SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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In the Matter of the Application of the New York Civil Liberties Union,	:	Present: Hon. Stephen J. Rooney
	:	ORDER TO SHOW CAUSE REGARDING APPLICATION FOR AN ORDER PURSUANT TO CPL § 190.25(4)
Petitioner,	:	# 80307/14
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.	:	Filed Under Seal

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Upon the affirmation of Arthur Eisenberg, Legal Director of the New York Civil Liberties Union, dated December 10, 2014, and upon the accompanying memorandum of law and upon all the papers and proceedings had herein, let the District Attorney of Richmond County show cause why this Court should not issue an order, pursuant to the C.P.L. § 190.25(4), mandating the public disclosure of the following documents and material:

1. The transcript of the grand jury proceedings investigating the death of Eric Garner except that any name and any personally identifiable information regarding grand jurors, witnesses or individuals from the Office of the District Attorney of Richmond County shall be redacted in the version of the transcript that is to be publicly disclosed.
2. The instructions given to the grand jury, in the Eric Garner matter, regarding relevant principles of law, including, without limitation, Penal Law § 35.30, pertaining to a police officer's use of physical force in making an arrest.

3. A comprehensive list of the evidence presented to the grand jury, with detailed descriptions thereof.

4. Physical and documentary evidence presented as exhibits to the grand jury, regarding the Eric Garner matter, including four videos, records regarding NYPD policies and procedures, photographs of the scene and records pertaining to NYPD training, except that autopsy photographs and medical records pertaining to Mr. Garner shall not be disclosed.

This application for disclosure, pursuant to C.P.L. § 190.25(4), shall be considered by the Honorable Stephen J. Rooney, sitting in Part 5 of the New York Supreme Court of Richmond County, located at 18 Richmond Terrance, Staten Island, New York 10301 on ~~or about~~ Dec 19, 2014.

~~Any response to this application by the Office of~~ the District Attorney shall be served upon petitioner and filed with the Court by Dec. 11, 2014 Memorandum by the parties regarding the sealing or unsealing of this application shall be filed ~~Office of the District Attorney and filed with the Court by~~ in this court by 10:00 AM on Dec 17, 2014. ~~. Service of a copy of this order, together with the papers upon which it was granted, upon the Office of the District Attorney of Richmond County on or before December ____, shall be deemed good and sufficient service.~~

Dated: December 11, 2014

Entered:

Hon. Stephen J. Rooney, J.S.C.

To: Arthur Eisenberg
Daniel Cohen
New York Civil Liberties Union
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New York, New York 10004
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District Attorney of Richmond County

Office of the Richmond County District Attorney
130 Stuyvesant Place, 7th Floor
Staten Island, NY 10301

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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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.	:	AFFIRMATION IN SUPPORT OF APPLICATON TO DISCLOSE TRANSCRIPT OF GRAND JURY PROCEEDING AND PHYSICAL AND DOCUMENTARY EVIDENCE Hon. Stephen J. Rooney

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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 support of the application by the NYCLU for an order, pursuant to C.P.L. § 190.25(4), mandating the public disclosure of the transcript of the grand jury proceedings regarding the death of Eric Garner, subject to narrow redactions as described in the attached Order to Show Cause; and further mandating the public disclosure of the instructions on the law given to the grand jury; and further mandating the public disclosure of a comprehensive list of the exhibits presented to the grand jury with detailed descriptions thereof; and further mandating the public disclosure of some, but not all, of the physical and documentary evidence that was presented to the grand jury, as set forth in the attached Order to Show Cause.

2. The procedure for presenting this application pursuant to CPL §190.25(4) comports with the instructions by the Supreme Court, Kings County in *Turturro v. City of New York*, 925 N.Y.S.2d 808 (Sup. Ct. Kings Cnty. 2011) and by the Third Department *In Matter of Aswad v. Hynes*, 439 N.Y.S.2d 737 (3d Dep't 1981). In *Turturro*, the Court observed that "[t]he general method to obtain the minutes and record [of a grand jury proceeding] are with an ex-parte application for disclosure

on notice to the district attorney." *Turturro*, 925 N.Y.S.2d at 811. This is the procedure that the petitioner NYCLU is employing here.

