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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF SOARES,

Respondent,

-against-

No. 198

HERRICK,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 16, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 198, Soares v.  
2 Herrick.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. KNOX: Two minutes, please, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
7 Go ahead.

8 MR. KNOX: Good afternoon. James Knox, on  
9 behalf of all appellants in this matter.

10 Your Honors, I'd like to begin with what  
11 this case is not about, and this case is not about a  
12 meritless lawsuit commenced for the purpose of  
13 frustrating a prosecution or for the purpose of  
14 generating a "Get Out of Jail Free" card, as it has  
15 been characterized.

16 CHIEF JUDGE LIPPMAN: Why don't you start  
17 with the writ of prohibition? Why does it lie or not  
18 lie?

19 MR. KNOX: It does not lie, Your Honor,  
20 because - - -

21 CHIEF JUDGE LIPPMAN: Why?

22 MR. KNOX: It doesn't lie because none of  
23 the things that would cause it to lie in this case  
24 are present. We have a judge who acted within the  
25 statutorily granted authority in County Law 701. No

1 one's disputing that he didn't have jurisdiction to  
2 do what he did. What DA Soares is arguing is that he  
3 exceeded - - -

4 JUDGE CIPARICK: Exceeded his jurisdiction?

5 MR. KNOX: Yes, he exceeded his - - - well,  
6 I believe that there are - - -

7 CHIEF JUDGE LIPPMAN: What about the cases  
8 that say that it doesn't lie in similar  
9 circumstances? What cases do you rely on to say that  
10 it doesn't lie?

11 MR. KNOX: We rely on *Kavanagh v. Vogt*,  
12 Your Honor, namely. I think that that's the - - -  
13 and *State v. King*.

14 CHIEF JUDGE LIPPMAN: What about *Schumer*  
15 and the other case?

16 MR. KNOX: Well, those cases have slight  
17 variations that are different. I mean, *Schumer v.*  
18 *Hol* - - - *Schumer/Holtzman* saying that article 78 is  
19 appropriate, but there you had a DA appointing - - -  
20 exercising essentially the same sort of power to  
21 appoint a special prosecutor. They don't have that  
22 statutory authority, so they were clearly acting in  
23 excess of jurisdiction - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but the  
25 departments have a different - - - really have a

1 different view on it, you know what I mean, that it's  
2 not just a slightly different circumstance. Did the  
3 Third Department have a different position from the  
4 First and Second on this?

5 MR. KNOX: Heretofore - - -

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. KNOX: - - - Your Honor. But I think  
8 that those decisions in the First and Second  
9 Department, if you actually look at - - -

10 CHIEF JUDGE LIPPMAN: Are colored by  
11 different circumstances?

12 JUDGE CIPARICK: So how would - - -

13 MR. KNOX: They are, but they're also very  
14 brief. It's hard to really tell exactly what was  
15 going on.

16 JUDGE SMITH: And is - - -

17 JUDGE CIPARICK: How would this be  
18 reviewable? There'd have to be a conviction and then  
19 on review - - -

20 MR. KNOX: Well - - -

21 JUDGE CIPARICK: - - - on appeal from that  
22 conviction then this issue could be reviewed?

23 MR. KNOX: Well, Judge, I think that the  
24 way the legislature has crafted both the county law  
25 and the criminal procedure law is they've foreclosed

1 a review of this. And that's not to say that - - - I  
2 mean, there are some times when review is not to be  
3 had. They've rested the discretion - - -

4 JUDGE SMITH: That's a very - - - I mean I  
5 suppose - - - you start out by saying this was not -  
6 - - and I assume you're right, this was not some  
7 meritless case that was just thought up to get the DA  
8 disqualified. But suppose it were and suppose the  
9 judge had bought it, you could make exactly the same  
10 jurisdictional argument, couldn't you?

11 MR. KNOX: You could, but the boundaries  
12 that have been set by the legislature rest that  
13 discretion with the county court - - -

14 JUDGE SMITH: So - - -

15 MR. KNOX: - - - or Supreme Court judge.

16 JUDGE SMITH: So you not only - - - you're  
17 saying not only can you make that argument, that  
18 argument should prevail, even in the hypothetical  
19 case of a totally spurious lawsuit and the judge is  
20 so bewildered by it that he disqualifies the DA?

21 MR. KNOX: It should, unless it was to  
22 taint the entire proceedings, which might have been  
23 the case had, in this case, leave to re-present then  
24 not been granted. But here - - -

25 JUDGE PIGOTT: Well, if you switch Kavanagh

1 v. Vogt around - - - I mean, let's assume that the  
2 judge said I'm not going to disqualify the DA even  
3 though defense counsel has now joined the DA's  
4 office; aren't you just opening up - - - I mean, the  
5 argument would then be we now have twelve acquittals  
6 because there's a clear conflict of interest and they  
7 reversed every single conviction because we couldn't  
8 touch the judge who decided that this was not a  
9 conflict of interest to have defense counsel join the  
10 other team. That would make no sense.

