SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

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THE PEOPLE OF THE STATE OF NEW YORK

against

Ind. No. 746/2020
Decision and Order

TRACY McCARTER,

Defendant.

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DIANE KIESEL, J.

The defendant is charged with murder in the second degree following the stabbing death of her husband. The District Attorney of New York County has filed a "recommendation of dismissal" of the indictment and the defendant joins in that application. It is opposed by family members of the deceased.

Factual background.

On March 2, 2020, at 9:08 p.m. members of the New York Police Department responded to a radio run of an assault with a knife at 646 Amsterdam Avenue, Apt. 2C, in New York County. A neighbor had heard the defendant yelling, "Get the fuck out. Get out, get out. Don't ever come back here again," and later, "Don't take my purse, give me my purse, don't leave with my bag." "I have a knife," and finally, "What did you do? Somebody help me."[1] When they entered the apartment, the police found a man lying face-up on the floor bleeding heavily from his neck. The defendant, who happens to be a nurse, was holding a towel on one of his wounds, attempting to stop the bleeding. More law enforcement officers arrived, followed by Emergency Medical Technicians. The officers inspected the apartment and ascertained that no other civilian was there except the defendant and the gravely injured man who was identified as the defendant's husband, James Murray. The defendant admitted to her neighbor, "I stabbed him."[2] She made no mention to the neighbor or to the police that the deceased fell on the knife or that he strangled her.

The defendant was arrested at the scene and transported to the 24th Precinct for arrest processing. A silver kitchen knife was recovered from an area where the victim and the defendant had been in the apartment. Although the defendant had no visible injuries, she complained of an inability to walk, and said that she had been unconscious for a second or two during the altercation with her husband. Because of those complaints, the defendant was taken to a hospital for evaluation and possible treatment. Mr. Murray died at St. Luke's Hospital at 9:43 p.m. that same night. His autopsy revealed that his blood alcohol level was .15%, and he suffered a stab wound to his upper right chest, which angled right to left at a 45-degree downward angle, piercing his

[1] Defendant's affirmation, Aug 8, 2022, exhibit 25, Grand Jury tr at 5, lines 15-16; tr at 6 lines 5-6, 15.
[2] *Id.* at 8, line 16.

lung and reaching his spine. He also had four other knife wounds: two small, incised wounds to the right side of his neck and two vertical incised wounds to his right shoulder.

Procedural history prior to transfer to this Court.

The defendant was arraigned before a New York City Criminal Court Judge on March 3, 2020 and remanded for Grand Jury action. On the next date, when CPL § 180.80 would require the Court to release the defendant unless the People had conducted a preliminary hearing or voted an indictment within 144 hours of arraignment, the defendant's counsel waived the release time until March 27, 2020. Presumably, this was to allow the People to further investigate what happened the night of the stabbing, in light of the defendant's arraignment claims that she had been a victim of domestic violence at the hands of her late husband.

Meanwhile, the COVID-19 pandemic struck and the state went into lockdown, rendering it impossible to empanel grand juries or conduct court proceedings in person for months. On May 21, 2020, a preliminary hearing was held pursuant to CPL § 180.60. At that hearing, a judge found "reasonable cause to believe the defendant committed a felony" (CPL § 180.70[1]), and the defendant remained in jail. It was not until September 10, 2020, that an indictment was filed against the defendant charging her with one count of murder in the second degree (Penal Law § 125.25[1]), a class A-I felony. At the time, Cyrus R. Vance, Jr. was the District Attorney of New York County.

Prior to the defendant's indictment, her counsel was replaced by a team of attorneys from Dechert LLP and later joined by others from the ZMO Law Firm and Kaplan Hecker & Fink who were recruited by a domestic violence organization to accept the case pro bono. Following her indictment, the defendant's case was transferred to the Hon. Melissa C. Jackson in the Supreme Court for pretrial proceedings and eventual trial or disposition. While the case was pending before Justice Jackson, it proceeded in due course. The People applied to the Court for search warrants and exchanged discovery with defense counsel. The defense lawyers filed an omnibus motion, pursuant to which Justice Jackson found the Grand Jury presentation was legally sufficient, and ordered suppression hearings. Each side retained domestic violence experts.

