AT A TERM OF the Rochester City Court sitting in and for the City of Rochester, County of Monroe, State of New York this 6th day of February, 2015.

Present: Hon. Thomas Rainbow Morse
Rochester City Court Judge

STATE OF NEW YORK COUNTY OF MONROE
CITY COURT OF ROCHESTER CRIMINAL BRANCH

THE PEOPLE OF THE STATE OF NEW YORK -v- GRACE M. MILLER, RYAN DAVID ACUFF, and JOHN THOMAS MALTHANER, Defendants.	Index # 14 - 10731 # 14 - 10751 # 14 - 10730

Ryan Acuff, John Malthaner and Sister Grace Miller, ardent advocates for the rights of Rochester's homeless population, were arrested on September 15, 2014 for trespassing in the Monroe County Office Building (hereinafter the "COB") . It is alleged that at least two of them refused repeated requests by law enforcement that they return downstairs from a second floor COB office. They assert they had gone to Room 210 to attempt to re-schedule a meeting with local officials regarding a shelter for homeless men and women displaced from the Civic Center Garage (hereinafter the "Garage"). Before going to room 210, they and other community members who shared their concerns had peacefully gathered for over two hours outside the County Clerk's and County Executive's offices in a "designated protest area" on the first floor protesting the plight of the homeless.[1] The prosecution has offered to have their cases adjourned for six months in contemplation of dismissal (hereinafter "ACD").[2] Although the defendants

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[1] Activities on the first floor of the COB were consistent with every citizen's right to assemble, speak their mind and petition their government. There is no allegation that advocates for the homeless were not able to fully advocate their concern for the plight of the homeless on September 15th in this area COB. Such "regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *People v. Barton* 8 N.Y.3d 70, 76 (2006)(citation and punctual omitted).

[2] CPL § 170.55(2)("An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice"). In cases such as this, "the granting of an ACD is not in and of itself a final dismissal. When an ACD is granted, the

have not rejected that offer, they have moved for dismissal of the charge immediately in the furtherance of justice (hereinafter "DIFJ"). The People have opposed that motion. For the reasons that follow, the motion is denied.

New York law allows a court to dismiss a charge in the furtherance of justice "when, even though there may be no basis for dismissal as a matter of law...such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument...would constitute or result in injustice." [3] Long ago, New York's highest court recognized that the statute's "thrust...has been to allow the letter of the law gracefully and charitably to succumb to the spirit of justice." [4] While "the decision to dismiss an information lies within the discretion of the trial judge, it is clear that...discretion is neither absolute nor uncontrolled." [5] It remains an extraordinary remedy which necessitates that a judge undertake "a sensitive balancing of the interests of the individual and of the People." [6] When deciding a DIFJ motion "the court must, to the extent applicable, examine and consider, individually and collectively" ten factors [7] upon which this opinion is focused.[8]

The Seriousness and Circumstances of the Offense

The defendants were charged with Criminal Trespass even though the COB was open to the public at that time. Under the Penal Law an individual can be charged with trespassing for

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[3] McKinney's CPL § 170.40. Cf. *People v. Douglass* 60 N.Y.2d 194, 204 (1983)("courts never had inherent power to dismiss, *sua sponte*, a criminal prosecution for any reason until 1881, and that power was limited to situations where the court found such dismissal to be in furtherance of justice").

[4] *People v. Rickert* 58 N.Y.2d 122, 126 (1983)(citation and internal quotation marks omitted).

[5] *People v. Wingard* 33 N.Y.2d 192, 195 - 96 (1973)(citation omitted). See also *People v Belge* 41 NY2d 60, 62-63 (1976); *People v Insignares* 109 AD2d 221, 234 (1st Dept., 1985) lv denied 65 NY2d 928 (1985); *People v Loria* 214 AD2d 1043 (4th Dept., 1995); *People v Rucker* 144 AD2d 994 (4th Dept., 1988) lv denied 73 NY2d 926 (1989).

[6] *Rickert* supra at 126 - 27. See *People v Rahmen* 302 AD2d 408 (2nd Dept., 2003)

[7] The subheadings that follow in this opinion are those set forth in CPL § 170.40 (a) - (j).

[8] *People v. Berrus* 1 NY3d 535, 536 (2003)(a court must "[take] into consideration the factors considered in CPL 170.40"); see also *People v Clayton* 41 AD2d 204 (2nd Dept., 1973)(common law basis for DIFJ); *People v Belkota* 50 AD2d 118 (4th Dept., 1975); *People v Mitchell* 64 AD2d 1012(4th Dept., 1978).

remaining on a premises after the privilege to be there has been revoked. [9] Yet, the accusatory instrument in this case may be insufficient on its face because at the time of the arrest the building was not "fenced or otherwise enclosed in a manner designed to exclude intruders." [10] The defendants, however, have not made a motion to dismiss the accusatory instrument on that basis. Neither have the People moved to amend the charge to the non-criminal offense of simple Trespass.[11] The court believes the legal severity of the offense is that of a violation, not a crime.

Such a starting point, however, actually favors the People's position on this motion. A compelling case might be made that, under the circumstances presented, a criminal conviction for these dedicated advocates for the homeless would result in an injustice. Yet, that argument loses much of its force when any conviction would be no more serious than a speeding ticket.