11 MR. KNOX: If Kavanagh v. Vogt had come out  
12 the other way, is that what you're saying, Your  
13 Honor?

14 JUDGE PIGOTT: Right. Right.

15 MR. KNOX: Well, I agree.

16 JUDGE PIGOTT: If the situation were  
17 reversed.

18 JUDGE SMITH: As well, you know, if the - -  
19 - if it were the defendant complaining in Kavanagh v.  
20 Vogt rather than the prosecutor. If the DA had been  
21 improperly left on the case instead of - - -

22 MR. KNOX: Yes.

23 JUDGE SMITH: - - - left off, that's the  
24 question.

25 MR. KNOX: But that DA could have chosen to

1 recuse himself in that case had he not been - - -

2 JUDGE CIPARICK: You concede that there are  
3 times when there should be a disqualification,  
4 correct?

5 MR. KNOX: Yes, when there should be - - -  
6 when a DA should be disqualified.

7 JUDGE CIPARICK: Right.

8 MR. KNOX: Absolutely, that's our position.  
9 And our position is that there was a conflict of  
10 interest here that merited that disqualification and  
11 warranted it.

12 JUDGE GRAFFEO: Why is the rule that you're  
13 proposing here the better way for us to go? I mean,  
14 clearly the Appellate Division was concerned that  
15 this could lead to gamesmanship in the future. So  
16 why is - - -

17 MR. KNOX: And Your Honor, I think it was  
18 that motivating concern that - - -

19 JUDGE GRAFFEO: Why is your argument the  
20 better argument?

21 MR. KNOX: I think that drove their  
22 decision, but I think that it was wrong because - - -  
23 I think it also relied on the separation-of-powers  
24 argument that by prohibiting review there's a - - -  
25 the judiciary encroaches upon the domain of the

1 executive and their ability to prosecute cases. But  
2 the legislature has set the boundaries with County  
3 Law 701. They've vested the discretion in when to  
4 disqualify a prosecutor with the judge sitting on the  
5 case and the - - -

6 JUDGE READ: So what, is it up to the judge  
7 to determine if there's gamesmanship?

8 MR. KNOX: It is, Your Honor, and I think  
9 that the paucity of case law on this demonstrates  
10 that the slippery slope argument that they're making  
11 that there's going to be an avalanche of these type  
12 of lawsuits - - -

13 JUDGE SMITH: It doesn't happen every day  
14 but it's a big deal when it does happen, isn't it?  
15 He didn't just disqualify an assistant; he  
16 disqualified the whole office. That's a rather major  
17 interference with the normal course of law  
18 enforcement.

19 MR. KNOX: It is, but the conflict - - -  
20 the nature of the conflict was such that the entire  
21 office and the DA himself and some of his staff were  
22 all and are all defendants in the civil lawsuit.

23 JUDGE CIPARICK: What's the status of that  
24 suit at this point?

25 MR. KNOX: I've provided the court - - -



1 JUDGE CIPARICK: Yeah, I know.

2 MR. KNOX: We've provided the court with a  
3 couple of orders - - - recent orders setting it down  
4 for trial near the end of February 2013.

5 JUDGE GRAFFEO: What did the Eleventh  
6 Circuit do?

7 MR. KNOX: It dismissed some of the - - -  
8 it dismissed the federal claims, but dependent - - -

9 JUDGE GRAFFEO: So what's left?

10 JUDGE CIPARICK: State claims?

11 MR. KNOX: State claims - - -

12 JUDGE CIPARICK: Defamation?

13 MR. KNOX: - - - for defamation and  
14 injurious falsehood that are going to be heard in the  
15 federal court, nonetheless, even though they're state  
16 court.

17 JUDGE SMITH: Has there been - - - in the  
18 federal court?

19 MR. KNOX: Yes, the middle district.

20 JUDGE SMITH: How come?

21 JUDGE CIPARICK: In Florida.

22 MR. KNOX: In Florida.

23 JUDGE SMITH: Just out of curiosity, how do  
24 you get in federal court when you have no federal  
25 claims?

1                   MR. KNOX: Well, they got into federal  
2 court with the federal claims, and then once federal  
3 court dismisses the federal claims they have the  
4 discretion to maintain jurisdiction over - - -

5                   JUDGE SMITH: Okay.

6                   MR. KNOX: - - - the state law claims and  
7 that is what has happened in this case.

8                   JUDGE GRAFFEO: To some extent, I see this  
9 as kind of the chicken-and-the-egg dilemma. How do  
10 you know if the judge exceeded his or her authority  
11 if you don't allow review of whether they exceeded  
12 their authority?

13                   MR. KNOX: Well, I think that if - - - if  
14 what I'm saying is correct and that there is no - - -  
15 the writ does not lie to review, then you will never  
16 know except to the - - -

17                   CHIEF JUDGE LIPPMAN: The court could be  
18 acting so outside their purview that there could be  
19 review, couldn't it?

20                   MR. KNOX: Well, Your Honor, that would be  
21 a case where, say, he would disqualify the office and  
22 dismiss the indictment without leave to re-present.  
23 That would be - - - and then it would trigger - - -

24                   JUDGE SMITH: But would that be in excess  
25 of his jurisdiction?

1                   MR. KNOX: That would taint the whole  
2 proceedings and then you could make the argument that  
3 that would - - -

4                   JUDGE SMITH: Well, I don't - - -

5                   MR. KNOX: - - - exceed his jurisdiction.

6                   JUDGE SMITH: I don't see how his  
7 jurisdiction is any different. I mean, his  
8 jurisdiction to deny leave to re-present, that's a  
9 discretionary decision. Presumably what would happen  
10 in that case is he'd eventually appoint some other DA  
11 and that DA could appeal from the denial without  
12 leave to re-present.

