

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF SOARES,

Respondent,

-against-

No. 70

CARTER,

Appellant.

20 Eagle Street
Albany, New York 12207
March 23, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

JAMES C. KNOX, ESQ.
E. STEWART JONES HACKER MURPHY
Attorneys for Appellant
28 Second Street
Troy, NY 12180

CHRISTOPHER D. HORN, ADA
ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent Soares
6 Lodge Street
Albany, NY 12207

MARK S. MISHLER, ESQ.
LAW OFFICE OF MARK S. MISHLER, PC
Attorneys for Respondent Donnaruma, et al.
750 Broadway
Albany, NY 12207

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number
2 70, Matter of Soares v. Carter.

3 Counselor, would you like any rebuttal
4 time?

5 MR. KNOX: One minute, Your Honor, please.

6 CHIEF JUDGE LIPPMAN: One minute. Go
7 ahead.

8 MR. KNOX: James Knox of the E. Stewart
9 Jones Hacker Murphy Law Firm on behalf of Judge
10 Carter. Your Honors, I'd like to draw your attention
11 to the amendments that happened to the operative CPL
12 provisions, or the ones that Judge Carter thinks are
13 the operative CPL provisions in this case. In 1970,
14 CPL 170.40 and its counterpart, 210.40, were modified
15 to add a provision that allows a judge, the
16 defendant, or the district attorney to make a motion
17 to dismiss in the interest in justice, required that
18 the judge set forth the reasons for granting such a
19 motion on the record.

20 But this court, in 1976, in People v.
21 Belge, which is 41 N.Y.2d 60, gave voice to the fact
22 that it was uncomfortable with the fact that the
23 statute didn't provide any criteria by which to
24 analyze whether that review was - - - that motion
25 would properly be granted.

1 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
2 what's underlying this - - - this whole proceeding?
3 Where - - - where - - - talk to us.

4 MR. KNOX: Sure.

5 CHIEF JUDGE LIPPMAN: Cut to the quick
6 here.

7 MR. KNOX: Well, the quick - - -

8 CHIEF JUDGE LIPPMAN: You got a judge - - -
9 an unusual situation where the judge and the district
10 attorney's office are sparring about a well-
11 publicized sit-in, the - - - here in Albany. What -
12 - - what has created this - - - do you - - - do - - -
13 is your argument on behalf of the judge that his
14 interest of justice power has been marginalized? Is
15 it that the district - - - or is the district
16 attorney not just doing what you want him to do or
17 what your client wants him to do?

18 MR. KNOX: The district attorney is not
19 doing what the law requires him to do, Your Honor.

20 CHIEF JUDGE LIPPMAN: Yeah, how - - - how
21 so? What - - - what's the underlying - - - you got a
22 thing where the district attorney doesn't want to
23 prosecute the case. Putting aside the - - - the - -
24 - the - - - the legal merits, which we're going to
25 talk about - - -

1 MR. KNOX: Sure.

2 CHIEF JUDGE LIPPMAN: - - - obvious
3 extensively, what is this, a test of wills between
4 the DA and the judge? What's really underlying all
5 of this?

6 MR. KNOX: Judge Carter is committed to the
7 rule of law. He is committed to requiring - - -

8 CHIEF JUDGE LIPPMAN: To the rule of law of
9 having the D - - - the DA prosecute a case that he
10 doesn't believe is worth prosecuting?

11 MR. KNOX: Absolutely not, Your Honor. And
12 that's not - - - that's a mischaracterization of
13 Judge Carter's position.

14 CHIEF JUDGE LIPPMAN: So what is the right
15 characterization?

16 MR. KNOX: The right characterization has
17 always been that Judge Carter is requiring either go
18 forward with the hearing or make a motion to dismiss
19 in the interest of justice.

20 JUDGE PIGOTT: If I - - - if I could
21 compartmentalize this. As I was reading it all, it
22 seems to me that your argument is that outside the
23 courtroom, outside, you know, where a judge presides,
24 DA does what he wants or she wants. If they want to
25 prosecute, they can. If they don't, they don't, et

1 cetera. But once they come in within - - - within
2 the courtroom and within the jurisdiction of the
3 judge - - - and I think he makes the point that
4 informations were filed subsequent to the police
5 original charges here - - - that there are rules.