Procedural history in this Court.

On January 1, 2022, a new District Attorney assumed office. On April 5, 2022, in anticipation of Justice Jackson's planned retirement, the case was transferred to this Court. After an initial appearance, the matter was scheduled for hearings and trial on May 25. On that date and in the six months that followed, perplexing and conflicting signals emanated from the District Attorney's office regarding the prosecution of this matter.

The first attempt to reduce and dispose of the case was made on May 25 when, with the assigned Assistant on trial elsewhere, a supervisor appeared seeking court approval of an *Alford* plea (*North Carolina v. Alford,* 400 US 25 [1970]; *People v. Miller*, 91 NY2d 372, 377 [1998]), in which the defendant would have pled guilty to manslaughter in the second degree (Penal Law §

125.15[1]) and menacing in the second degree (Penal Law § 120.15[1]), with no admission of wrongdoing or factual allocution.[3] The deal included the promise that after a year of good behavior the defendant could withdraw her felony plea and stand convicted only of the B misdemeanor of menacing. Setting aside the fact that *Alford* pleas "are—and should be—rare," (*Silmon v. Travis,* 95 NY2d 470, 474 [2000]), the proposed plea was illegal. The New York State Legislature has mandated that a plea of guilty on an indictment for murder in the second degree must include at least a plea to a class C violent felony offense (CPL § 220.10[5][d][i]; *People v. Myers*, 167 AD3d 1573 [4th Dept 2018]). The Court could not have accepted a plea of guilty to manslaughter in the second degree, a non-violent felony, to satisfy the indictment (Penal Law § 70.02[1][b]). Nor could the defendant have pled guilty to menacing in the second degree, which was neither on the indictment, nor a lesser included offense to the sole charge of murder (*see* CPL §§ 220.10[3]; 220.20[1]).

While the executive staff went back to the drawing board, the Assistant District Attorney continued the prosecution. On July 27, 2022 the Assistant answered ready for suppression hearings. Nonetheless on that same day, a member of the District Attorney's executive staff made an oral application to dismiss the indictment so the People could replace it with a superior court information ("SCI") charging manslaughter in the first degree (Penal Law § 125.20). The Court denied the oral application, instructing the People to put the motion in writing. Meanwhile, the assigned Assistant proceeded with the suppression hearings and prevailed.

On August 5, 2022, the People filed a motion pursuant to CPL §§ 210.20(1)(1) and 210.40, seeking an order dismissing the indictment in the interest of justice and granting leave to replace it with an SCI charging manslaughter in the first degree, upon which both the People and the defendant were prepared to proceed to trial. This was undercut by the defendant's papers, which made no mention of an SCI or a trial, but instead sought outright dismissal of the indictment against her. Regardless, the People's motion was wholly inadequate; there were no compelling circumstances rendering continued prosecution of the indictment unjust, and no rationale for going to trial on an SCI because manslaughter in the first degree is a lesser included offense to murder in the second degree that could have been presented to a petit jury for its consideration.[4]

Following the denial of the motion, the assigned Assistant District Attorney continued pursuing the murder case against the defendant. As late as September 12, 2022, she made an application pursuant to *People v. Ventimiglia,* 52 NY2d 350 (1981), seeking to put forth evidence at trial of prior bad acts by the defendant. The defense also made motions regarding the scope of the testimony of their expert witness, and a trial date of November 28 was chosen. Instead, on November 18, the District Attorney filed a letter with the Court and his recommendation of dismissal. On the date originally set for trial, he came to Court personally to argue in favor of dismissal.

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[3] An *Alford* plea, however, would require the People to put forth evidence to support the charge of manslaughter.