13                   MR. KNOX: Well - - -

14                   JUDGE SMITH: What's the problem?

15                   MR. KNOX: Well, what I'm getting at, Your  
16 Honor, is that there are those cases where this court  
17 has said that even if the judge is acting within his  
18 jurisdiction there may be circumstances that - - -

19                   JUDGE SMITH: Where he's just gone too far.

20                   MR. KNOX: - - - the writ does lie. Yes.

21                   JUDGE SMITH: You're saying if there is a  
22 "gone too far", this isn't gone too far.

23                   MR. KNOX: But jurisdiction is the larger  
24 question. Then you look to see whether the judge had  
25 statutory authority to do what he did, and here he

1 did. The legislature has not seen fit to provide a  
2 level of review for it.

3 JUDGE SMITH: I mean, it does. It does - -  
4 - just intuitively, if you were designing a system,  
5 when a judge does something as unusual as this, you  
6 would think there ought to be at least one level of  
7 appellate review.

8 MR. KNOX: But I think that that's a  
9 question left for the legislature, just as they've  
10 determined that there is no appeal by the People when  
11 an indictment is dismissed with leave to re-present.

12 CHIEF JUDGE LIPPMAN: But isn't there a  
13 fine line here when you're acknowledging that it can  
14 be so out of whack that the whole proceeding is  
15 tainted and - - - you know what I'm saying? Where do  
16 you draw the line if no one's available to look at  
17 what happened, if there's no real appeals process?

18 MR. KNOX: Well, that would be the  
19 question, is whether the proceedings have been so  
20 tainted - - -

21 CHIEF JUDGE LIPPMAN: It's what Judge  
22 Graffeo said, what comes first, you know?

23 MR. KNOX: Well, I think that I don't know  
24 if we can set a bright line rule in these  
25 circumstances but - - -

1 CHIEF JUDGE LIPPMAN: Well, how about - - -  
2 well, what rule should we do? What should our  
3 position be?

4 MR. KNOX: Well, I think you've set forth  
5 the position in your prior cases to say when it  
6 taints the whole proceeding such that it imperils the  
7 fundamental administration of justice. That would be  
8 the case if somehow that this ruling by Judge Herrick  
9 had ended the prosecution, but it didn't end the  
10 prosecution; it just vested the authority to  
11 prosecute the case with a special prosecutor who is  
12 not, like DA Soares is, now personally liable to pay  
13 the attorney fees - - -

14 JUDGE SMITH: And a ruling - - -

15 MR. KNOX: - - - to each client - - -

16 JUDGE SMITH: - - - ending the prosecution  
17 is appealable, right?

18 MR. KNOX: It is. It is.

19 CHIEF JUDGE LIPPMAN: All right, counselor,  
20 anything else?

21 MR. KNOX: I would like to go a little  
22 further, Your Honor - - -

23 CHIEF JUDGE LIPPMAN: Sure, go ahead.

24 MR. KNOX: - - - and mention to you that  
25 one of the problems, I think, that demonstrates the

1           problematic nature of the Third Department's decision  
2           is that they chose to vacate the entire order of  
3           Judge Herrick. Now, Judge Herrick had already - - -  
4           in part of that order he dismissed the indictment  
5           with leave to re-present. The People attempted to  
6           appeal that dismissal at the Third Department and  
7           that appeal was dismissed because, under the CPL,  
8           there is no appeal authorized in those circumstances.

9                        The Third Department has reinstated the  
10           indictment by vacating Judge Herrick's entire order,  
11           which means that they've allowed the People to  
12           achieve an alternate means of collateral review that  
13           this court has said many times is simply not  
14           prohibited - - - is simply not allowed, is  
15           prohibited. And they've achieved a level of appeal  
16           that's not allowed in the - - -

17                       JUDGE SMITH: Could we solve that problem  
18           by modifying the order to leave the dismissal with  
19           leave to re-present in place but to vacate the  
20           disqualification?

21                       MR. KNOX: You could solve it that way,  
22           Your Honor, but in doing so you would ignore the time  
23           line with which this case began, which was that at  
24           the time the civil lawsuit was filed the indictment  
25           against my clients had been dismissed without leave

1 to re-present. And at that time an appeal had been  
2 noticed but not perfected, and it wasn't until almost  
3 a year later that that appeal was actually decided.  
4 And in that interim time, as the statute of  
5 limitations was running out on my clients, they filed  
6 their civil lawsuit at a time when no indictment was  
7 pending against them and leave to re-present had been  
8 denied.

9 JUDGE SMITH: So you're now making the  
10 point that the lawsuit was not gamesmanship; it was a  
11 legitimate lawsuit?

12 MR. KNOX: Absolutely, Your Honor. And I  
13 think that while things have changed in the interim -  
14 - -

15 JUDGE SMITH: But how can the outcome of  
16 this case turn on that? I mean, he can't have  
17 jurisdiction to disqualify only for illegitimate  
18 lawsuits but not legitimate ones or the other way  
19 around.

20 MR. KNOX: The basis for him to disqualify  
21 is whether he foresees a conflict that is so severe  
22 as to create what I call an appearance of impropriety  
23 plus: not simply the appearance of impropriety but  
24 actual conflict of interest - - -

25 JUDGE SMITH: I guess what I'm saying - - -

1 MR. KNOX: - - - that precludes - - -

2 JUDGE SMITH: - - - is aren't you now  
3 arguing the merits of Judge Herrick's decision, and  
4 isn't that exactly what you're saying we have no  
5 jurisdiction to look at?