6 And the rules are - - - and he - - - the -
7 - - the judge has spelled them out here and feels
8 that that's the - - - that's the limit for both as to
9 what can be done within the court. And - - - and
10 therefore someone cannot simply not show up at court
11 and have a case disposed of that way. It has to be
12 disposed of within the confines of the CPL?

13 MR. KNOX: Exactly. And I know they're
14 going to point they did show up. They always showed
15 up. But I - - - I think what started, if you want to
16 call it a contest of wills, were these letters from
17 the district attorney saying we decline to prosecute
18 in this case.

19 JUDGE READ: Well, let me ask you this. I
20 thought the issue in this case was whether the court
21 could compel the prosecutor to - - - let's say the
22 court wants him to comply with the CPL. Isn't the
23 issue whether he could compel the prosecutor to move
24 to dismiss or to - - - to - - - to go forward through
25 his contempt threat? Isn't that that the issue?

1 MR. KNOX: I think that that is the issue,
2 Judge Read. I - - -

3 JUDGE RIVERA: No. But isn't it even more
4 narrow than that? Isn't the issue whether or not he
5 can compel through the threat of contempt to the DA
6 to call witnesses if the DA chooses not to call
7 witnesses?

8 MR. KNOX: I think the two - - -

9 JUDGE RIVERA: At that hearing.

10 MR. KNOX: I think the - - - the two
11 statements that both of you have made dovetail to one
12 another, and Judge Read's question is directly
13 implied by the - - - the narrow issue that you have
14 re - - - recited. That is the issue that - - - I
15 think that we are - - - we have before this court.

16 CHIEF JUDGE LIPPMAN: What could the
17 possible contempt be on the part of the DA's office?

18 MR. KNOX: The - - - the failure to obey a
19 - - - a lawful order to follow the Criminal Procedure
20 Law and elect from one of the possible avenues of
21 disposition allowed thereunder.

22 JUDGE RIVERA: All right, but this is my
23 question, again. Isn't it - - - I understand that -
24 - - that you wish to present it that way. But isn't
25 the legal question that's really come up, given the

1 posture of the case, whether or not Judge Carter
2 could use the threat of contempt to require them to
3 call witnesses at the hearing?

4 MR. KNOX: Yes.

5 JUDGE RIVERA: He may view it differently.
6 I understand. But if the AD has made a finding that
7 that is the way it reads the record, aren't we bound
8 to that reading?

9 JUDGE READ: And wouldn't we have to find
10 that the Supreme Court abused its discretion in
11 deciding that Judge Carter exceeded his authority? I
12 mean, to find in your favor - - -

13 MR. KNOX: No.

14 JUDGE READ: - - - don't we have to decide
15 that?

16 MR. KNOX: I dis - - - I don't agree with
17 that. I think that this court can find without going
18 to the abuse of direction standard that the writ
19 didn't lie in the first place. Because Judge
20 Carter's decision as to whether or not he could, at
21 that moment in time, have held them in contempt for
22 failing to call a witness, because they had gone
23 through this procedure. He had said several times
24 follow the procedure in the CPL. They had issued
25 these letters saying we decline to prosecute. They

1 were the ones that had occasioned the occurrence of
2 this hearing.

3 JUDGE PIGOTT: Well, I - - - I was curious
4 and I - - - and - - - and neither one of you
5 addressed it, and I don't blame you, but when the
6 judge turned down the ACD saying there - - - it - - -
7 it's going to be conditioned on community service - -
8 - and generally speaking, I think defendants expect
9 that if they're convicted of something they have a -
10 - - they would have a sentence.

11 But to say it's going to be adjourned in
12 contemplation of dismissal, which at that point would
13 mean there is no charge, that for some reason I've
14 got to work my way into that. I've got to - - - I've
15 got to pay a penalty to get an adjournment in
16 contemplation of dismissal is an interesting
17 question. But the judge decided that he was not
18 going to go along with an ACD and - - - unless there
19 was community service. And there's - - - and the
20 record's kind of - - - kind of thin on that. And I -
21 - - I suppose it should be. But isn't that where - -
22 - if - - - if the - - - if the ACD had been granted
23 we - - - we wouldn't be here.

24 MR. KNOX: That's true.

25 JUDGE FAHEY: So really what we have - - -

1 to follow up on Judge Pigott's point, the - - - what
2 - - - what I understand that was in the record is the
3 judge said no ACD unless they do six months of
4 community service at the veterans' house. Is that
5 correct?

