

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,

For a Judgment Pursuant to CPLR Article 78,

VERIFIED PETITION

- against-

**Index No.
RJI No.**

JOEL ABELOVE, District Attorney, Rensselaer
County,

Respondent.

The Petition of ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, and Special Prosecutor pursuant to Executive Order No. 147, by his attorney, ADRIENNE J. KERWIN, Assistant Attorney General, of Counsel to the Office of the Attorney General, respectfully states as follows:

1. This Petition is made by Petitioner, ERIC T. SCHNEIDERMAN (“Attorney General” or “Special Prosecutor”), seeking a judgment pursuant to CPLR Article 78, prohibiting Respondent JOEL E. ABELOVE, District Attorney, Rensselaer County (DA Abelove), from exercising jurisdiction to investigate or prosecute any matters arising from the death of civilian Edson

Thevenin on April 17, 2016, in Troy, New York (the “Incident”), and from acting as the custodian of any evidence taken by a grand jury that considered the Incident, and mandating that DA Abelove fulfill the limited duties assigned to him by the Attorney General.

2. The sources of knowledge for this Petition are publicly available documents and press; the files of the Office of the Attorney General (OAG); and communications with relevant OAG personnel.

3. The venue of this action is based on the judicial district in which the challenged events occurred pursuant to CPLR 506(a).

I. The Jurisdiction of the Special Prosecutor

4. By Executive Order 147, dated July 8, 2015 (Exhibit 1), 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, as listed in subdivision 34 of section 1.20 of the Criminal Procedure Law,” 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.”

5. By Executive Order 147, the Governor directs that the Special Prosecutor shall appear before any grand jury conducting “proceedings,

examinations, and inquiries” regarding such incidents, and “shall have the powers and duties specified in subdivisions 2 and 8 of section 63 of the Executive Law for purposes of this Order, and shall possess and exercise all the prosecutorial powers necessary to investigate, and if warranted, prosecute the incident.” (Exhibit 1). This includes, “managing and conducting” any grand jury consideration of the incident (Executive Law § 63(2)); providing charges to the grand jury as its legal adviser (CPL 190.25(6)); examining evidence obtained by the grand jury (CPL 190.25(4)(a)); and taking custody of the grand jury stenographer’s original notes and minutes (Judiciary Law § 325).

6. For such incidents, and any criminal actions or proceedings that may be had or taken “concerning or relating” to such incidents, 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 as specified in subdivision 2 of section 63 of the Executive Law.” Executive Order 147.¹

¹ Executive Law § 63(2), in relevant part, provides that “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.”

7. On July 13, 2015, the Attorney General issued “Designation #1 Pursuant to Executive Order #147 and New York Executive Law 63(2)” (“Designation”) (Exhibit 2),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.”

8. 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” The Designation further provided, however, that the District Attorney may not, “without prior authorization from the Special Prosecutor or his designee, confer[] immunity on any witness, elicit[] witness testimony in grand jury proceedings, or enter[] plea or cooperation agreements.”³

² The Designation was transmitted to the local District Attorneys via e-mail on the same day.

³ 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 in turn designated that the District Attorneys could conduct certain investigations. Exhibit 8 (Working Agreement at 2.A and 3.A).

II. Death of Edson Thevenin & Subsequent Investigation

9. On Sunday, April 17, 2016, at approximately 7:00 a.m., DA Abelove called AAG Paul Clyne, a member of the Special Investigation and Prosecution Unit of the OAG, to inform him of a recent incident (the “Incident”) in which a civilian was fatally wounded by a law enforcement officer in Rensselaer County, in the City of Troy. DA Abelove told AAG Clyne, in sum and substance, the following:

(a) earlier that morning, at approximately 3:15 a.m., a member of the Troy Police Department (later identified as Sergeant Randall French), attempted to stop a vehicle;

(b) the driver of the vehicle (later identified as Edson Thevenin) attempted to flee and crashed his vehicle;

(c) police cruisers—one at the front and one at the rear—then blocked in Mr. Thevenin’s vehicle;

(d) Sgt. French then 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 stuck 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;⁴

(e) Sgt. French then fired several shots through the windshield, striking Mr. Thevenin, who was pronounced dead shortly thereafter.