6 MR. KNOX: I think it's a two-fold  
7 analysis, Your Honor, and I, standing here today,  
8 don't know if you will stop and decide that the writ  
9 simply didn't lie, or if you'll get to that second  
10 question, which is was the merit - - -

11 CHIEF JUDGE LIPPMAN: But let's say the  
12 writ does lie.

13 MR. KNOX: - - - properly decided?

14 CHIEF JUDGE LIPPMAN: Let's say the writ  
15 does lie. Is there actual prejudice here?

16 MR. KNOX: There is actual prejudice, and I  
17 can explain this in the way that I - - -

18 CHIEF JUDGE LIPPMAN: What is it? Why is  
19 there actual prejudice?

20 MR. KNOX: Because District Attorney Soares  
21 can march down to a conference room in Florida and  
22 say I can drop this case, make this prosecution go  
23 away, or affect it in a way that's to be favorable to  
24 you in Albany if you drop the civil lawsuit against  
25 me in Florida or if you forgive my obligation to pay



1 your attorneys' fees for my misconduct during my  
2 deposition or I - - -

3 JUDGE CIPARICK: If at trial it's found  
4 that there is no viable cause of action here, et  
5 cetera, and your clients lose in the federal case,  
6 would that change this at all?

7 MR. KNOX: It changes it, Your Honor, but  
8 it doesn't necessarily end it because even if there  
9 was a no case or a verdict in favor of District  
10 Attorney Soares, one, it could be appealed, but also,  
11 his reputation has been affected by the situation, by  
12 his conduct - - -

13 JUDGE CIPARICK: So because along the way  
14 because there have been attorneys' fees charged to  
15 him and sanctions, et cetera, so there's no way of  
16 salvaging this at this point - - -

17 MR. KNOX: I don't think so, Your Honor.

18 JUDGE CIPARICK: - - - other than - - -

19 MR. KNOX: I don't think so. You can't  
20 leave the courthouse with a victory and pick up your  
21 reputation at the clerk's office on your way out the  
22 door.

23 JUDGE CIPARICK: So this demonstrable  
24 conflict of interest is there, regardless of the  
25 outcome of the civil action?

1 MR. KNOX: Yes, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay. Anything else,  
3 sir?

4 JUDGE PIGOTT: Let me take - - -

5 JUDGE SMITH: Is the - - -

6 JUDGE PIGOTT: Can I take it one step  
7 further? I just - - -

8 CHIEF JUDGE LIPPMAN: Judge Pigott then  
9 Judge Smith - - - yeah.

10 JUDGE PIGOTT: I just wanted to ask you,  
11 let's assume for a minute that we disagree with you  
12 and the Albany District Attorney's Office prosecutes  
13 your case, I mean, haven't you won? I mean, you now  
14 have every argument that you're now making as part of  
15 your argument on appeal that this thing was wrong  
16 from the beginning, that there was a use of civil  
17 testimony in a Florida court as part of a grand jury  
18 presentation in which the presenter had a personal  
19 stake. You can't lose today.

20 MR. KNOX: That may be correct, Your Honor.

21 JUDGE PIGOTT: Okay. Okay.

22 MR. KNOX: I hope so.

23 JUDGE SMITH: Okay.

24 CHIEF JUDGE LIPPMAN: Judge Smith, want to  
25 add anything? No? Okay.

1 Thank you, counselor.

2 MR. KNOX: Thank you.

3 CHIEF JUDGE LIPPMAN: You'll have rebuttal.  
4 Counsel?

5 JUDGE CIPARICK: Just picking up on what  
6 Judge Pigott said, I think it's related to my  
7 question of your adversary earlier, assuming in the  
8 criminal prosecution that it goes forward, et cetera,  
9 and there's a conviction, when they appeal their  
10 conviction, can this whole issue be revisited as  
11 error by the court, error by the district attorney,  
12 prosecutorial misconduct or - - - all these issues  
13 can be reviewed, I suppose.

14 MR. HORN: Absolutely, Your Honor, and I  
15 believe that's the correct order.

16 JUDGE CIPARICK: After a defendant's  
17 conviction, but your claim is that the People have no  
18 remedy here - - -

19 MR. HORN: Yes, Your Honor.

20 JUDGE CIPARICK: - - - to review.

21 MR. HORN: And review after the fact is how  
22 it's supposed to actually take place. That way the  
23 judiciary gets to do what the judiciary does, which  
24 is decide whether errors were committed, and we get  
25 to do what we're supposed to do, which is decide who

1 is going to be prosecuted, how they're going to be  
2 prosecuted - - -

3 JUDGE SMITH: Well, but if a judge, in the  
4 ordinary course - - - are you saying that every  
5 disqualification of a district attorney is reviewable  
6 before - - - is reviewable by interlocutory appeal or  
7 by mandamus?

8 MR. HORN: I believe it is, unless of  
9 course we've requested the disqualification, which is  
10 the most common way the disqualification occurs.

11 JUDGE SMITH: So Kavanagh against Vogt is  
12 just plain wrong?

13 MR. HORN: Yes, not for that exact reason,  
14 but the way I read Holtzman v. Goldman and Schumer v.  
15 Holtzman, read together, I believe those two cases  
16 indicate that Kavanagh v. Vogt is no longer good law.

17 CHIEF JUDGE LIPPMAN: Isn't the - - -  
18 weren't there different circumstance in that case, in  
19 Schumer - - -

20 MR. HORN: In Kavanagh v. - - - oh,  
21 Schumer?

22 CHIEF JUDGE LIPPMAN: Isn't it a little  
23 different circumstance than you have here?

24 MR. HORN: The circumstances are very  
25 different there. They're not as different in People

1 - - -

2 CHIEF JUDGE LIPPMAN: I mean, there she  
3 actually - - - the DA herself gave the case to  
4 somebody else. That's really - - - when we're  
5 talking about going beyond the norm, that would seem  
6 to be very different than the case here.