6 MR. KNOX: It - - - no. It was - - - I
7 believe it was forty hours for the defendants who
8 were charged with violations only and - - -

9 JUDGE FAHEY: And six months for the
10 misdemeanor charge?

11 MR. KNOX: - - - 180 - - - right. Yeah.

12 JUDGE FAHEY: Yeah. I was in city court
13 for a couple years. I can't ever recall a case where
14 an ACD was given with that much community service.
15 That - - - that is unusual.

16 MR. KNOX: I, speaking from personal
17 experience, don't find it to be unusual.

18 JUDGE FAHEY: I - - - I do.

19 MR. KNOX: I practice in all local courts
20 and I know that in this - - - in this district that -
21 - - our capital district - - -

22 JUDGE FAHEY: Um-hum.

23 MR. KNOX: - - - that's an ordinary thing.

24 JUDGE FAHEY: You know, well, Buffalo's not
25 the far side of the moon, and - - - and I really

1 don't find it - - - I find it a little unusual, that
2 amount of community service, for basically a - - - a
3 protest argument where the AC - - - where the ACD's
4 being's offered by the district attorney. It seems
5 to me that legally this case is a case of the laws of
6 physics where an irresistible force meets an
7 immoveable object, and we're dealing here with - - -
8 with issues that really are not even properly before
9 the court.

10 And I think the arg - - - the questions
11 that the court have given seem to have really,
12 correctly, narrowed it down to the writ of
13 prohibition and the - - - the interest of juris - - -
14 the interest of justice jurisdiction questions, which
15 I'd ask - - - I'd ask you to briefly address, because
16 it seems to me since that issue was not decided we
17 shouldn't be addressing that at all, even given when
18 the Appellate Division said.

19 MR. KNOX: I think what the Appellate
20 Division said is why you have to address that,
21 because they have - - - their decision leaves open
22 this avenue for any district attorney that wants to
23 dismiss a case now - - -

24 JUDGE FAHEY: Yeah. But it's tough to
25 address something that hasn't be decide - - - really

1 been decided. I think if the issue was - - - if
2 there was a request to dismiss in the interest of
3 justice and then the court ruled on it or the court
4 said I was going to do it within this forum, then
5 we'd have something to deal with in front of us. But
6 we really don't at this point, and it's - - - it's -
7 - - sometimes the less you say the better off you
8 are, I think, in my limited experience here so far.

9 MR. KNOX: I don't have much to say to
10 that. But I - - - I understand that you want to
11 constrain the issue, but I - - - the implications of
12 what's going to occur if you don't decide that the
13 writ does not apply are - - - are dramatic.

14 JUDGE FAHEY: Well, and that's a good
15 point. I think if you - - - you follow up on the
16 implications, it seems that, really, what you do is
17 over time there'll be a motion to dismiss for failure
18 to prosecute, or there will be a scheduled hearing
19 and a - - - or a scheduled trial and the DA will
20 offer no proof and the court will be compelled to
21 dismiss. Either one of those options are going to
22 end you up in the same place without creating a
23 situation where an argument is being made that the
24 court should not have the authority to exercise
25 interest of justice jurisdiction, which I agree with

1 you on. That's - - - that's contrary to the statute.
2 At the same time, we - - - we solve this impossible
3 quagmire. It seems to me one of those two - - -

4 MR. KNOX: I - - -

5 JUDGE FAHEY: - - - one of those two
6 options are going to end up how this thing resolves
7 itself.

8 MR. KNOX: It is, and it's easy to jump
9 from where we are now, if you take the snapshot of
10 the case when this litigation began, to - - -

11 JUDGE FAHEY: Sure.

12 MR. KNOX: - - - what - - - what's the end
13 result? I mean that's - - - something as lawyers we
14 like to do is just say what's - - - where are we
15 really headed here, right?

16 JUDGE FAHEY: Um-hum.

17 MR. KNOX: But the implications for what's
18 occurred in this case have broader application - - -

19 CHIEF JUDGE LIPPMAN: I think case is - - -

20 MR. KNOX: - - - all over.

21 CHIEF JUDGE LIPPMAN: - - - highly unusual.
22 And - - - and I - - - I really don't - - - it seems
23 to be a - - - a personal issue back and forth. While
24 I agree with you if you take it's to its logical
25 legal implications or conclusion, you could have a

1 broad effect. But I - - - it just seems like this
2 became a very confrontational divide between the DA
3 and the judge, and both want to prevail. And - - -
4 and I don't know if there's great majestic legal
5 issues here that - - - that we're dealing with. Or
6 it's - - - it - - - or it's a case that never should
7 have come here.

