next week, because DA Abelove sent the letter by first class mail, rather than by e-mail, fax, or hand delivery. *Id.* ¶ 20. The letter did not attach any of the materials sought by the Attorney General's Letter or otherwise respond to the Attorney General's requests for information. *Id.* Nor did the letter make any mention of DA Abelove's intent to present to, or previous presentation to, a grand jury. *Id.* ¶ 27. And it did not seek the Attorney General's permission or consent to a grand jury presentation, as required under the designation. *Id.*

C. DA Abelove's Unauthorized Grand Jury Presentation

Around the time he dropped his letter in the mail and less than a week after the Incident, DA Abelove's Office purportedly made a grand jury

presentation. *Id.* ¶ 25. The Attorney General learned about the presentation from a press statement released by DA Abelove on Friday, April 22, 2016. *See id.* ¶ 28 & Exh. 6. The press release states that the Grand Jury "has passed on charging Sergeant French with any crime relating to the death of Edson Thevenin" and that the Grand Jury "found that Sergeant Randall French's use of deadly physical force was justifiable under the law." *Id.* ¶ 29 & Exh. 6.

ARGUMENT

POINT I

THE ATTORNEY GENERAL HAS EXCLUSIVE JURISDICTION OVER THE INCIDENT

Executive Order 147 "displace[s] and supersede[s]" the prosecutorial authority of a local District Attorney under Executive Law § 63(2) in any case where the death of a civilian is caused by a law enforcement officer and the decedent is either unarmed or, in the Attorney General's opinion, there is a significant question whether the decedent was armed and dangerous.

The Executive Order expressly gives the Attorney General the authority to determine whether there is a significant question as to whether the decedent was armed and dangerous. Under the plain terms of the Executive Order, the inquiry turns on the opinion of the Attorney General, as Special Prosecutor. Executive Order 147 ("The special prosecutor may also investigate and prosecute in such instances where, *in his opinion*, there is a significant question as to whether the civilian was armed and

dangerous . . . ." (emphasis added)). *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) ("when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words" (quotation marks omitted)); *Matter of Parietti v. Sampson*, 117 A.D.3d 830, 834-35 (2d Dep't 2014) (applying principles of statutory construction to interpret executive orders). Here, the Attorney General conveyed to DA Abelove multiple times the Attorney General's opinion that there was such a significant question: through AAG Clyne's statements to DA Abelove at the Incident scene; through AAG Clyne's statement to DA Abelove about the *Times Union* article the day after the incident; and through the Letter.

There certainly was and is a strong basis for the Attorney General to hold this opinion. Although Mr. Thevenin was not "armed" in the ordinary meaning of the term, i.e., he did not possess a knife or a gun, the evidence *may* show that Mr. Thevenin used his car as a "dangerous instrument," Penal Law § 10.00(13), and one could conclude that use of a car as a dangerous instrument makes a decedent armed under Executive Order 147. According to DA Abelove's April 21, 2016 letter, DA Abelove assessed the evidence available to him and made his determination using this logic. *See* Petition Exh. 5. Yet, under Executive Order 147, it is not his determination to make. It is the Attorney General's opinion, not DA Abelove's that matters for this

purpose, as the Attorney General has sole jurisdiction to make this determination under Executive Order 147.

Further, the Attorney General's requests for information to DA Abelove address critical issues necessary to inform the Attorney General's opinion. For example, Sgt. French's hospital records may shed light on how fast Mr. Thevenin's car was moving at the time it struck Sgt. French, and how gravely he was injured. Likewise, video footage or a civilian witness might indicate whether Mr. Thevenin's car—which according to DA Abelove's account was maneuvering backward and forward to escape from being wedged between two police cruisers—was going backward or forward at the moment that Sgt. French fired. They also might show the extent to which Sgt. French was pinned between Mr. Thevenin's car and a police car. In other words, the evidence may show Mr. Thevenin's car was not a dangerous instrument at all and his death may have been the death of "an unarmed civilian."