7 MR. HORN: It is very unusual. What was  
8 helpful from that case was really the clarification  
9 that this court made with regard to Shinkle and  
10 Zimmer and how they were being applied by appellate  
11 courts, particularly in Kavanagh v. Vogt and then - -  
12 - and this court affirmed Kavanagh v. Vogt. But in  
13 Schumer v. Holtzman, the court clarified that  
14 prohibition is a proper remedy to void the improper  
15 appointment of a prosecutor when made by a court, and  
16 that has been relied on by the Appellate - - -

17 JUDGE SMITH: Well, an appointment's  
18 different from a disqualification, isn't it?

19 MR. HORN: It is, Your Honor, and actually  
20 that's one of my points, is that Section 701 of the  
21 County Law does not actually authorize the judiciary  
22 to disqualify the district attorney. There's no  
23 language - - -

24 JUDGE PIGOTT: It just says when they're  
25 disqualified; it doesn't say who does the

1           disqualification.

2                   MR. HORN:  Correct, Your Honor, and - - -

3                   JUDGE PIGOTT:  I was going to say - - - I  
4           was going to put - - -

5                   JUDGE SMITH:  Are you saying that no judge  
6           can ever disqualify a DA?

7                   MR. HORN:  I wouldn't want to use quite so  
8           blanket a statement; it could be so egregious at some  
9           point that the judge would have to - - -

10                  CHIEF JUDGE LIPPMAN:  So then how does the  
11           DA get disqualified in the appropriate case, never?

12                  MR. HORN:  In 99.9 - - -

13                  CHIEF JUDGE LIPPMAN:  The governor  
14           disqualifies the DA?  What's the remedy?

15                  MR. HORN:  The governor under - - -

16                  CHIEF JUDGE LIPPMAN:  If the DA is out of  
17           control, what do you do?

18                  MR. HORN:  The governor - - - if we're out  
19           of control, the governor can actually remove us from  
20           office for misconduct.

21                  JUDGE SMITH:  Well, what if you just had a  
22           plain old ordinary conflict of interest, the sort  
23           that would disqualify any other lawyer?  You're  
24           immune?

25                  MR. HORN:  We're not immune because there's

1 always a remedy for that. If we decide to go ahead -  
2 - - we decide we don't have a conflict, there is no  
3 actual prejudice here, we go ahead and we prosecute  
4 the case, they make a record, they object to it,  
5 you've got a conflict and you ought to recuse  
6 yourself, if we then go ahead and we win at trial,  
7 just as Judge Pigott was indicating - - -

8 JUDGE SMITH: So then - - -

9 MR. HORN: - - - we just raise that on  
10 appeal.

11 JUDGE SMITH: Then it can't move to - - -  
12 you can move to disqualify his lawyer, but he can't  
13 move to disqualify you?

14 MR. HORN: Well, the difference is that  
15 we're a Constitutional officer and we have to be - -  
16 -

17 CHIEF JUDGE LIPPMAN: So the only remedy is  
18 on appeal to challenge your refusal to - - -

19 MR. HORN: We can absolutely - - -

20 CHIEF JUDGE LIPPMAN: - - - get off the  
21 case.

22 MR. HORN: - - - raise that on appeal under  
23 those cir - - -

24 JUDGE SMITH: You would admit that they  
25 could disqualify an individual assistant, just not

1 the whole office?

2 MR. HORN: Yes, Your Honor, just because  
3 the DA is a Constitutional officer, he's charged with  
4 the responsibility for prosecuting all crimes within  
5 the county.

6 JUDGE SMITH: So in a community where - - -  
7 I mean if - - - yeah, presumably, if you're in Bronx  
8 County and an Assistant DA has a conflict, the judge  
9 can disqualify him. But if you're in a county where  
10 there's only - - - where the DA - - - maybe there  
11 still are some where there's one DA and he doesn't  
12 have any assistants and he's got that conflict, it's  
13 up to him whether he gets off or stays on?

14 MR. HORN: Yes, Your Honor.

15 CHIEF JUDGE LIPPMAN: Until appeal.

16 MR. HORN: Until appeal, and then you can  
17 always raise it and you'll get a new trial, and at  
18 that point I would think, obviously, the court would  
19 - - -

20 JUDGE CIPARICK: Unless the governor sets  
21 it and does it. We had that - - - we saw that in the  
22 capital punishment cases where the governor  
23 disqualified the District Attorney of Bronx County.

24 MR. HORN: And because he's in the same  
25 branch of government, it's undeniable - - -



1 JUDGE CIPARICK: I see.

2 MR. HORN: - - - that he has the authority  
3 to step in and he can - - - I mean, for misconduct we  
4 can actually be removed from office. The DA himself  
5 can be removed from office by the governor under the  
6 Constitution. But under 63(2) of the Executive Law,  
7 for any reason, if he thinks the law is not being  
8 applied appropriately or enforced appropriately - - -

9 CHIEF JUDGE LIPPMAN: But if you're a  
10 Constitutional officer, the court has no power over  
11 you in terms of you doing your job - - -

12 MR. HORN: Yes, Your Honor.

13 CHIEF JUDGE LIPPMAN: - - - is your  
14 position.

15 MR. HORN: The decision whether to go  
16 forward and prosecute someone is inherently an  
17 executive decision, so that falls within the  
18 executive branch. And - - -

19 JUDGE PIGOTT: All right. You've sued a  
20 judge and you're - - - let's - - - I'm trying to  
21 figure out who's going to win here today. So you sue  
22 Judge Herrick and you say he can't do this and you  
23 lose. Now you're going down in front of Judge  
24 Herrick.