8 JUDGE RIVERA: And I - - -

9 CHIEF JUDGE LIPPMAN: And should have been
10 able to be resolved.

11 JUDGE RIVERA: And, counsel, in the interim
12 you have defendants who have these charges over their
13 head when they are happy to have the DA decide not to
14 continue with the case and want the case to go away.
15 It's not - - - it's not like you have the defendants,
16 for some strange reason, saying no, no, no, we want
17 the prosecution to move forward. There's no
18 suggestion here, right, of any incorrect conduct - -
19 -

20 MR. KNOX: No.

21 JUDGE RIVERA: - - - by - - - by the DA in
22 the sense of something that's unconstitutional or - -
23 - or suspect, right?

24 MR. KNOX: But we're never going to have
25 those things on the record, though. If there was

1 some sort of collusion to get rid of criminal charges
2 - - - and there is a criminal charge here of
3 resisting arrest. And I understand that, as people
4 who support the First Amendment, I and everyone
5 probably in this room can sympathize with the
6 criminal defendants in this case. But the
7 ramifications are larger than that. The
8 ramifications are that if you are saying, as the
9 Appellate Division did, that under these circumstance
10 Judge Carter is compelled to dismiss in the interest
11 of justice, that denigrates 170.40 which lists
12 specific criteria, none of which are - - -

13 CHIEF JUDGE LIPPMAN: But you're saying
14 that the judge - - -

15 MR. KNOX: - - - just send me a letter
16 saying they don't like the case.

17 CHIEF JUDGE LIPPMAN: - - - should exercise
18 his options under the law the same way you're saying
19 that the DA should exercise whatever options they
20 have.

21 MR. KNOX: Not - - - not exactly, if I
22 could just clarify briefly.

23 CHIEF JUDGE LIPPMAN: Quickly. Go ahead.

24 MR. KNOX: CPL 180.85 provides for the
25 exact procedure the People tried to follow here with

1 the felony complaint. It allows them to file an - -
2 - a motion, an application to dismiss. And if the
3 defense consents it shall be granted. That's what
4 the legislature said. They didn't provide a similar
5 procedure for misdemeanor cases.

6 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
7 hear from your adversary.

8 MR. KNOX: Thank you.

9 CHIEF JUDGE LIPPMAN: And then you'll give
10 us your rebuttal.

11 Counselor?

12 MR. HORN: May it please the court. This -
13 - -

14 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
15 what's really going on here? I'll ask you the same
16 thing. What - - - well, how did all this come about?
17 We have this case in front of the high court on what
18 seems like a regular, ordinary, run-of-the-mill - - -
19 not that I'm characterizing the protests that way,
20 but you have a protest. They come in. DA doesn't
21 want to prosecute. What - - - what - - - what - - -

22 MR. HORN: I think - - - I think the court
23 has laid it out pretty well. I mean we had these - -
24 - this is the capital of New York State. We tend to
25 attract a few protestors now and then.

1 CHIEF JUDGE LIPPMAN: We've noticed. Go
2 ahead.

3 MR. HORN: Yeah. And we've - - - we've had
4 some experience in dealing with them. We have
5 chosen, in our discretion, to be quite respectful of
6 their First Amendment rights, exercising their First
7 Amendment rights.

8 JUDGE READ: So why didn't you just move to
9 dismiss?

10 MR. HORN: In the interest of justice?

11 JUDGE READ: Yeah.

12 MR. HORN: Well, the judge has made it very
13 clear he was not going to grant a motion to dismiss
14 the case in this - - -

15 JUDGE PIGOTT: I - - - I'm not sure of that
16 at all. I - - - I - - - you may - - - you may
17 absolutely believe that, and it might absolutely be
18 true. But even if it is, I mean, I hope there's
19 adults in this thing. I - - - I'm - - - I'm - - -
20 there's sixty-two counties, sixty-two DAs, who knows
21 how many judges. And for some reason, this case, as
22 Judge Lippman is saying, gets all the way to the
23 Court of Appeals over who struck John. And - - - and
24 I - - - I'm befuddled by it. I would have thought at
25 some point somebody would say look, file the damn

1 motion and we'll get out of here.

2 MR. HORN: I agree. And - - - and,
3 generally speaking, a motion to dismiss in the
4 interest of justice comes from the defendants, not
5 generally from us. In our view, he was not going to
6 grant it, and I am relying on his words when I say he
7 wasn't going to grant it.