[4] For a full explanation of why the People's first motion to dismiss the indictment was rejected, *see People v. McCarter,* 76 Misc 3d 1048 (Sup Ct, NY County 2022).

The recommendation of dismissal.

On November 18, 2022 the District Attorney filed a three-page "recommendation of dismissal" (commonly referred to as a "DOR"). There is no such thing as a DOR in the Criminal Procedure Law, but these applications have been used as vehicles by which prosecutors inform the courts that there exists some impediment to continuing prosecution of a case. Other than to claim—incorrectly—that all avenues to pursuing alternative lesser charges were "foreclosed" by prior decisions of this Court, the District Attorney offered no reason in the recommendation for seeking to dismiss the case. He wrote: "At this stage—with the proposed [illegal] plea and reduced charge by SCI foreclosed—the options remaining to the People are stark: to proceed or decline to proceed to trial on murder in the second degree. Given those options, the People decline to proceed."

Augmenting his recommendation, the District Attorney sent a letter to this Court, in which he stated: "I have a reasonable doubt of whether Ms. McCarter stabbed Mr. Murray with the requisite intent to support a conviction of murder in the second degree" (Bragg letter to Court, Nov. 18, 2022 at 1). He also wrote: "I cannot proceed to trial on a charge that I do not believe in" (*id.* at 2). He indicated in the letter that he had hoped to "find a final disposition that would provide a measure of accountability for Ms. McCarter without asking a jury to reach a conclusion I cannot reach myself" (*id.* at 1). Nowhere did he state the indictment should be dismissed for any of the reasons recognized in CPL Article 210. Nor did he state that he believed the defendant was justified in stabbing the deceased.

The options of the courts and district attorneys are extremely limited once a Grand Jury has voted a true bill, for good reason (*see, e.g., Holtzman v. Goldman*, 71 NY2d 564 [1988]). The purpose of the Grand Jury is to protect the populace from overreaching by the state. The Grand Jury as we know it first appeared in England during the reign of Edward III (1312-1377), when 24 knights were selected by the county sheriff and empowered to commence a prosecution. In 1635 the Grand Jury made its way to the American colonies, and over time, it evolved into a body to create a barrier between "accusations and convictions" (Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla St U L Rev 1, 8-12 [1996]). The federal Grand Jury is established by the Fifth Amendment to the United States Constitution which prevents a person from being held to "answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (US Const, 5th Amend). By having a Grand Jury initiate a prosecution, the people are protected "against hasty, malicious and oppressive persecution" (*Wood v. Georgia,* 370 US 375, 390 [1962]). The right to indictment by a Grand Jury in state court is ensconced in the New York State Constitution (NY Const, art I, § 6). Once a Grand Jury has voted a true bill, the power to cease prosecution of that individual is strictly circumscribed by statute leaving both the district attorney and the courts with limited power (*see Grand Jury*, Touro L Rev, Vol. 11, No. 3, art 41, 964-966 [1995]).

A district attorney has the power to decline to prosecute a case, but that power is not unilateral. Since 1829 New York law requires the consent of the court before a district attorney may dismiss or abandon prosecution of an indictment (2 Rev Stat of NY, part IV, ch II, tit IV [1st

ed 1829]; *People v. Douglass,* 60 NY2d 194, 203, n. 4 [1983]). "A statement of a district attorney declining continued prosecution of a criminal case does not divest the court of jurisdiction or otherwise impose a mandatory duty upon the court to dismiss the case, even where the criminal defendant consents to dismissal" (*Matter of Donnarunna v. Carter,* 41 Misc 3d, 195, 197 [Sup Ct, Albany County 2013]).

Neither the People *nor the Court* have the authority to dismiss an indictment for a reason other than those provided by the CPL (*People v. Ekpachi*, 37 NY3d 39, 48 [2021]; *People v. Extale*, 18 NY3d 690 [2012]; *People v. Douglass*, 60 NY2d 194 [1983]). The only framework under which to evaluate the District Attorney's recommendation of dismissal in this matter is to address it as a motion to dismiss in the interest of justice (*see* CPL §§ 210.20[1]; 210.40). The Court adopts its previous analysis (*see People v. McCarter*, 76 Misc 3d 1048 [Sup Ct, NY County 2022]), and additionally considers the following:

The position of the victim's family (CPL § 210.40[1][i]).