3. In submitting this application, the NYCLU recognizes the strong presumption in favor of maintaining the secrecy of grand jury proceedings. It acknowledges that any deviation from the secrecy of grand jury proceedings requires a "compelling and particularized" justification. *Matter of Dist. Atty. of Suffolk County*, 58 N.Y.2d 436 (1983).

4. Petitioner maintains, however, that there is a "compelling and particularized" justification for disclosure in this case. Indeed, there are two "compelling interests" generated by the unique circumstances of this case that support the disclosure of the grand jury transcript requested here. Both interests converge as a consequence of the fact that public confidence in the integrity and fairness of the criminal justice system has been severely shaken by the grand jury's decision in the Garner case. A substantial segment of the New York City community perceives the outcome of this grand jury process to be unfair and incompatible with video accounts of the incident that resulted in Mr. Garner's death. This widespread perception of unfairness in this case breeds a more generalized loss of public confidence in our courts and the processes of our criminal justice system. As this Court thoughtfully observed "[s]omewhat uniquely in this matter, 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 District Attorney of Richmond County*, Index No. 80294/14, Slip Op. at 3 (Sup. Ct. Richmond Cnty. 2014). This sense of injustice has reached such a level of concern that many in the community are seriously calling for reform of the grand jury system. Accordingly, the two interests of a "compelling" nature that

support disclosure of the grand jury transcript are, first, the need to restore public confidence in our criminal justice system and, second, the need to inform the current debate that has begun regarding the role of the grand jury as an instrument of justice or injustice.

5. Providing the public with the transcript of the grand jury proceeding as well as the physical and documentary evidence considered by the grand jury will advance both of these interests. It will allow the public to evaluate the testimony that was presented to the grand jury, the manner of the presentations, the questions posed by the grand jurors, the evidence considered and the instructions given to the grand jury on the application law. Disclosure will enable the public to better understand the atmospherics within the grand jury room and to better understand the result. It is uncertain as to whether more information about what took place in the grand jury room will restore public confidence in the process. But what is certain is that restoration of public confidence will not occur if that proceeding remains cloaked in secrecy. It is also absolutely clear that public discussion regarding the functioning of grand juries will be far better informed if the proceeding that is central to that discussion is made transparent.

6. Our entire community is enhanced if confidence in the fairness of our judicial institutions is improved. Moreover, we all stand to benefit if public discussion of the performance of the Garner grand jury, and of grand juries in general, is as fully informed as possible by an understanding of what took place here. But the judiciary has a special interest – indeed, a special obligation – to promote public confidence in our judicial institutions. Moreover, the judiciary also has a "particularized" interest in having public debate about grand juries proceed in a manner as fully informed as possible.

7. So understood, the public interest in disclosure far outweighs the interest in grand jury secrecy under the unique circumstances of this case. The justifications for maintaining the secrecy

and confidentiality of grand jury proceedings include the following: (1) the prevention of flight prior to indictment by those suspected of criminal conduct; (2) the protection of individuals who are the targets of grand jury investigations from public stigma unless and until they are indicted; (3) the protection of grand jurors from interference and retaliation; (4) the protection of witnesses from interference and retaliation. The first two of these interests are inapplicable here. There is no risk of flight on the part of the targets of the investigation. And the public has long known the identity of the principal police officer who was the subject of this investigation. The third and fourth interests can be advanced by redacting the names and personally identifiable information regarding witnesses and grand jurors.

8. There may well be an institutional interest in secrecy so as to encourage witnesses, in future cases, to come forward and testify candidly. But this institutional interest can be addressed in a judicial decision, accompanying the disclosure of the grand jury proceedings in this case, that emphasizes the unique qualities of this case and that reinforces the general presumption, in the overwhelming number of cases, that grand jury proceedings will remain secret.

9. In addition, the NYCLU has a particularized interest in seeking disclosure in this case. The NYCLU is the New York State affiliate of the American Civil Liberties Union. As such, it is deeply devoted to the advancement of civil rights and the assurance of fundamental fairness in our criminal justice system. It is interested in promoting the perception of fairness by promoting the reality of fairness. Moreover, if there is to be a public discussion of the role of grand juries and of the procedures employed by grand juries, the NYCLU maintains that such a discussion should move forward in as fully informed a manner as possible. It therefore urges the disclosure of the grand jury proceedings set forth in the attached order to show cause.