8 JUDGE PIGOTT: Would you say - - - wouldn't
9 - - -

10 JUDGE READ: Why wouldn't you test it?

11 JUDGE PIGOTT: Wouldn't that have played -
12 - -

13 JUDGE READ: Why wouldn't you test it?

14 JUDGE PIGOTT: Yeah.

15 MR. HORN: I - - - to be honest, I sort of
16 suspected that the defendants would make that motion
17 at some point in time.

18 JUDGE PIGOTT: Well, you're sitting with
19 them. Didn't you talk to them?

20 MR. HORN: Well, we don't usually do all
21 that much. Usually, we're negotiating a disposition.

22 JUDGE PIGOTT: Right.

23 JUDGE ABDUS-SALAAM: Well, when you
24 negotiated the ACD, did you think about taking it a
25 step further to a motion to dismiss in the interest

1 of justice?

2 MR. HORN: We did consider that. We did
3 not ultimately do that because we were confident the
4 judge was not going to grant it, because he said he
5 was not going to grant it.

6 JUDGE PIGOTT: As Judge Read just
7 suggested, that - - - that - - - that would have teed
8 it up for you. If you guy - - - if you guys wanted
9 to get into this kind of a contest you say go ahead,
10 judge, deny it in the interest of justice, and we'll
11 see what the Appellate Division does.

12 MR. HORN: Sure. Look, I wish we had made
13 a - - - had made that motion so I wouldn't have to
14 answer this question. Okay. I've said that all
15 along. I wish we had done that. But we would have
16 been - - -

17 CHIEF JUDGE LIPPMAN: Good answer. Go
18 ahead.

19 MR. HORN: We would have been banging our
20 head against a wall. If you look at pages 7 and 8 of
21 Judge Carter's brief, he says he would not have
22 granted the motion to dismiss in the interest of
23 justice if he had been presented with one. I'm
24 taking him at his word. He wrote it in two
25 decisions.

1 JUDGE FAHEY: Yeah, all - - - all that - -
2 - all that's true. But you still should have made
3 the motion.

4 MR. HORN: Sure.

5 JUDGE FAHEY: There's no sense - - - no
6 sense - - - no sense abusing you any more about it.
7 If it's - - - it's self-evident you should have made
8 the motion. And the way I read the statute, he had a
9 right to refuse to grant it. It seems to be quite
10 clear that he makes that determination. You may have
11 a different argument.

12 But I think the point that was made before
13 is that with the writ of prohibition, if it applies
14 the way the Supreme Court said, you have two
15 resolutions that are perfectly acceptable, that are
16 legal alternatives that resolve this case, without a
17 determination in your favor on the interest of
18 justice jurisdiction. And that would have been the
19 way to resolve it rather than go all the way here.

20 MR. HORN: I agree with that. But there
21 are many ways to resolve this. He - - - he is
22 insisting that we're not following the CPL, as if the
23 only way to resolve it is by a motion to dismiss in
24 the interest of justice. But that's not true.
25 There's - - - you can have a - - - he can have a

1 trial order of dismissal if we don't sustain our
2 burden. You can have a speedy trial, dismiss in
3 court.

4 JUDGE PIGOTT: We know all of that. We
5 know all of that. Of course. Of course.

6 MR. HORN: Well, you know, that - - -
7 that's what we were relying on. And to the extent
8 that he's accusing us of not following the CPL, it
9 was Judge Carter who was not following the CPL.

10 JUDGE PIGOTT: That's why you can appeal
11 when you make a motion and he denies it. What do you
12 think of People v. Reardon? Kinderhook.

13 MR. HORN: Oh, all of the - - - all of the
14 Kinderhook cases? We're doing something different
15 from what - - - from what's happening in Kinderhook
16 with regard to claiming that our statement that we're
17 not going to prosecute removes it from the court's
18 jurisdiction. We're - - - we're - - - we're not
19 making that claim.

20 JUDGE PIGOTT: Well, the point - - - my - -
21 - my - - - my thought about it is that this case has
22 generated a decision out of - - - out of Columbia
23 County now that is going to probably generate more of
24 these things. And - - - and - - - and I - - - I - -
25 - I'm just befuddled. I - - - I - - - I don't know.

1 DA's generally get along with the court system, and
2 they generally work hand-in-hand with defense counsel
3 to get justice done. But apparently it's not - - -
4 not working here.