25 MR. HORN: Well, that's a little bit of a

1           problem. I'd like it to be assigned to a different  
2           judge.

3                         JUDGE CIPARICK: You should move to  
4           disqualify.

5                         JUDGE PIGOTT: That was going to be my next  
6           question.

7                         MR. HORN: Yes.

8                         JUDGE PIGOTT: You can ask for recusal, but  
9           it's solely at his discretion.

10                        MR. HORN: Correct.

11                        JUDGE PIGOTT: And you can't - - - I mean,  
12           you can't say, Judge, if you don't recuse yourself  
13           we're going to appeal.

14                        MR. HORN: That is true, but again,  
15           deciding whether or not he - - - whether he can be  
16           the judge is a judicial function, so I'm okay with  
17           that.

18                        CHIEF JUDGE LIPPMAN: So you determine who  
19           the DA is; he determines who the judge is.

20                        MR. HORN: Exactly.

21                        CHIEF JUDGE LIPPMAN: Okay.

22                        MR. HORN: And the way I would phrase it  
23           is, the bigger question here is whether the judicial  
24           branch of our government can reach into another  
25           coordinate, equal branch of government and remove a

1 Constitutional officer, replace that officer with an  
2 attorney of his own choosing and then - - -

3 JUDGE PIGOTT: But let's assume for a  
4 minute - - -

5 MR. HORN: - - - have that branch of  
6 government tell you you have no review of that  
7 decision.

8 JUDGE PIGOTT: Let's assume for a minute  
9 that all you say is true, but here's a judge who's  
10 watching a clear conflict, a different case than  
11 this, but a clear conflict, and he said here is a  
12 really, really, really bad guy, mass murderer or  
13 something. Here's a DA that has such conflicts I  
14 can't believe it, and if I don't do something about  
15 this, this really, really bad guy is going to get  
16 acquitted. And so he says I'm disqualifying you and  
17 I'm going to appoint somebody that can prosecute this  
18 case. You're saying you have absolutely no right to  
19 interfere in this justice system and prevent me from  
20 making sure my brother-in-law gets off, the mass  
21 murderer, because I'm going to put in a bad case and  
22 I'm going to let him off and that's too bad, Judge,  
23 because no one can appeal from that.

24 MR. HORN: I'm saying at the very least,  
25 statutorily, there's no authority for that. At some

1 point if there are just enormous Constitutional  
2 violations going on, could the court's inherent  
3 authority kick in? I mean, I leave that possibility  
4 open - - -

5 CHIEF JUDGE LIPPMAN: How do you know - - -

6 MR. HORN: But certainly if it does - - -

7 CHIEF JUDGE LIPPMAN: How do you know that,  
8 if it's such an unusual situation or the average  
9 situation? I'd assume anything in this area,  
10 removing a DA, is relatively unusual. So how do you  
11 determine between just unusual and wildly beyond it?

12 MR. HORN: Well, that's what judges do.

13 JUDGE PIGOTT: But suppose you're right - -  
14 -

15 MR. HORN: When it's really severe, judges  
16 know that they've got to jump in - - -

17 JUDGE PIGOTT: Well, suppose - - -

18 CHIEF JUDGE LIPPMAN: But what about if the  
19 judge in this case - - -

20 MR. HORN: This is not that case.

21 CHIEF JUDGE LIPPMAN: - - - felt it was  
22 really severe?

23 MR. HORN: In this case?

24 CHIEF JUDGE LIPPMAN: Yeah.

25 MR. HORN: He didn't seem to find it was

1 particularly severe because he applied the wrong  
2 standard here.

3 JUDGE PIGOTT: No, but what I'm saying, Mr.  
4 Horn, is suppose he has your best interests at heart.  
5 He says these guys and gals, whoever, really deserve  
6 to be convicted, and this DA is so blind to the fact  
7 that he's getting sued by these people and it's such  
8 a clear conflict, at least an appearance of  
9 impropriety, I'm going to do something about it, and  
10 he does it. You're saying he's wrong, he can't do  
11 it?

12 MR. HORN: I am. I'm leaving the door open  
13 to really extreme Constitutional violations - - -

14 JUDGE SMITH: Suppose - - -

15 MR. HORN: - - - but - - -

16 JUDGE SMITH: Would an example of an  
17 extreme case be suppose it became known that the DA  
18 had a movie deal, a deal to sell the case to the  
19 movies, contingent on conviction, could the judge  
20 disqualify that DA?

21 MR. HORN: I think that is sufficiently  
22 egregious for the judge to - - -

23 CHIEF JUDGE LIPPMAN: So aren't we just  
24 talking about different in degree though? I mean - -  
25 -

1 MR. HORN: I think we are talking  
2 difference in degree, however, I also think that - -  
3 - I mean, it's not like there's no other options.  
4 The court can say that on the record. I mean, if the  
5 court becomes aware of a movie deal contingent on  
6 conviction, you'd raise that on the record and say  
7 are you seriously considering going forward with this  
8 case under these circumstances.

9 JUDGE GRAFFEO: But what rationale are you  
10 suggesting that we adopt? That the writ doesn't lie  
11 in most cases but only in really egregious cases?