There is no doubt under the plain language of Executive Order 147 that DA Abelove's authority to investigate this matter was superseded. Executive Order 147 ("The special prosecutor's jurisdiction will displace and supersede the jurisdiction of the county district attorney."). The Court of Appeals has "long held that Article IV, § 3 of the Constitution and Executive Law § 63(2) together provide the Governor with discretionary authority to supersede the District Attorney in a matter," *see Matter of Johnson v. Pataki*, 91 N.Y.2d

214, 223 (1997), as he did in this case. The effect of Executive Order 147 is to "designate[] the Attorney-General in place of the District Attorney in prosecuting the entire matter." *Id.* at 227; *see also Matter of Cranford Material Corp.*, 174 Misc. 154 (Sup. Ct. Kings Co. 1940) (Governor's order under Executive Law § 63(2) operates as a "suspension of the execution of powers of prosecution by the office of district attorney").

Accordingly, the Attorney General's Designation to take limited actions is the *only* authority DA Abelove has to investigate the death of an unarmed civilian or a civilian whose death is the subject of a significant question as to whether he was armed and dangerous. That Designation made abundantly clear that DA Abelove was not authorized to make a grand jury presentation. *See* Petition Exh. 2 (delegation did not include, without prior authorization of the Attorney General, "eliciting witness testimony in grand jury proceedings).[4]

DA Abelove's lawless assertion of jurisdiction violates not only Executive Order 147, it violates the Executive Law and flies in the face of longstanding Court of Appeals precedent recognizing the authority of such an Executive Order.

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[4] *See generally People v. Weiner*, 63 A.D.2d 722 (2d Dep't 1978) (for incident falling within scope of an appointment pursuant to Executive Law § 63(2), "the District Attorney of Kings County was required to obtain [the Special Prosecutor's] authorization before presenting the case against defendant to a Grand Jury.").

POINT II

PROHIBITION IS APPROPRIATE BECAUSE DA ABELOVE HAS ACTED, AND CONTINUES TO ACT, WITHOUT JURISDICTION

Article 78 provides for relief in the nature of prohibition where a judicial or quasi-judicial officer has "proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." C.P.L.R. 7803(2). Prohibition will lie in such cases if "the clear legal right to relief appears and, in the court's discretion, the remedy is warranted." *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 51 (1983) (citation omitted).

In determining whether a writ of prohibition should be issued:

> [A] court must weigh a number of factors, which include the gravity of the harm caused by the act sought to be prohibited, whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity, and the remedial effectiveness of prohibition if such an adequate remedy does not exist.

Soares v. Herrick, 88 A.D.3d 148, 151 (3d Dep't 2011). *See also Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986). In this matter, an Article 78 proceeding seeking relief in the nature of prohibition is the only vehicle available to the Attorney General to challenge the unauthorized activities of DA Abelove. *See Soares*, 88 A.D.3d 148 at 151 (listing lack of other legal or equitable recourse as a factor to be considered when determining if a writ of prohibition should be issued).

The Court of Appeals has long upheld the use of prohibition to restrain unauthorized actions by a prosecutor. As the Court has explained, a "public prosecutor is a quasi-judicial officer, who performs important duties within our judicial system, and is subject to prohibition under proper circumstances." *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 (1976). Such circumstances arise when a prosecutor pursues a criminal matter over which he or she has no authority. Prohibition will thus lie "to prevent prosecution by a special prosecutor of crimes which exceed the authority granted." *Matter of Schumer*, 60 N.Y.2d at 52 (citing *Dondi*). Similarly, where a prosecuting officer has some authority over a case, but may undertake only certain enumerated acts, then prohibition is available to stop any other steps. *See Matter of B. T. Prods. v. Barr*, 44 N.Y.2d 226, 236 (1978) (organized crime task force could subpoena certain business records, but could not obtain them by search warrant).

In particular, a challenge to a District Attorney's jurisdiction to investigate a matter for which the Governor has superseded that jurisdiction by appointing a special prosecutor via Executive Order is properly brought as a proceeding in the nature of prohibition. *Matter of Hennessy, Jr., as District Attorney of Onondaga County*, 67 A.D.2d 1089, 1089-90 (4th Dep't 1979), *affirmed* 48 N.Y.2d 863 (1979). In *Hennessy*, the Governor had appointed the Attorney General as special prosecutor to investigate and supersede the