5 MR. HORN: Well, we - - - we thought an ACD
6 would have resolved all of this, you know, very
7 neatly and it should have. We resolved over a
8 hundred other of these Occupy Albany cases, and they
9 all ended in dismissal with us declining to sustain
10 our burden or go - - - go forward and - - - go
11 forward.

12 JUDGE RIVERA: Was the community service
13 unusual?

14 MR. HORN: It - - - well, it was with
15 regard to all of the Occupy Albany cases. As far - -
16 - as far as the political protest cases go, we were
17 not handling - - - handing out community service - -
18 -

19 JUDGE RIVERA: Um-hum.

20 MR. HORN: - - - unless there was some sort
21 of property damage or if there was some sort of
22 violence involved.

23 JUDGE ABDUS-SALAAM: Are you suggesting
24 that these cases were resolved before other judges,
25 not Judge Carter?

1 MR. HORN: It was the same court but
2 another judge. Yes.

3 CHIEF JUDGE LIPPMAN: Okay, anything else,
4 counsel?

5 MR. HORN: Well, the - - - the main thing
6 that we're relying on here - - - and, you know, I'll
7 rely upon Schumer v. Holtzman where this court said
8 that the DA has the discretion to determine whom,
9 whether, and how to prosecute. That's what we're
10 doing right here.

11 And also in Council 82 v. Cuomo, that
12 discretion extends to the ordering of priorities and
13 decisions about how to allocate staff and resources
14 to best carry out our duties. When it comes to
15 Albany City Court, our priorities where we're
16 allocating our staff is prosecution of domestic
17 violence, DWI, any sort of crime that has some
18 element of violence. That's - - -

19 JUDGE PIGOTT: You could have put all of
20 that in a motion and dis - - - and you wouldn't be
21 here. I think what - - - what - - - what gets kind
22 of aggravating about this is you're try - - - you - -
23 - you're citing the Holtzman case and - - - and
24 they're big cases. They were important case - - -
25 you're trying to raise this whatever-it-is, whether

1 it's an argument between two people or what, to the
2 level of those kind of cases, and I just don't think
3 it's there. I - - - I just don't know what's going
4 on here. But to ask the seven of us to make some
5 grand pronunc - - - pronounciation on this is
6 difficult.

7 MR. HORN: Fair enough. Well, okay.
8 Leaving all of that aside, ultimately, the entire
9 procedure has been unfair to the criminal defendants
10 in this case. Separation of powers is not an end
11 unto itself. It is intended to safeguard liberty.
12 It ensures that no one is convicted of a crime
13 without the concurrence of all three branches of
14 government.

15 JUDGE ABDUS-SALAAM: Counsel, what standard
16 do you think we should use in deciding this? Is it
17 abuse of discretion by the Supreme Court or is it
18 something else?

19 MR. HORN: You would have to find that the
20 Supreme Court abused its discretion. It - - -
21 because it really is a very narrow issue. We're - -
22 - we relied on our discretion on the question of
23 whether we're going to call witnesses in the
24 suppression hearing. And - - - and, you know, that -
25 - - that's another thing. Under 710.60(2)(b) the

1 court was required to summarily grant the suppression
2 motion. We repeatedly said that we were not opposing
3 the suppression motion. That is a stipulation.

4 Under the language of that statute, if we - - - if we
5 stipulate that the evidence should be suppressed,
6 there's to be no hearing. There's nobody to call as
7 a witness. So it's that particular statute that we
8 rely on in addition to our discretion not to call any
9 witnesses. As every student of the law knows - - -

10 JUDGE PIGOTT: Well, I wish you'd filed
11 some papers to that effect. I - - - I mean
12 everybody's alluding to the - - - to the transcripts
13 and things like that. I - - - I am missing - - - I
14 mean a 170 motion is pretty standard and there's
15 formbooks on them.

16 MR. HORN: Well, so is 710.60(2)(b). And -
17 - -

18 JUDGE PIGOTT: Yeah.

19 MR. HORN: - - - as David Rossi said in the
20 court, the court should grant the motion because
21 we're not opposing it.

22 JUDGE PIGOTT: You can file it. You can
23 file a motion to that effect.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.
25 Thanks, counsel.

1 MR. HORN: Thank you.

2 MR. MISHLER: Good afternoon. May it
3 please the court Mark Mishler representing the - - -
4 what I think of as the central players in the
5 process.