In a homicide, where family members are deprived of their loved one forever, it is appropriate to consider their feelings about dismissing the prosecution of the alleged perpetrator. It was only after the District Attorney's November 18 letter to the Court was reported in the press that this Court became aware of the attitude of the deceased's family, through letters e-mailed directly to the Court (copies of which have been provided to attorneys for both parties).

In a letter signed by Steven Murray, brother of the deceased, he stated that "we are unequivocally opposed to these charges being dismissed and we have forcefully communicated that to the DA. However, he has repeatedly ignored our repeated requests to let a jury weigh the evidence and determine guilt or innocence. . . . My brother is dead and his daughter has been left without her father, and the DA's actions have been focused solely on the defendant and not on seeking the truth and obtaining justice for Jim since he took office." In another letter, signed by the deceased's prior wife, Hyonchu Murray, she writes, "The death of Jim Murray has left my 17-year-old daughter, Kayla Murray, without her father, who she loves very much. She continues to grieve this tremendous loss. . . . To know that a grand jury already found reason to indict, only for it to be dropped will be added torment to her ongoing grief."

The evidence of guilt, whether admissible or inadmissible (CPL § 210.40[1][c]).

The Court has reviewed the extensive history of this case in bail applications, omnibus motions, pre-trial evidentiary hearings, previous motions to dismiss, and Justice Jackson's decisions. No evidence presented to the Court establishes as a matter of law that the defendant was justified in her use of deadly physical force. Nor does the evidence fail to establish, as a matter of law, that she intended to cause the death of the deceased. The District Attorney correctly stated that there was only one "fatal" wound, but misspoke when he states there was "not a series of wounds" (Nov. 28, 2022, tr at 5, lines 7-8)—the deceased suffered four other knife wounds, unexplained by either party, and two of those wounds are consistent with the use of a second knife.

The history of the defendant (CPL § 210.40[1][d]).

To reiterate a point expressed in the Court's prior decision: the defendant may be a victim of serious domestic violence (*McCarter*, 76 Misc 3d at 1056). She may have been faced with deadly force on the night of March 2, 2020 and could have been justified in stabbing her husband to death to protect herself. If so, she committed no crime. But sufficient questions of fact surround this case, crying out for the opportunity to be answered at a trial. This doesn't punish victims of domestic violence; it ensures that cases are decided solely on their individual merits, by a fair and impartial jury. It promotes public confidence in the court system, which society needs to peacefully resolve differences, keep the citizens safe, and ensure accountability for those who commit crimes. The law must not apportion justice according to the size of one's advocacy group or the savviness of a media campaign, but afford "[e]qual and exact justice to all [people], of whatever state or persuasion" (First Inaugural Address, Thomas Jefferson, March 4, 1801).

The impact of dismissal upon the confidence of the public in the criminal justice system (CPL § 210.40[1][g]).

After the defendant's arrest, this case became the focus of an intense advocacy campaign, which received extensive attention in the press. Virtually all the media coverage adopted the defendant's narrative that she was the victim of domestic violence and that prosecuting her for killing her husband was unjust. The content of news stories is not evidence, and the Court takes no position on its accuracy. In evaluating the impact of dismissal upon the confidence of the public, however, it is important to identify the contrast between the reporting on this matter and the more complex narrative reflected in the official court file.