10. Finally, although we acknowledge a strong presumption in favor of maintaining the secrecy of grand jury proceedings, which we argue has been overcome in this case, there is no presumption of secrecy when it comes to the papers submitted here requesting disclosure of the grand jury minutes. These papers, which are seeking judicial resolution of the issue of disclosure, are "judicial documents." As such, there is a strong presumption, under the first Amendment, that these documents must remain open and available for public scrutiny. *United States v.Erie County*, 763 F.3d 235 (2d Cir. 2014). There is no reason why the First Amendment presumption in favor of the openness of "judicial documents" should not pertain here. These papers, seeking disclosure, contain no secret information from the grand jury proceedings. They reveal nothing not already public about what took place before the grand jury.

Dated: December 10, 2014
New York, N.Y.

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(212) 607-3324

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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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.

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Hon. Stephen J. Rooney

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

Arthur Eisenberg
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Dated: December 10, 2014
New York, New York

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PRELIMINARY STATEMENT

The New York Civil Liberties Union, as petitioner, brings this *ex parte* application, pursuant to C.P.L. § 190.25(4), requesting the Court, in the exercise of its discretion and with appropriate redactions, to order the release of (1) the transcript of the grand jury proceedings; (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 itself, with regard to the Eric Garner matter. Petitioner has notified the District Attorney of this application in accordance with the generally recognized procedure for seeking disclosure of grand jury proceedings pursuant to CPL § 190.25(4). *See Turturro v. City of New York*, 925 N.Y.S.2d 808, 811 (Sup. Ct. Kings Cnty. 2011) ("The general method to obtain the minutes and record [of a grand jury proceeding] are with an ex-parte application for disclosure on notice to the district attorney.") (citing *Matter of Aswad v. Hynes*, 439 N.Y.S.2d 737 (3d Dep't 1981)).

ARGUMENT

I. Legal Standard

There is a strong presumption protecting the secrecy of grand jury proceedings. *Matter of Dist. Atty. of Suffolk County*, 58 N.Y.2d 436 (1983). Nevertheless, "secrecy of grand jury minutes is not absolute," and this Court has discretion to grant the relief requested here. *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970). A Court "may authorize the revelation of the nature and substance of in-person testimony and other evidence considered by the grand jury, or any other matter attending a grand jury proceeding, in such circumstances and to such persons as the court may deem . . . appropriate." *In re Carey*, 988 N.Y.S.2d 852, 866 (Sup. Ct. Wyoming Cnty. 2014). Disclosure is appropriate where the movant has shown "'a compelling and particularized

need for access' to the Grand Jury material." *People v. Fetcho*, 91 N.Y.2d 765, 769 (1998) (quoting *Matter of Dist. Atty. of Suffolk County*, 58 N.Y.2d at 444). "If a defendant meets that initial burden, the trial court must then balance the public interest for disclosure against the public interest favoring secrecy. Where the former outweighs the latter, the trial court may exercise its discretion to direct disclosure." *Id.* (citations omitted).

II. Compelling and Particularized Need

This Court has already held that there is a compelling and particularized need for disclosure of grand jury materials regarding the Eric Garner investigation. There is a strong public interest – indeed, a "compelling need" – in promoting community confidence in the integrity and fairness of the criminal justice system. While this public interest is one that should concern the entire community, the judiciary bears a special responsibility to nurture and protect that interest to ensure, as broadly as possible, public confidence in the legal system. That public confidence has been severely shaken by the decision of the grand jury not to return an indictment in the Garner case, despite shocking and seemingly unambiguous video evidence that has made an indelible mark on the public consciousness. *See* 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, *available at* http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486 (attaching video).