10. AAG Clyne advised DA Abelove that he would respond to the scene on behalf of the OAG.

11. AAG Clyne, along with two OAG investigators, arrived at the scene shortly thereafter.

A. Initial Communication Regarding Investigation

12. At the scene, AAG Clyne indicated to DA Abelove that the Attorney General would not make a determination of whether Mr. Thevenin was "unarmed" until it received more information regarding the Incident; for the time being, and at least absent further information, there was necessarily a significant question about whether Thevenin had been "armed and dangerous" at the time of the incident."

13. 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

⁴ A *Times Union* article published the next day (Exhibit 3), states that Sergeant French was treated at a nearby hospital and released with "'soft-tissue' injuries."

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.

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

14. The next day, Monday, April 18, a *Times Union* article (Exhibit 3) quoted DA Abelove as saying "It was relayed to me by Mr. Clyne that the attorney general . . . is not going to be claiming jurisdiction in this case." The article also quoted a spokesperson for the Attorney General as saying "We're in the preliminary stages of the investigatory process and we'll request information from the DA's office."

15. 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.

16. After being informed of DA Abelove's quote in the *Times Union* article and the same day the article was published, AAG Clyne called DA Abelove to advise him that the statement quoted in the article was untrue. AAG Clyne again informed DA Abelove that the Attorney General did not have enough information to determine that the decedent was armed and

dangerous at the time of the Incident, in which case the OAG would not have jurisdiction.

17. Indeed, 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 the request be put in writing.

C. OAG's Written Request to DA Abelove

18. On Tuesday, April 19, 2016, the OAG hand-delivered the requested letter (the "Letter") to DA Abelove's office. (Exhibit 4.) The Letter advises DA Abelove that the Attorney General is "trying to ascertain whether or not jurisdiction over this matter properly lies with your office or the OAG," and "formally requesting" that DA Abelove provide certain materials to allow that determination to be made. The Letter demonstrated that in the Attorney General's opinion, there was still a significant question that decedent was armed and dangerous. Unless and until the Attorney General resolved that significant question by concluding that the decedent was armed and dangerous, only the Attorney General had jurisdiction and the District Attorney's powers and duties with respect to the Incident were limited to those designated to him in the Designation.

D. DA Abelove's Response Acknowledging OAG's Investigation

19. By letter dated Thursday, April 21, 2016 (Exhibit 5), DA Abelove acknowledged "that [the OAG] wishes to continue to pursue its investigation into this matter, which is certainly within your discretion."

20. This letter was not received by the Attorney General until Monday, April 25, 2016, because DA Abelove sent the letter by first class mail, rather than by e-mail, fax, or hand delivery. 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.

21. The effect of Executive Order 147 is to simultaneously grant authority to the Attorney General while removing it from the District Attorney such that the offices do not have authority concurrently. DA Abelove's acknowledgement that an investigation of the matter was within the Attorney General's authority is, therefore, tantamount to DA Abelove's acknowledgment that he lacked authority to act, except as designated by the Attorney General.

22. Yet, DA Abelove advised that it is 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."

23. DA Abelove's analysis was erroneous because, in the Attorney General's opinion, there was a substantial issue of fact as to whether the decedent was "armed and dangerous."

24. To date, DA Abelove has not provided the Attorney General with any of the information requested by the OAG.

III. DA Abelove's Unauthorized Grand Jury Presentation

25. Less than a week after the Incident, without informing or seeking the approval of the Attorney General, and with knowledge that DA Abelove had not complied with the Attorney General's formal requests, DA Abelove's Office purportedly made a presentation to the grand jury.

26. At the time of the presentation, the Attorney General, acting as special prosecutor under Executive Order 147, had exclusive authority to "manag[e] and conduct[]" any grand jury consideration of the incident (Executive Law § 63(2)); provide charges to the grand jury as its legal adviser (CPL 190.25(6)); examine evidence obtained by the grand jury (CPL 190.25(4)(a)); and take custody of the grand jury stenographer's original notes and minutes (Judiciary Law § 325).