Onondaga County District Attorney in matters relating to the offer to, or acceptance of, bribes to public officials. *Id.* at 1089. Notwithstanding the limitations placed upon his jurisdiction by the Executive Order, the District Attorney presented subpoenas *duces tecum* in connection with a matter covered by the Executive Order. *Id.* "Based upon the inability of the District Attorney and Special Prosecutor to resolve the jurisdictional question in [the] investigation," the District Attorney brought an order "directing the Special Prosecutor to show cause why the District Attorney should not be allowed to conduct unencumbered the investigation." *Id.* The Appellate Division, Fourth Department, held that the proceeding between the District Attorney and the Special Prosecutor was "in the nature of prohibition." *Id.* Passing on the merits, the court held:

> A careful review of the records presented leads us to conclude that this investigation is a proper subject for the Special Prosecutor . . . to pursue and that such authority is clearly within the parameters of Executive Order 42. We also point out that where a Special Prosecutor is authorized to investigate and proceed in a subject area the District Attorney's authority is superseded.

Id. (citation omitted). The Court of Appeals affirmed, noting that "no relief should be available to the District Attorney." 48 N.Y.2d 863, 865 (1979).

The issue raised in *Hennessey* is identical to that involved in this proceeding, and the principles set forth in *Hennessey* warrant prohibition here. In his letter of April 21, DA Abelove recognized the pendency of the

Attorney General's investigation, and thus should have recognized his own lack of jurisdiction and obligation to cooperate with the Attorney General's investigation. Instead, he ignored the import of the Attorney General's jurisdiction.

DA Abelove has acted without jurisdiction by taking steps including, but not limited to, investigating and purporting to submit charges to a grand jury regarding the Incident without prior authorization by the Attorney General, causing the grand jury to (i) examine evidence in the presence of an unauthorized person (CPL 190.25(3)), (ii) consider charges submitted by an unauthorized legal adviser (CPL 190.25(6)), and (iii) purportedly dismiss charges submitted by an unauthorized prosecutor (CPL 190.75(1)).

Moreover, DA Abelove continues to act without legal authority by having possession of evidence presented to the grand jury, including, upon information and belief, grand jury minutes, without leave of the Court pursuant to CPL 190.25(4)(a) (grand jury proceedings are secret). *See* N.Y. Jud. Law § 325(1) (permitting the grand jury stenographer to furnish minutes to the prosecutor). DA Abelove is not a person authorized to possess the minutes or evidence of the grand jury. A prosecutor who goes before a grand jury without the "necessary jurisdictional authority" is "clearly an unauthorized person before the grand Jury . . ." *People v. DiFalco*, 44 N.Y.2d 482, 486 (1978). "[W]here a prosecutor lacks the requisite authority he is not

a proper person before the Grand Jury and those proceedings conducted by him before the Grand Jury are defective." *Id.*

For the foregoing reasons, the Court should grant the Attorney General's request that it issue an order prohibiting DA Abelove from exercising jurisdiction over an investigation and prosecution in which his authority has been superseded by an Executive Order of the Governor.

POINT III

MANDAMUS IS APPROPRIATE BECAUSE DA ABELOVE HAS A DUTY TO COMPLY WITH THE ATTORNEY GENERAL'S REQUESTS

Under CPLR 7803(1), the court may issue an order directing the performance of "a duty enjoined upon [the respondent] by law." CPLR 7803(2) "mirrors a mandamus to compel through a 'judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed.'" *Cobb v. District Attorney*, 47 Misc.3d 1229(a), 18 N.Y.S.3d 578, 2015 NY Misc LEXIS 2023, *3 (Sup. Ct. New York Co. 2015) (quoting *Brownlee v. Kohm*, 61 A.D.3d 972, 973 (2d Dep't 2009) in an Article 78 proceeding seeking production of records from District Attorney). A petitioner seeking relief in the form of a mandamus to compel must establish that "the right to relief is clear and the action sought to be compelled is an act commanded to be performed by law involving no exercise of discretion." *Cobb*,

2015 NY Misc LEXIS 2023 at *4. *See also Savastano v. Prevost*, 66 N.Y.2d 47, 50 (1985). Additionally, "the act sought to be compelled must be based upon a 'specific statutory authority mandating performance in a specified manner.'" *Kane v. N.Y. State Dep't of Housing & Community Renewal*, 28 Misc.3d 1231(A), 958 N.Y.S.2d 61, 2010 NY Misc 4230, *11 (Sup. Ct. New York Co. 2010). (quoting *Highland Hall Apts., LLC v. N.Y. State Div. of Housing & Community Renewal,* 66 A.D.3d 678, 682 (2d Dep't 2009)).