12 MR. HORN: I think the writ does lie - - -

13 JUDGE GRAFFEO: It's not - - -

14 MR. HORN: - - - in most cases.

15 JUDGE GRAFFEO: - - - there's no dismissal?

16 MR. HORN: I think the writ lies in almost  
17 all cases.

18 JUDGE SMITH: You - - -

19 MR. HORN: There's an occasional circ - - -  
20 well, no, I think the writ will still lie and you'll  
21 still be able to challenge it, but it's just that - -  
22 -

23 JUDGE SMITH: You want to - - -

24 MR. HORN: - - - the court could jump in  
25 and say you're out but you need to give us permission

1 to come up here and challenge it by writ of  
2 prohibition.

3 JUDGE SMITH: You want to say - - -

4 MR. HORN: And then everybody's rights - -  
5 -

6 JUDGE SMITH: - - - that would overrule  
7 Kavanagh.

8 MR. HORN: Excuse me, Your Honor?

9 JUDGE SMITH: You want to say it would  
10 overrule Kavanagh or say it's already been overruled.

11 MR. HORN: Yes, I do, Your Honor. And I  
12 really do think the court - - - between Holtzman - -  
13 -

14 JUDGE GRAFFEO: Tell me the - - -

15 MR. HORN: - - - v. Goldman - - -

16 JUDGE GRAFFEO: Tell me the rule that you  
17 want us to adopt, just so we're clear.

18 MR. HORN: On Kavanagh v. Vogt and Schumer  
19 v. Holtzman?

20 JUDGE GRAFFEO: In this case.

21 MR. HORN: In this case. Because there - -  
22 - where there's an abuse of power that affects the  
23 entire proceeding, as distinguished from a procedural  
24 error, it's going to be jurisdictional and  
25 prohibition should lie. The removal of a duly

1           elected Constitutional officer is not just a  
2           procedural error and it impacts upon the entire  
3           proceeding, so prohibition should always lie.  
4           Regardless of whether the courts might jump in in  
5           some particular case because they think there's been  
6           an egregious violation doesn't really go to whether  
7           or not prohibition should lie. Prohibition should  
8           always lie because it is jurisdictional because - - -

9                        CHIEF JUDGE LIPPMAN: So your basic  
10           position is usually a county court judge cannot  
11           remove the DA and you acknowledge that in some  
12           circumstances they might - - - extreme, whatever you  
13           want - - - however you want to describe it, but that  
14           that can be challenged.

15                       MR. HORN: And I should be allowed to  
16           challenge that on prohibition and then everyone's  
17           protected and one branch of government is not  
18           completely superseding the rights of another branch.

19                       JUDGE PIGOTT: But don't you run into the  
20           situation, again, not necessarily this case, where if  
21           you lose this, I mean, the judge can say I'm going to  
22           dismiss this indictment. Then you have no appeal  
23           from that.

24                       MR. HORN: Well, you mean if you send it  
25           back with the indictment intact?



1 JUDGE PIGOTT: Yeah.

2 MR. HORN: If he dismisses that indictment  
3 without leave to re-present I can appeal, depending  
4 on the reason he appeals.

5 JUDGE PIGOTT: He does it again. My point  
6 is that the very argument you seem to be making is  
7 the one that prevents anybody from reviewing a  
8 recusal or anything with respect to the judge's  
9 conduct.

10 MR. HORN: We can definitely appeal a dis -  
11 - - I mean, if he dismisses the indictment without  
12 leave to re-present we can definitely appeal him. If  
13 he gives us leave to re-present then we can certainly  
14 re-present it and do it over and over again. And if  
15 I get sent up to the Appellate Division for a third  
16 time on this case I will definitely ask that another  
17 judge be assigned if he's just going to constantly  
18 dismiss the indictment.

19 CHIEF JUDGE LIPPMAN: Okay. Thank - - -

20 MR. HORN: I - - -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 MR. HORN: Do I have a couple of minutes?

23 CHIEF JUDGE LIPPMAN: Sure, you do.

24 MR. HORN: With regard to whether or not  
25 this lawsuit was tactical or whether this is a

1 sincere lawsuit, there are a couple of illustrations  
2 I can give you.

3 JUDGE SMITH: Does it matter?

4 MR. HORN: Well, it matters in the sense  
5 because I need to illustrate for the court just how  
6 dangerous this precedent really is because in this  
7 case, going back to 2007, Judge Herrick had ordered  
8 us to turn over the remaining wiretap materials to  
9 the criminal defense attorneys; they had asked for  
10 those. But they were currently under seal down in  
11 Florida with Judge Kest. So at the judge's direction  
12 - - - he gave us ten days - - - we went down to  
13 Florida and asked that Judge Kest give us permission  
14 to release those to the criminal defense attorneys.  
15 Well, then the civil attorneys down in Florida walked  
16 into Judge Kest and opposed release of those  
17 materials so that we could comply with the order of  
18 Judge Herrick, thereby disrupting the orderly  
19 discovery process.