27. DA Abelove's April 21 letter to the Attorney General—which the Attorney General did not receive until April 25—made no mention of DA Abelove's intent to present, or previous presentation to, a grand jury. It did

not seek the Attorney General's permission or consent to a grand jury presentation, as required under the Designation.

28. The Attorney General learned about DA Abelove's grand jury presentation from press statement. DA Abelove has not provided the Attorney General with any information regarding the grand jury presentation—e.g., the witnesses called, any grants of immunity purportedly given, or the charges considered.

29. According to a press statement released by DA Abelove on Friday, April 22, 2016 (Exhibit 6), the Grand Jury "has passed on charging Sergeant French with any crime relating to the death of Edson Thevenin" and "found that Sergeant Randall French's use of deadly physical force was justifiable under the law."

IV. The Need for Expedited Consideration

30. As the Governor observed in issuing Executive Order 147, "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 the public is entitled to the "full, reasoned, and independent investigation, free from any conflict or bias or the perception of conflict or bias," contemplated by Executive Order 147.

31. DA Abelove—in his ultra vires rush to judgment—has frustrated the Attorney General’s ability to provide such an investigation, once again challenging the public’s confidence and trust in our system of criminal justice.

32. Time is of the essence for the Attorney General to conduct a thorough, independent investigation. Indeed, DA Abelove’s press release announcing the resolution of his investigation noted the importance of a prompt resolution. In order for the Attorney General to conduct a timely investigation, the public needs clarity that the Attorney General is the sole, rightful prosecutor for matters arising from the Incident. DA Abelove’s conduct undoubtedly has led to public confusion.

33. Public sentiment questioning the regularity of DA Abelove’s grand jury proceedings has already surfaced, including, for example, in an Opinion piece published by the Troy Record, on April 25, 2016 (Exhibit 7).

34. Witnesses and their lawyers now reasonably may be less likely to meet with the Office of the Attorney General absent judicial confirmation that Executive Order 147 extinguished DA Abelove as the District Attorney to investigate the Incident. Further, in order to conduct a thorough investigation, the Attorney General needs information that DA Abelove lawlessly is withholding.

35. In sum, every day that this jurisdictional matter goes unresolved interferes with the Attorney General’s ability to conduct a thorough and

timely investigation. Accordingly, the Attorney General seeks an expedited schedule.

IV. Reasons for Granting the Petition

A. The Attorney General is Entitled to an Order Prohibiting DA Abelove From Exercising Jurisdiction to Investigate or Prosecute any Matters Arising from the Incident

36. For the reasons fully set forth in the accompanying memorandum of law, petitioner asserts that DA Abelove:

(a) has proceeded 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 decide to dismiss charges against a designated individual where charges had been submitted by a prosecutor who lacked authority to do so (CPL 190.75(1)); and,

(b) continues to proceed without jurisdiction by having custody of grand jury minutes and evidence without leave of the Court pursuant to CPL 190.25(4)(a).

B. The Attorney General is Entitled to an Order Mandating that DA Abelove Fulfill the Duties Assigned to Him by the Attorney General

37. For the reasons fully set forth in the accompanying memorandum of law, petitioner asserts that DA Abelove has a non-discretionary duty pursuant to Executive Order 147 and the Designation to preserve and provide the Attorney General with the documents and materials requested in the April 19, 2016 Letter and to preserve and transfer the case file, including any grand jury minutes and evidence, to the Attorney General, as the proper custodian of such materials.

WHEREFORE, a judgment should be entered pursuant to CPLR Article 78, (1) compelling that Respondent HON. JOEL E. ABELOVE comply with the Attorney General's requests regarding the investigation of the Incident by preserving and providing the information and materials requested therein; (2) prohibiting Respondent HON. JOEL E. ABELOVE from taking any action regarding the death of Edson Thevenin in Rensselaer County on April 17, 2016, except as required of him by the Attorney General, as Special Prosecutor for the matter; and (3) granting the Petitioner any further relief that the court deems just, proper and equitable.

Dated: Albany, New York
April 27, 2016

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(Not for service of papers)