The evening of March 2, 2020 was the end of a turbulent relationship between the defendant and the deceased. In addition to the deceased's alcohol abuse, court records document video evidence, which purports to show that in July 2019 the deceased was intoxicated and became "physically aggressive" during an argument, prompting the defendant to threaten to stab him while holding a pair of scissors (People's affirmation in support of admission of evidence of uncharged bad acts, Sept. 12, 2022 ¶ 5). In October 2019, the deceased's text messages to the defendant reference a time when she "pulled a knife on [him]," when he "was nowhere even close to hitting" her (*id.* ¶ 6). Later in 2019, the defendant kicked the deceased out of her apartment, furious at him for cheating on her (*id.* ¶ 7). Throughout their relationship, the defendant monitored the deceased's e-mails, iCloud, and dating applications—even tracking his location by using his cellular telephone (*id.* ¶ 8). Even after their relationship ended, in the month preceding the deceased's death, she was monitoring his accounts and checking his whereabouts—once changing his dating profile status to "married liar" (*id.*). She, herself, described this behavior as "stalking" the deceased (*id.*).

Although portrayed as estranged in the media, the defendant and the deceased maintained some involvement. In the days leading up to the deceased's death he exchanged text messages with the defendant regarding their meeting each other, and the defendant sent the deceased a text on March 1, 2020—the day before his death—asking to visit him (*People v. McCarter*, Sup Ct, NY County, Nov. 15, 2021, Jackson, J., indictment No. 746/2020 at 14).

The court file contains conflicting versions of what happened the night Mr. Murray died. According to information provided by prior defense counsel, which the People relied upon in seeking a search warrant in this case, the deceased came to the defendant's home, intoxicated, demanding money (aff of Detective Cruz in support of application for search warrant of 646 Amsterdam Avenue, ¶ 4[k]). When the defendant refused to give it to him, he got angry and pushed her (*id.*). Because the defendant feared he might put her in a headlock, she grabbed a breadknife and placed it at his neck to push him away (*id.*).

The deceased continued to ask for money and, to defuse the situation, the defendant decided to give it to him, but then was unable to find her wallet (*id.*). He became angry again and moved close to her at which time she stabbed him once in the chest to stop him (*id.*). Later, however, when new counsel appeared on the scene, the defendant told them—and they revealed it to the People—that she held a kitchen knife at her waist to ward off the deceased, who fell forward onto the knife and was accidentally stabbed (People's affirmation in opp to mtn to dismiss, undated ¶ 28). The medical examiner did not believe, based upon the location and downward angle of the wound, that the injuries were consistent with this accident narrative (*id.*).

The defendant stated in a 911 call on the night of the incident that she stabbed her husband (*McCarter*, Nov. 15, 2021 at 6). After the police arrived at her apartment, Police Officer Samantha Cortez said, in front of the defendant, "She said he tried to take her money and she stabbed him in the chest" (*id.* at 5). Although the defendant was present when the police officer made this statement, she did not deny it and said nothing to correct it (*id.* at 5). What the officer said was similar to what the defendant's neighbor—a neutral party with no apparent reason to fabricate—told the Grand Jury (Defendant's affirmation, Aug 8, 2022, exhibit 25, Grand Jury tr at 8, lines 12-18). He said he asked the defendant, "How did this happen?" and she replied, "I stabbed him" (*id.*). He also asked her, "How did you?" and she said, "With a knife" (*id.*). Neither this neighbor, nor any other witness heard the defendant calling for help prior to the stabbing.

The defendant also told police that the defendant had pushed her, that they had fallen into a mirror, and that she was afraid the mirror would fall (Pretrial hearing tr, July 27, 2022 at 60, lines 1-4). And, as the officers were placing her in handcuffs, the defendant said, "He was fighting me" (*id.* at 60, lines 14-18). The defendant complained of no injuries, but stated that she couldn't walk and may have lost consciousness for a few moments during the altercation. The defendant did not say to the police that the deceased had tried to strangle her that evening or had placed her in a chokehold.

