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November 10, 2010

Cyrus R. Vance, Jr.
District Attorney
New York County
One Hogan Place
New York, NY 10013

Via Facsimile: 212-335-9705

Dear Mr. Vance:

We are writing regarding the mass arrests on the Brooklyn Bridge of October 1, 2011 and related matters, as counsel for demonstrators arrested in that mass sweep. As detailed below, we request by this letter that your office dismiss the prosecutions of those arrested, without requiring that arrestees agree to ACDs.

Dismissal of Charges from the Mass False Arrest is Appropriate

We are asking you to review this matter and to dismiss the charges against those arrested. There is no basis to prosecute those persons arrested, and requiring those who were subject to this group arrest, which was devoid of probable cause, to defend against these baseless charges only compounds the injuries they have suffered and appears as an act of malicious prosecution.

Tapping into taxpayer funds for these prosecutions, and consuming the resources and time of those arrested, as well as the resources of the judiciary, is unwarranted under these circumstances.

The entrapment/trap-and-arrest Brooklyn Bridge mass protest sweep was unlawful and unconstitutional in its entirety. The police may not truncate peaceful First Amendment-protected activity, surround a group, issue no audible orders, prohibit persons from having an avenue of exit, and then arrest the hundreds of persons caught in the trap. See Barham v. Ramsey, 434 F.3d 565 (D.C. Cir. 2006) (noting the District Court's finding "that charging hundreds of individuals with failure to obey a police order without first ordering them to disperse 'is nothing short of ludicrous.'")

It is an indefensible form of entrapment for police to lead and escort a mass march onto a bridge and then arrest them for being on a bridge. The marchers were under the impression that they were permitted to be on the bridge, particularly given that police led the march in the front and escorted the march on the flanks onto the Brooklyn Bridge. At a minimum, there was the appearance that the police were permitting them to be on the bridge.

The mass sweep trap-and-arrest tactic has been used by the NYPD for years now. For reasons elaborated upon below, it is plainly unconstitutional. The Brooklyn Bridge mass arrest, however, is a most egregious manifestation of the tactic given that the police command staff, themselves, led and permitted protestors onto and across the Brooklyn Bridge and without audible warning or fair notice arrested hundreds for being present upon the bridge.

There is clear precedent for the District Attorney to comprehensively dismiss all charges against protestors/arrestees under such circumstances. On October 6, 2004, your office determined that it would not pursue charges against 227 persons who were mass arrested at a march on August 31, 2004. As ADA William Beesch advised the presiding judge in Manhattan Criminal Court at that time, "The police likely created the impression among the participants that the march had official sanction." Sabrina Tavernise, The New York Times, Prosecutors Won't Pursue Cases of 227 in Disputed Protest, October 7, 2004 at B1.

On October 1st, by escorting and leading the march upon and halfway across the bridge the police, in fact and law, permitted the use of the bridge by the marchers. See Dellums v. Powell, 566 F.2d 167, 183 n.4 (D.C. Cir. 1977) (permission or an "unwritten permit" deemed to have been issued where police initially stopped marchers, but then stood aside and permitted them to proceed to the U.S. Capitol steps, making no efforts to keep protestors from assembling at or upon the steps; false arrest claims against police upheld, where protestors were thereupon arrested by police for being present on the U.S. Capitol steps); See also Cox v. Louisiana, 379 U.S. 559 (1965) (quoting Raley v. Ohio, 360 U.S. 423 (1959)) ("to sustain [plaintiffs'] later conviction for demonstrating where they told [them they] could 'would be to sanction an indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State had clearly told him was available to him.'")

The police have called attention to the fact that prior to permitting entry upon the bridge, one officer standing at the front of the march used a hand-held bullhorn to issue a statement or directive that persons present on the roadway were subject to arrest. The march numbered in the thousands of people, extending many blocks back. The noise that demonstrators were making was, to say the very least, substantial and loud. Audio recorded from cameras just a few feet away shows that this small bullhorn was inaudible to the hundreds subject to its supposedly communicated order.