Other courts have found that the need to restore public confidence in the grand jury system is a compelling one. Where, as here, "the integrity of the grand jury system . . . is [in] question," such a concern has been considered to be a sufficiently compelling need to justify disclosure. *See People v. Cipolla*, 711 N.Y.S.2d 303, 305 (Rensselaer Cnty. Court 2000). As this Court has recognized, the Eric Garner grand jury decision creates a uniquely compelling and

particularized need for public disclosure in order to instill a sense of trust in the criminal justice system. *See Matter of Application of the District Attorney of Richmond County*, Index No. 80294/14, Slip Op. at 3 (Sup. Ct. Richmond Cnty. 2014). The Court observed 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." *Id.*

Despite that thoughtful statement, in *Matter of Application of District Attorney of Richmond County* the Court only disclosed a handful of exceedingly general facts about the grand jury proceeding and the evidence presented, leaving all of the important details about the proceeding a mystery. Specifically, the Court disclosed the length of time the grand jury was empaneled, the number of witnesses and exhibits that were presented (and some very limited, very general descriptions thereof), and the Court disclosed one of the laws on which the jury was instructed. *Id.* at 4. Unfortunately, those very limited disclosures – which may have been entirely consistent with the District Attorney's request[1] – fall well short of providing the sort of information that would restore public trust by explaining how and why the grand jury reached the decision that it did. To address the public concerns raised by the grand jury decision, the disclosures must be sufficiently comprehensive to inform the public about how the grand jury reached a decision that to many outside observers appears to be a manifest miscarriage of justice. Only with substantially more information about the facts and evidence it considered, and the legal instructions it received, can the public begin to understand the grand jury's decision. Whether such disclosure will improve public confidence in the decision cannot be known. What

[1] Of course, because the District Attorney's application remains sealed, we are not in a position to determine whether and to what extent the Court's order is consistent with the DA's request.

is clear, however, is that, under the unique circumstances of this case, the continued cloak of secrecy surrounding the grand jury proceedings will only further erode public confidence in the outcome of those proceedings.

As the Eric Garner controversy has unfolded, a second equally compelling need has arisen that supports the disclosure of the grand jury transcript and related evidence. The controversy has now spawned a serious public discussion about the appropriate role of grand juries in our criminal justice system. Around the country, the Eric Garner and Michael Brown matters "have sparked protests." James C. McKinley, Jr. and Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. Times, Dec. 7, 2014, *available at* http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html. Along with those protests, there have been "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." *Id.* Some commentators have gone as far as urging the abolishment of grand juries in New York altogether. *See* Norman Siegel and Ira Glasser, *The Grand Jury's Day is Done*, Daily News, Dec. 7, 2014, *available at* http://www.nydailynews.com/opinion/siegel-glasser-grand-jury-day-article-1.2035380.

The disclosures this Court made in *Matter of Application of District Attorney of Richmond County* do very little to advance that policy discussion. As the debate proceeds, individuals on each side of it are left to speculate about how and why the Garner grand jury reached its decision. Such discussion would be far better informed if the transcript were disclosed so that the public and policymakers alike could acquire a deeper understanding of the

decision-making process and the evidence upon which the decision turned. Seen in these terms, disclosure will further the important interest in reasoned discourse by an informed community.

There are also "particularized" interests that support the disclosure requested here. If the "particularity" requirement means that the proponent must show that the information in the grand jury minutes cannot be obtained through some other source, *see Matter of Dist. Attorney of Suffolk Cnty.*, 58 N.Y.2d at 445, this requirement is satisfied here. This is because the Garner grand jury proceeding is obviously central to the debate that is currently taking place regarding the fairness of grand juries and the continuing need for secrecy. Information about that proceeding is critical. No document other than the grand jury transcript will be as probative.

In this case, the interests in disclosure are also "particularized" in two other ways. First, the disclosure sought is narrowly tailored to withhold from disclosure information that is not important to the current debate. Petitioner is prepared to redact unnecessary information, including the names of witnesses, where such names are not critical to the public's understanding of the issues. Second, as the subject of grand jury reform has now emerged as an important criminal justice issue, the NYCLU, as an organization devoted to fair criminal processes, has a particular interest in seeing the debate regarding grand juries proceed in as informed a manner as possible.

III. Balance of Interests

Additional disclosure is appropriate not only because of the incongruity between the previously acknowledged compelling and particularized needs at issue and the extremely limited information that has already been made public, but also because the balance of interests weighs heavily in favor of it. In cases like this one, implicating the public trust in the justice system, the public interest in disclosure is very strong. *See Application of FOJP Serv. Corp.*, 463 N.Y.S.2d

681, 685 (Sup. Ct. New York Cnty. 1983) ("It is manifest that there is a substantial public interest here. The very integrity of the judicial process and advocacy system is involved."). On the other hand, the justifications for applying the strong presumption of grand jury secrecy are only minimally implicated, if at all. Courts recognize such a presumption of secrecy for five reasons: (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." *Di Napoli*, 27 N.Y.2d at 235.