The intense press coverage is also of note as it demonstrates the charged atmosphere that has surrounded this case and the tremendous pressure that has been brought to bear on the District Attorney to drop it.[5] In June 2019, Alvin L. Bragg, Jr., announced his candidacy for New York

[5] The Court has also been subject to media scrutiny, and even direct calls to action, which it has ignored. ("A judge shall not be swayed by partisan interests, public clamor or fear of criticism" (22 NYCRR 100.3[B][1]; *see also* COLOR OF CHANGE: DISTRICT ATTORNEY BRAGG HAS MADE THE RIGHT DECISION AND WE CALL ON STATE SUPREME COURT JUDGE DIANA [sic] KIESEL TO HONOR HIS DECISION NOT TO

County District Attorney. (Cyril Josh Barker, *Alvin Bragg Announces Run for Manhattan D.A.*, NY Amsterdam News, June 21, 2019, available at https://amsterdamnews.com/news/2019/06/21/alvin-bragg-announces-run-manhattan-d [last accessed Nov. 30, 2022]). On September 10, 2020, which was the day that the indictment against the defendant was filed, New York City was gearing up for a primary campaign season. On that same day, future District Attorney Bragg, one of eight candidates in a hotly contested Democratic primary, posted the following message on his Twitter account: "I #StandWithTracy. Prosecuting a domestic violence survivor who acted in self-defense is unjust" (*See* Alberto Luperon, *Prosecutor Wants to Drop Indictment Against 'Survivor of Domestic Violence' Charged with Stabbing Husband to Death*, Law & Crime, Nov. 20, 2022, available at https://lawandcrime.com/crime/prosecutor-wants-to-drop-indictment-against-domestic-violence-survivor-charged-with-stabbing-husband-to-death [last accessed Dec. 2, 2022]). That tweet opened a floodgate of articles about the case and what advocates viewed as Mr. Bragg's "promise" in connection with it.[6]

By the time the District Attorney was contemplating offering the defendant an *Alford* plea, 58 domestic violence organizations, 12 domestic violence experts and advocates, and Gloria Steinem, had signed a letter to the District Attorney urging him to drop the charges against her. "The violence Ms. McCarter survived at the hands of Mr. Murray and the revictimization she has suffered after his death have left her deeply traumatized. What Ms. McCarter needs is in-patient treatment to address this psychological trauma not further debilitating engagement with the criminal justice system" (Defendant's affirmation, August 8, 2022, exhibit 28, Kluger letter, May 3, 2022). In another letter, written later, the District Attorney was also reminded of his campaign promise by 36 members of the clergy, who wrote: "During your campaign, you claimed to support survivors and expressed your support of Tracy specifically" (Defendant's affirmation, August 8, 2022, exhibit 29, Breyer letter, August 6, 2022). Another organization, "Survived and Punished," had also sent a letter signed by "over 60 organizations and institutions . . . to urge Manhattan DA Alvin Bragg to use his prosecutorial discretion to drop all charges against Tracy McCarter" (Stand With Tracy | Survived & Punished NY, https://www.survivedandpunishedny.org/stand-with-tracy/ [last accessed December 2, 2022]). That letter was not only delivered to the District Attorney, but also twice printed in The New York Times by the group "Color of Change" (*id.*). This same group reportedly provided the District Attorney with considerable financial support during his campaign.[7]

PROSECUTE TRACY MCCARTER | Color Of Change, https://colorofchange.org/press_release/color-of-change-district-attorney-bragg-made-the-right-decisioni-not-to-prosecute-tracy-mccarter/ [last accessed Dec. 1, 2022]).

[6] One example: Jessica Washington, "DA Alvin Bragg Still Won't Drop Charges Against Manhattan Woman Charged With Murder Who Says She Acted in Self-Defense," in which the author wrote in *The City*, "Bragg has been in the hot seat for how his office has handled the Upper West Side woman's case, after he called her prosecution "unjust" during his campaign running as a progressive prosecutor set on reducing incarceration before taking office Jan. 1" (March 14, 2022, available at https://thecity.nyc/2022/3/14/22978149/alvin-bragg-tracy-mccarter-murder-self-defense [last accessed Nov. 30, 2022]).