The fact that the police did have one officer issue a directive, albeit one inaudible to the hundreds subject to arrest for supposed failure to comply, is an implicit acknowledgment that the police knew of their constitutional obligation under these circumstances to provide "fair notice" before effecting a mass arrest – and substituted the show of the bullhorn order for an actual audible directive calculated to reach those assembled.

"Fair notice," as that term is interpreted constitutionally in the context of protests, requires the police to issue orders (to disperse, where authorized, or to comply with a particular directive), followed by a meaningful opportunity to comply. Only those who refuse to comply after provision of fair notice may be constitutionally subject to arrest. See Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011) ("What [police] could not lawfully do. . . was arrest people who the police had no good reason to believe knew they were violating a police order."); Papineau v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006) (citing City of Chicago v. Morales, 527 U.S. 41, 58, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) "[T]he purpose of the fair notice requirement [in disorderly conduct statutes] is to enable the ordinary citizen to conform his or her conduct to the law.")

Constitutionally required "fair notice" is "notice reasonably likely to have reached all of the crowd despite any noise the demonstrators may have been making." Dellums, 566 F.2d at 181 (citing Cullinane, 566 F.2d at 120 n.4).

However, this single hand-held bullhorn was insufficient to be heard even feet away, given noise conditions, much less provide the constitutionally required "fair notice," issuance of audible orders and meaningful opportunity for compliance, to the entirety of those about to be arrested before such a mass arrest may be effected; See, e.g., Dellums v. Powell, 566 F.2d 167, 184 (D.C. Cir. 1977). Affirming liability against the Chief of Police for mass false arrest, "Chief Powell should have been aware that the hand-held bull horn he testified he used to give his orders was not powerful enough to reach the crowd."

The ACD Offer Should be an Outright Dismissal; The ACD Chills Protected Speech

We are aware that your office has stated that it would offer ACDs to an arbitrary subset of arrestees, those who received Desk Appearance Tickets (as opposed to those who received Summons for the exact same incident). The ACD, of course, requires that a person not be rearrested during the subsequent six months.

Under the current circumstances, where the police are employing an indiscriminate trap and detain mass arrest tactic against demonstrators and persons in proximity to demonstrations, persons conforming their behavior to the law still cannot immunize themselves from false arrest.

Given that there are ongoing demonstrations and marches associated with the Occupy Wall Street movement, combined with the threat of arbitrary false arrests, the use of the ACD offer seems calculated to chill lawful demonstration activity. It gives the NYPD license and incentive to continue to conduct mass false arrests to take people off the street.

In other words, so long as the NYPD continues to arrest protestors indiscriminately, without regard to each's particular conduct or misconduct, a protestor taking an ACD must feel as if he or she must completely avoid any protest activity, for risk that they will be arrested indiscriminately again during the relevant period - - even if they conform their behavior perfectly, so long as they are in proximity to demonstration activity.

There is No Basis for the Prosecutions to Proceed, Except to Cause Hardship to the Arrestees

As it stands now, your office is requiring over 700 innocent people to suffer the hardship of returning to court for appearances, to obtain defense counsel, to go to trial where they so opt to vindicate themselves, even though the matter is devoid of probable cause for the mass arrest. These are working people, students, and people trying to find jobs, all who must now bear this illegitimate burden. It is unreasonable to force them through this process, an additional injustice and a waste of limited public resources.

People in New York City, as around the country, must be free to participate in the essence of grassroots democracy, free speech, and peaceful collective action without being subject to mass false arrest that punishes them for no more than exercising their cherished rights to demonstrate and redress grievances.

We ask that you do the right thing under the circumstances of this case, exercise the discretion of your office, follow the precedent your office previously set, and entirely dismiss the charges stemming from the mass arrest on the Brooklyn Bridge.

Sincerely,

Carl Messineo

Mara Verheyden-Hilliard