6 JUDGE PIGOTT: You could have made the
7 motion too.

8 MR. MISHLER: But they've been shunted to
9 the side.

10 JUDGE PIGOTT: The DA makes a great
11 argument for the defense, which we don't see too
12 often up here.

13 MR. MISHLER: Well, and we appreciate the
14 DA's support.

15 JUDGE PIGOTT: But you could have made a
16 motion at any time, true?

17 MR. MISHLER: And, Your Honor, we did, in
18 fact. After the Appellate Division issued its
19 decision we submitted a motion to dismiss in
20 furtherance of justice.

21 JUDGE PIGOTT: How'd you do?

22 MR. MISHLER: Even at that point it would
23 have been very easy for Judge Carter, at that point,
24 to say okay, I'll accept this motion. I'll make a
25 decision on this motion. And, in fact, he refused to

1 even - - - I mean literally refused to accept the
2 motion which had been filed.

3 JUDGE PIGOTT: Was that - - - that wasn't
4 the speedy trial motion, was it?

5 MR. MISHLER: No. The speedy trial motion
6 was made prior to the suppression hearing. And in
7 fact, you know, the - - - we believed that was a
8 motion that should have been granted. And, again,
9 the People explicitly indicated that they were not
10 opposing the speedy trial motion. As the court is
11 aware, in 30.30 motions the People - - - once - - -
12 once the issue's raised, the People have the burden
13 of - - -

14 CHIEF JUDGE LIPPMAN: Counsel, let me ask
15 you what I asked your - - - your other two
16 colleagues. What's really going on here? How did
17 this happen? We're all kind of asking in our own
18 way. Why is this case here? From the defendants'
19 perspective, why is this case here?

20 MR. MISHLER: Your Honor, we're as - - -
21 the defendants are perhaps even more puzzled than the
22 court. I mean this was a relatively routine protest.
23 In fact, as the record indicates, it was the exact
24 same march in the exact same location that took place
25 the prior week. Nobody was arrested. There were no

1 issues. This particular week the police officers
2 there decided to make some arrests. The practice had
3 been very clear all along. All of the Occupy-related
4 arrests in Albany the DA's office declined to
5 prosecute.

6 JUDGE FAHEY: Well, let me - - - let me ask
7 this. If the ACD was offered without any community
8 service, would we be here?

9 MR. MISHLER: No, absolutely not.

10 JUDGE FAHEY: Okay.

11 MR. MISHLER: No.

12 JUDGE FAHEY: So that's why you're here.

13 MR. MISHLER: Right.

14 JUDGE FAHEY: Right. Okay. I got it.

15 Thank you.

16 JUDGE PIGOTT: Well, that and the DA - - -
17 the DA filed informations subsequent to the police
18 making their charges, right?

19 MR. MISHLER: I mean that's in the record.
20 There really was little or no change - - - I mean,
21 basically, they were informations prepared - - -
22 complaints prepared by the police officers. There -
23 - - there were some documents indicating a
24 superseding informations that were filed by the DA's
25 office.

1 JUDGE PIGOTT: Do you know why he did that?

2 MR. MISHLER: I - - - I don't. No. But, I
3 mean, so - - - I mean we certainly agree with what I
4 think the members of the court have expressed that
5 this is an unusual case. We don't believe there's
6 any real reason for it to be in the Court of Appeals.

7 The only thing I would say that counters
8 that is since we are here, this case does implicate
9 what we believe are very serious issues of separation
10 of powers and issues of separation of powers that go
11 directly to the rights of criminal defendants. And
12 we have a concern about criminal defendants, not just
13 in this case, facing what, in essence, are two
14 prosecutors. I mean we have one - - - one prosecutor
15 who's supposed to be doing the job as a prosecutor.
16 And then in this case we have the court, the judge,
17 Judge Carter, taking on the role of prosecutor.

18 JUDGE PIGOTT: Well, the - - - the - - -
19 the - - - the concern here, at least the way I look
20 at it now that this is such a high-visibility case,
21 let's assume for a minute that you've got a domestic
22 violence case and that, for one reason or another,
23 the DA decides that he or she doesn't want to
24 prosecute it. And the judge is very concerned about
25 that particular issue and perhaps even this

1 particular - - - these particular respondents or - -
2 - or people in the court. Is he just supposed to
3 take the - - - a district attorney's - - - say we're
4 not prosecuting and say okay, fine; I'm dismissing
5 it?