20 JUDGE PIGOTT: Sounds like a conflict.

21 MR. HORN: Sounds like gamesmanship, is  
22 what it sounds like.

23 JUDGE PIGOTT: I'm saying - - -

24 MR. HORN: We're not conflicted; we're  
25 doing what the court told us to do, we're prosecuting

1           our case - - -

2                   JUDGE SMITH:   But I - - -

3                   MR. HORN:   - - - we're doing our job.

4                   JUDGE SMITH:   I mean, I think everyone can  
5           appreciate the problem with letting the defendant  
6           disqualify the DA just by suing him.  Isn't this a  
7           little unusual in that you had a federal judge uphold  
8           the civil complaint in an opinion that makes it sound  
9           as though he doesn't think that it's wholly without  
10          merit.  I understand that's since been reversed, but  
11          at the time Judge Herrick decided, that was the state  
12          of play.  Was it so unreasonable for him to say if  
13          the DA is in this much trouble, maybe I better get  
14          somebody else in here?

15                  MR. HORN:   I don't know whether you've all  
16          had an opportunity to read that decision, but even a  
17           cursory reading of that decision made it pretty clear  
18          that it wasn't worth the paper it was written on.

19                  JUDGE PIGOTT:   Ouch.

20                  MR. HORN:   And that - - - well, and that's  
21          the way it turned out.  They were all thrown out.

22                  JUDGE SMITH:   I guess I didn't read the - -  
23          - I mean, I thought the Eleventh Circuit thought he'd  
24          made an error of law but there were a lot of factual  
25          allegations in the complaint that seemed to trouble

1 even the Eleventh Circuit.

2 MR. HORN: They were troubled by it but  
3 they didn't rise to the level of satisfying even  
4 summary judgment standards.

5 JUDGE SMITH: I understand that completely,  
6 but I guess what I'm saying is, I'm a trial judge,  
7 I've got a DA before me who's been sued. I said big  
8 deal; people get sued all the time. Then I read an  
9 opinion by a federal judge that seems quite critical  
10 of the DA. I read an opinion by a federal court of  
11 appeals that seems a little bit critical of the DA.  
12 Is it such a wild thing to say you know what, it's  
13 not so good for this DA to be prosecuting this case?

14 MR. HORN: Sure, but again, as I've said, I  
15 don't believe he's statutorily authorized to make  
16 that decision. And as far as the sincerity of this  
17 lawsuit, they've never asked for a stay of the civil  
18 proceeding. They've invoked the Fifth Amendment to  
19 avoid answering questions. If it was a sincere civil  
20 lawsuit you would ask for a stay so that the civil  
21 litigants didn't have to choose between their Fifth  
22 Amendment rights.

23 JUDGE PIGOTT: Well, that's kind of unfair.

24 MR. HORN: I assume there's some claim - -

25 -

1                   JUDGE PIGOTT: I mean, are you suggesting  
2                   that people don't have rights under the Fifth  
3                   Amendment?

4                   MR. HORN: I'm saying they do, but if they  
5                   really were serious about that civil case, they would  
6                   ask for a stay pending resolution of the criminal  
7                   case so that they didn't have to waive their Fifth  
8                   Amendment rights because the criminal case would be  
9                   done and then they could go forward.

10                  CHIEF JUDGE LIPPMAN: Okay, counselor.  
11                  Thanks, counselor.

12                  MR. HORN: Thank you.

13                  CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

14                  MR. KNOX: Thank you, Your Honor. One  
15                  point I wanted to address was the emphasis that the  
16                  DA is a Constitutional officer and that that's what  
17                  makes him immune to disqualification by a judge. But  
18                  contrasted with the defendant's right to their  
19                  attorney of their choice, that's also a  
20                  Constitutional right, and while the DA is conceding  
21                  that they can move to disqualify a defense attorney,  
22                  at the same time that doesn't make sense that the  
23                  defense has to suffer a prosecution by a conflicted  
24                  district attorney and wait until that prosecution is  
25                  concluded in order to get review. That type of - - -

1 the reason that the county court judge can - - -

2 CHIEF JUDGE LIPPMAN: Well, he's saying  
3 that there are different branches of government, the  
4 separation of powers issue - - -

5 MR. KNOX: My point - - -

6 CHIEF JUDGE LIPPMAN: - - - that  
7 distinguishes - - - I think that's his argument.

8 MR. KNOX: My response to that, Your Honor,  
9 is that we have a system of checks and balances  
10 between those different departments of government.  
11 And one of the checks is that a trial court judge can  
12 remove or disqualify a district attorney when there's  
13 a conflict. That's a check that exists for a reason.  
14 It's to balance the power of the executive branch.  
15 And what they're asking you to do is to eliminate  
16 that check out of our statutory system, and I don't  
17 think that this court should do that and should  
18 uphold *Kavanagh v. Vogt*. And it applies directly in  
19 this case to uphold the decision that Judge Herrick  
20 made.

21 CHIEF JUDGE LIPPMAN: So you think it's  
22 still good law, *Kavanagh*?

23 MR. KNOX: I do, Your Honor. I don't see  
24 how you've overruled that. I don't see the case law  
25 - - - the cases that have been discussed don't

1           overrule that. To have a right to prohibition, you  
2           have to have a clear, legal right. The fact is there  
3           have been six judges, now, that have looked at this.  
4           Three judges at the Appellate Division said that the  
5           writ lied and there was no conflict. Two judges  
6           there and Judge Herrick all felt the other way. They  
7           felt the writ doesn't lie, and also - - - well, at  
8           least Judge Herrick - - - they all three of those  
9           felt there was a conflict that should preclude the  
10          District Attorney from prosecuting this case.

11                         JUDGE PIGOTT: It's a good thing there's an  
12          odd number of us, huh? We'll break the tie.

13                         CHIEF JUDGE LIPPMAN: Thank you both.  
14          Appreciate it.

15                                 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF SOARES v. HERRICK, No. 198 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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