In this case, because the Attorney General had exclusive prosecutorial jurisdiction over the Incident, DA Abelove had a duty to comply with the Attorney General's requests. The plain use of mandatory, as opposed to permissive, language, in Executive Law § 63(2), Executive Order 147, and the Designation compels this conclusion. *Compare Home Dept USA v. Town Bd. of the Town of Southeast*, 70 A.D.3d 824, 827 (2d Dep't 2010) (the use of the mandatory language "shall" requires the performance of an act), *with Fox Meadows Realty & Development Corp. v. Gardener*, 209 A.D.2d 616, 616-17 (2d Dep't 1994) (permissive, but not mandatory, language does not establish clear legal right to the relief sought).

Section 63(2) states the Attorney General "*shall* exercise all the powers and perform all the duties" when the Governor supersedes a District Attorney. N.Y. Exec. Law § 63(2) (emphasis added). It also states: "[T]he district attorney *shall* only exercise such powers and perform such duties as are required of him by the attorney-general." *Id.* (emphasis added). Similarly, Executive Order 147 unambiguously states that the "special prosecutor's jurisdiction *will* displace and supersede the jurisdiction of the county district attorney where the incident occurred" and "such county district attorney *shall* have only the powers and duties designated to him or her by the special prosecutor. . ." *See id.* (emphasis added).

The Attorney General's Designation is the *only* authority DA Abelove had to investigate the Incident, and having acted pursuant to the Designation in the initial stages of the investigation, he must now surrender his investigative file to the Attorney General so that the Attorney General may complete the investigation and make those decisions that DA Abelove was prohibited from making under the Designation. *See* Petition Exh. 2 (prohibiting District Attorneys, without prior authorization from the Attorney General, from conferring immunity on any witness, eliciting witness testimony in grand jury proceedings, or entering plea or cooperation agreements).

Moreover, even apart from the Designation, the Attorney General is entitled to the District Attorney's file in this case for the simple reason that Executive Order 147 appoints the Attorney General "in place of the District Attorney." *Matter of Johnson v. Pataki*, 91 N.Y.2d 227 (1997). The investigative file for this matter is an official record belonging to the District Attorney for the matter, and the Attorney General functions as the District Attorney for the matter pursuant to Executive Order 147.

Finally, Executive Law § 63(8) creates an additional obligation for DA Abelove to provide the materials requested of him by the Attorney General. Executive Order 147 was issued pursuant to Executive Law Section 63(8) as well as Section 63(2).[5] Executive Law § 63(8) provides that "[i]t *shall* be the duty of all public officers . . . and all other persons, to render and furnish to the attorney-general . . . , when requested, all information and assistance in their possession and within their power." *See* N.Y. Exec. Law §63(8) (emphasis added).

Notwithstanding Sections 63(2)'s and 63(8)'s clear statutory mandates, DA Abelove ignored the Attorney General's repeated requests for information about the Incident. Sections 63(2) and 63(8), Executive Order 147, and the Designation provide the District Attorney with *no* discretion to turn away the

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[5] Section 63(8) authorizes the Attorney General, with the Governor's approval, to "inquire into matters concerning the public peace, public safety, and public justice."

Attorney General's request for information about the Incident. Accordingly, an order should be issued compelling DA Abelove to provide the Attorney General with the materials requested in the Letter and any other information in DA Abelove's possession relating to the Incident, including grand jury materials.[6]

[6] Grand jury secrecy does not preclude providing the Attorney General with grand jury materials relating to the Incident, because the Attorney General is the proper prosecutor for this matter.

CONCLUSION

For the reasons discussed above, the relief sought in the petition should be granted in its entirety.

Dated: Albany, New York
April 27, 2016

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224-0341

By: _____
Adrienne J. Kerwin
Assistant Attorney General
Alvin L. Bragg, Jr.
Chief, Special Prosecutions & Investigations Unit
Leslie B. Dubeck
Counsel
Andrew W. Amend
Senior Assistant Solicitor General

Telephone: 518-776-2608
Fax: 518-915-7738
(Not for service of papers)

TO: Joel Abelove, District Attorney
Rensselaer County Courthouse
80 Second Street
Troy, New York 12180

Stephen A. Pechenik, County Attorney
Office of the Rensselaer County Attorney
1600 7th Avenue
Troy, New York 12180