6 MR. MISHLER: Yes. I - - -

7 JUDGE PIGOTT: I don't think so. I - - - I
8 - - - I - - -

9 MR. MISHLER: It is not up to the court.
10 But let - - - excuse me, Judge. I just want to say -
11 - -

12 JUDGE PIGOTT: Certainly.

13 MR. MISHLER: This was a hearing where the
14 People had a burden.

15 JUDGE PIGOTT: I'm giving you - - - I'm
16 giving you my hypothetical, and I'm saying that
17 there's a high - - - there's a - - - there's a
18 serious case - - - I won't say high visibility - - -
19 but involving a serious matter like domestic
20 violence. And can a district attorney simply call up
21 the judge or appear the next day and say judge, we're
22 choosing not to prosecute, without letting the public
23 - - - it's a public trial and a public proceeding - -
24 - know the reasons why that's happening because in -
25 - - in many cases it could be very important.

1 Wouldn't you agree?

2 MR. MISHLER: I - - - I agree. Except I
3 don't think the judge has a right to do that. I
4 think if the People are not going to prosecute the
5 case that, inevitably, and it should happen sooner
6 rather than later, lead to the dismissal of the case.

7 JUDGE PIGOTT: If - - - I - - - I - - - I'm
8 sorry, Judge.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 JUDGE PIGOTT: I'm thinking of one other
11 one where - - - where a district attorney loses
12 valuable evidence, loses the gun, loses, you know,
13 the DNA, loses something. And they are embarrassed.
14 They don't know what to do now. And so they just
15 call up the judge and say we're not prosecuting.
16 Does the judge have a right to know why this murder,
17 this rape, this some - - - is not going forward, or
18 does he simply say thanks for your call, Mr. or Ms.
19 DA. I'll strike it off my calendar?

20 MR. MISHLER: I think the hypothet - - - it
21 doesn't exactly match - - -

22 JUDGE PIGOTT: They get better, don't they?

23 MR. MISHLER: - - - this situation, of
24 course. I - - - I think the - - - the issue is the
25 bottom line is the prosecutor has to have the power

1 and discretion to decide not to continue with a case.
2 That - - - that's - - -

3 JUDGE PIGOTT: Should they put it on the
4 record?

5 MR. MISHLER: I can say as a matter of
6 public policy, yes, I think that makes sense. Is it
7 required under the law? No. I don't believe it is.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.
9 Thanks, counsel.

10 MR. MISHLER: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. KNOX: Thank you. I want to note one
13 thing about those hundreds of cases that - - - that
14 were dismissed. Those were cases under - - - to
15 another judge in which straight adjournments and
16 contemplation of dismissal were offered and approved
17 by the judge. But the procedure is that when an ACD
18 is offered, the judge has the discretion to approve
19 or not approve it and put whatever conditions on that
20 ultimate dismissal that he wants.

21 And, yes, there were other ways this could
22 have been resolved. For instance, the defendants
23 could have waived that hearing altogether and asked
24 the judge to set down a trial date and had a trial
25 where the DA declined to present witnesses. I don't

1 know why that didn't happen.

2 CHIEF JUDGE LIPPMAN: That wouldn't have
3 achieved much, would it have?

4 MR. KNOX: It wouldn't have achieved much,
5 but they could have done that. And - - - but they
6 elected to go through this process. And we - - - we
7 didn't just get here simply because we got to this
8 hearing that you have a transcript of and that's what
9 this is all about. It also is about the fact that
10 before that the criminal defendants, they commenced
11 their own Article 78 action to compel Judge Carter to
12 dismiss these cases based on the motions he'd already
13 denied. And they sought temporarily relief to bar
14 that hearing, that you have the transcript from, from
15 going forward.

16 That motion for temporary relief was
17 denied. And then literally several days later, we
18 have the district attorney commencing their own
19 Article 78 that's brought us here today. And I think
20 that's - - - that's what implicates the concern that
21 Reardon illustrates. When you have a district
22 attorney that wants to dismiss something and won't
23 put it on the record.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. KNOX: Thank you, Judge.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

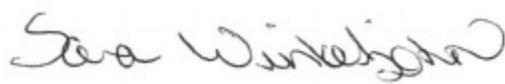
CHIEF JUDGE LIPPMAN: We'll take it under
advisement. Thank you.

(Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Soares v. Carter, et al., No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: March 24, 2015