None of those concerns would be implicated by disclosing the legal instructions that the grand jury was given. After all, the Court has already disclosed that "the grand jury was instructed on relevant principles of law, including Penal Law § 35.30 regarding a police officer's use of physical force in making an arrest." *Matter of Application of the District Attorney of Richmond County*, Index No. 80294/14, Slip Op. at 4 (Sup. Ct. Richmond Cnty. 2014). The policy considerations for limiting access to grand jury proceedings do not provide a rationale for limiting the legal-instruction disclosures in that way, or any other. Rather, the legal instructions can be disclosed in their entirety without creating a risk of any adverse consequences with respect to this or any other grand jury proceeding. In the unlikely event that certain portions of the instructions are so specific that they might identify witnesses by reference to specific evidence or testimony, the instructions could be redacted to eliminate that danger.

Similarly, releasing a detailed exhibit list, along with the limited physical and documentary evidence requested here, would not implicate any of the policy justifications for grand jury confidentiality. This Court has already disclosed that 60 exhibits were admitted into evidence, and has provided a broad summary of them. There is no grand-jury-secrecy policy concern that justifies disclosing, for example, the fact that the grand jury considered "records regarding NYPD policies and procedures," *id.*, but withholding *which* policies and procedures were considered. Again, to the extent that portions of particular evidence or descriptions thereof could be read to compromise the confidentiality of any witness, they may be appropriately redacted. Because *no* privacy concerns would be raised by public disclosure of the instructions, a detailed exhibit list, or the evidence requested, at the very least they should be disclosed. *See Aiani v. Donovan*, 950 N.Y.S.2d 745, 748 (2d Dep't 2012) (finding that balancing the interests favored disclosure where "none of the reasons for maintaining secrecy in grand jury proceedings [was] implicated").

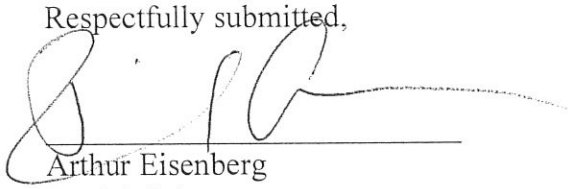
Further, though, balancing the interests also supports disclosure of the entire transcript, albeit with redactions where appropriate to protect the confidentiality of the witnesses who testified. Here, the first three considerations do not pertain, and the subject of the investigation is already well known to the public because of the high-profile nature of the case. As such, the only relevant policy consideration is whether disclosure will discourage future testimony by compromising the confidentiality of the witnesses here. *See Di Napoli*, 27 N.Y.2d at 235. The risk of such a result is exceedingly small in this case. Again, the witnesses' identities can be protected by proper redaction, thus substantially reducing the likelihood that future grand jurors will fear that their privacy will be compromised. Moreover, the highly unusual nature of this case makes it very unlikely that future grand jurors will consider it to be a move away from the

longstanding general rule that grand jury proceedings are protected from public disclosure. As this Court has already recognized, this matter is situated "at a crucial moment in the nation's history" and deals with issues "affecting the continued vitality of our core beliefs in fairness, and impartiality," making it unique. *Matter of Application of the District Attorney of Richmond County*, Index No. 80294/14, Slip Op. at 3 (Sup. Ct. Richmond Cnty. 2014). That fact, and a strong statement from the Court about the importance of confidentiality in the ordinary case and the very high burden of a compelling and particularized need to overcome it, should be more than enough to preserve the integrity of grand jury proceedings in future cases.

CONCLUSION

For the reasons set forth above, the Court should order the disclosure of (1) the transcript of the grand jury proceedings in the Eric Garner case, (2) all of the legal instructions given to the grand jurors, (3) a comprehensive list of the evidence presented to the grand jury, with detailed descriptions thereof; and (4) the physical and documentary evidence presented to the grand jury, with the exception of autopsy photographs and medical records of Mr. Garner. All of which should be subject to appropriate redaction by the District Attorney in order to protect the confidentiality of the witnesses and grand jurors.

Respectfully submitted,



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Dated: December 10, 2014
New York, N.Y.