[7] *See* Gwynne Hogan, *National Progressive PAC Plans to Back Manhattan DA Candidate Alvin Bragg With $1 Million Cash Infusion*, Gothamist, May 10, 2021, available at https://gothamist.com/news/national-progressive-pac-plans-back-manhattan-da-candidate-alvin-bragg-1-million-cash-infusion (last accessed Nov. 30, 2022); Sophie Mann, *Manhattan DA Alvin Bragg Seeks to Dismiss Murder Indictment against Nurse, 44, Who Stabbed Her Boyfriend to*

To be clear, this Court has no evidence of a *quid pro quo* and accepts the District Attorney's representation that he made his decision to drop the charges after independently reviewing the case. And in fairness, as the June 22, 2021 primary approached, Candidate Bragg joined seven of the eight Democratic candidates and the one Republican who declined to comment directly on the defendant's case when asked to do so by an advocacy group, stating it would be inappropriate if one day they might inherit it (Lauren Gill, *Prosecutors Ignored Evidence of Her Estranged Husband's Abuse. She Faces 25 Years in Prison for Murder.*, The Intercept, May 24, 2021, available at https://theintercept.com/2021/05/24/manhattan-district-attorney-domestic-violence-tracey-mccarter/ [last accessed Dec. 2, 2022]).

Nonetheless, the damage was done. The District Attorney's tweet, coupled with the interpretation given it by reporters and organizations supporting the defendant, kept alive the impression that he was willing to respond to campaign-related pressures, while the Rules of Professional Conduct limited his ability to respond to the press (22 NYCRR 1200.3.6). All of this media noise has created the appearance of impropriety, which could have been avoided had the District Attorney recused himself from this matter once he took office (*see Working Families Party v. Fisher*, 23 NY3d 539 [2014] [holding district attorney may disqualify himself upon application with good faith basis]). Instead, the case has reached the point where the public could perceive this dismissal as bought and paid for with campaign contributions and political capital.[8]

While there are rare instances "in which a significant appearance of impropriety" permits a court to disqualify a district attorney from participating in a prosecution and appoint a special prosecutor, this is not one of them (*see People v. Adams*, 20 NY3d 608, 613 [2013]). Absent more than headlines and news stories, this Court cannot overstep its bounds and demand that a duly-elected prosecutor step aside (*see Soares v. Herrick*, 20 NY3d 139, 145–46 [2012]; *Cloke v. Pulver*, 243 AD2d 185, 188 [3d Dept 1998]; *Murphy on Behalf of Rensselaer County. v. Dwyer*, 101 AD2d 376, 378–79 [2d Dept 1984]).

The District Attorney's repeated references to *Matter of Soares v. Carter*, 25 NY3d 1011 (2015), however, contain the veiled threat of a different blow to the public's confidence in the criminal justice system. In *Soares*, the District Attorney of Albany County stated his intention not to prosecute a case in which he did not believe. When directed to do so by a judge, he refused to call witnesses at the trial, for which he was threatened with contempt. The Court of Appeals, in

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Death in Upper West Side Apartment 'in Self-Defense' - after He Received $500,000 in Campaign Donations from Soros-Backed Advocacy Group, Daily Mail, Nov. 29, 2022, available at https://www.dailymail.co.uk/news/article-11481573/Manhattan-DA-Alvin-Braff-seeks-dismiss-murder-indictment-against-nurse-killed-boyfriend.html (last accessed Nov. 30, 2022).

[8] *See* Victoria Law, *The Manhattan DA Finally Keeps His Campaign Promise Not to Prosecute a Domestic Violence Victim*, The Nation, Nov. 21, 2022, available at https://www.thenation.com/article/society/manhattan-alvin-bragg-tracy-mccarter/ (last accessed Dec. 2, 2022); Jim Quinn, *Is DA Alvin Bragg seeking a murder dismissal because of a $500K woke campaign contribution?*, New York Post, Nov. 28, 2022 available at https://nypost.com/2022/11/28/is-da-bragg-seeking-a-murder-dismissal-because-of-a-500k-woke-campaign-contribution/ (last accessed Dec. 2, 2022).

reviewing the judge's actions, held that a trial court could neither direct a district attorney to prosecute a case, nor hold him in contempt for a "failure" to do so (*id.* at 1014).

This Court could deny the District Attorney's application and move this indictment to trial immediately—hearings and pre-trial applications have already been adjudicated. But to what end? The District Attorney's reliance on *Soares* signals he will simply refuse to present evidence and concede the acquittal.[9] Under the law, the Court could do nothing to force him to do otherwise. Such a result, after what would likely be weeks of jury selection, given the extensive pre-trial media coverage, would be a waste of judicial resources and would make a farce of the criminal justice system.

Conclusion.

The law that gives the Court power, in the end, leaves it powerless. The Court finds no compelling reason to dismiss the indictment, but for the District Attorney's unwillingness to proceed. It is not in the interest of justice for the Court to engage in a futile and unseemly stand-off with the District Attorney that would waste precious court resources, interfere with other important cases that must be prosecuted in this post-COVID backlog, and cause needless anxiety for the defendant and for the family of the deceased. Ultimately, it would hold the Court system up to ridicule and scorn, a result that must be avoided.

On September 12, 2005, future Chief Justice of the United States John G. Roberts, Jr. testified at his confirmation hearings before the United States Senate. In his opening statement to the Judiciary Committee, he stated in part: "I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat" ("Confirmation Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States," *Hearing before the Committee on the Judiciary,* U.S. SENATE, 109TH CONG., 1ST SESS., Sept. 12-15, 2005; Serial No. J-109-37). Accordingly, I must call an end to this prosecution. Constrained by my oath of office, the law I swore to uphold, and my role as legal umpire, I am left with the Hobson's choice of standing eye to eye with the District Attorney to see who will blink first, or dismissing the case of *The People of the State of New York v. Tracy McCarter*. I choose the latter.

Epilogue.

Although the District Attorney stated that he does not wish to continue the prosecution on lesser charges, he also stated that he did not "understand it to be something that [the People] can do." This dismissal in the interest of justice is *not* a dismissal on the merits (*Ryan v. NY Tel. Co.*, 62 NY2d 494, 504–05 [1984] ["A dismissal 'in the interest of justice' is neither an acquittal of the charges nor any determination of the merits. Rather, it leaves the question of guilt or innocence unanswered."]; *see also Ward v. Silverberg*, 85 NY2d 993, 994 [1995]). As such, it is *not* a bar to further prosecution of the same criminal transaction (*People v. Zagarino*, 74 AD2d 115, 116 [2d

[9] This would bar any further prosecution of the defendant, pursuant to CPL § 40.20.

Dept 1980] ["The defendant stands in no peril of double jeopardy, since the dismissal involved no aspect of his guilt or innocence."]). Nothing, therefore, prevents the People from presenting the case to the Grand Jury a second time, seeking an indictment for manslaughter in the first degree. The District Attorney has stated that he seeks "a measure of accountability" for the defendant (Bragg letter, Nov. 18, 2022, at 1), and the People have previously argued that manslaughter is supported by the facts (People's motion to dismiss, Aug. 5, 2022. at 2 ["[T]he most appropriate inference is that Defendant stabbed the decedent with intent to cause serious physical injury to her husband."). Alternatively, the People retain the option to file a felony complaint charging manslaughter in the first degree and work with the defendant to resolve the case without another Grand Jury presentation.

The Court therefore stays sealing of this matter for 60 days to give the District Attorney the opportunity to exercise those options. Should the prosecution of this criminal transaction end with this written decision, it will be the District Attorney's choice, and not the result of any dilemma caused by this Court.

This Constitutes the Decision and Order of the Court.

DATED: December 2, 2022
New York, New York

Diane Kiesel,
Acting Supreme Court Justice