The Extent of Harm Caused by the Offense

The People have alleged that the defendants acted in a disruptive manner while making their way from the "designated protest area" to Room 210. While counsel for the defendants characterizes the People's claim that the defendants were "'banging on doors' and 'disrupting the business of the county'" in the perimeter hallway of the cavernous COB atrium as an "attempt to obfuscate the facts", the prosecution's assertion was not disputed. [12] Although perhaps irrelevant at trial, the defendants' alleged behavior while proceeding to the second floor is pertinent to whether the record before the court at this point supports the extra ordinary remedy of dismissal in the furtherance of justice.

The Evidence of Guilt, Whether Admissible or Inadmissible at Trial

The accusatory instrument alleges the defendants were arrested for not leaving the second floor after repeatedly being told to go. In their affidavits, defendants Malthaner and Miller

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9 McKinney's Penal Law § 140.00(5).

10 McKinney's Penal Law § 140.10(a). *People v. Moore* 5 N.Y.3d 725, 726 (2005)("The plain language of the statute as amended, however, clearly requires that both buildings and real property be fenced or otherwise enclosed in order to increase the level of culpability from trespass to criminal trespass in the third degree").

11 McKinney's Penal Law § 140..05 ("A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises").

12 See *People v. Gruden* 42 NY2d 214, 217 - 18 (1977)(a party's duty to controvert facts in pre-trial motions in a criminal case).

essentially admit those facts. They deny that they "asked" to be arrested, however, they do not contest that they were told to leave room 210 and return to the designated protest area and did not. They assert they had a right to go to room 210 to request a meeting with county officials. Defendant Acuff, on the other hand, purports to have left the office when asked. In his affidavit he asserts that after leaving the office he began video-taping the events on the second floor when he was arrested. Unlike his co-defendants, he asserts his complete innocence.

Obviously, any disposition short of trial will leave the question of what really happened unanswered, [13] since a court does not rule on the accuracy of facts in an accusatory instrument when deciding a DIFJ motion.[14] As noted recently by a court in denying a DIFJ motion involving members of Occupy Wall Street "[a] motion to dismiss in the interest of justice should not be used as a substitute for a trial, or when the motion merely raises a trial defense."[15] Thus, allowing this matter to proceed to trial is really the only way culpability can be determined.

The History, Character and Condition of the Defendant

Each of these defendants has dedicated considerable time and energy to making sure Rochester's mostly invisible and often forgotten homeless population is provided with the shelter, sustenance and services they need. The defendants have been committed to caring for the homeless for years.[16] They have chosen to provide a safe haven for those individuals who "suffer from substance abuse, the mentally ill and those who are chronically homeless."[17] Defendants Malthaner and Miller together with others from The House of Mercy and St. Joseph's House are also involved in the *Housing First* project seeking to provide "no strings attached" housing for

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13 *Ryan v. New York Telephone Co.* 62 N.Y.2d 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).

14 *People v Thomas* 4 NY3d 143, 146 (2005). Nor is such a determination made when a case is ACD'd. "The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution". CPL § 170.55(8).

15 *People v Pesola* 37 Misc3d 569, 577 (N.Y. Crim. Ct., 2012)(citations omitted).

16 According to the affidavits filed they have lived with the homeless for: four years (Acuff ¶ 1); fifteen years (Malthaner ¶ 1); and nineteen years (Miller ¶ 2).

17 Miller affidavit ¶ 7.

the most challenged of the homeless population in our area. Such housing would appear apropos for many of the 30 - 50 homeless men and women who have historically called the Garage their home and have now had to relocate. The professed purpose of the defendants' initial presence in the COB, and later, a trip to room 210 "to arrange a meeting with county officials in order to find alternative shelter space for those forced out of the Civic Center Garage"[18] is consistent with their altruism. Their history of selfless acts speak volumes about their commendable character.

Any Exceptionally Serious Misconduct of Law Enforcement Personnel In the Investigation, Arrest and Prosecution of the Defendant

Other than defendant Acuff's claim that he had complied with the request to leave and was arrested only as he filmed the scene with his phone, there are no allegations of even minimal misconduct in this matter.

The Purpose and Effect of Imposing upon the Defendant A Sentence Authorized for the Offense

A fair reading of the papers submitted on behalf of the defendants is that they acted out of concern for the health and safety of the homeless in a manner consistent with each defendant's conscience. While civil disobedience has long been part of the fabric of our society, the notion that those who engage in such activities should not suffer consequences for their actions is a relatively new phenomenon. [19] As recently as 1963, the Rev. Dr. Martin Luther King, Jr. recognized that accepting the consequences of direct action was a component of civil disobedence.[20] He wrote that "[n]onviolent direct action seeks to create such a crisis and foster such a tension that a community which has consistently refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored."[21]

One could argue that based on their decision to leave the "designated protest area" the refusal of defendants Malthaner and Miller to leave the second floor office when asked may represent such direct action and constitute a pre-meditated conscious choice made by them to risk

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18 Id. at ¶ 29.

19 See *Civil Disobedience: an American Tradition,* Lewis Perry, Yale University Press, 2013.

20 "One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty." *Letter from a Birmingham Jail* on April16, 1963.

21 Id.

arrest in order to raise public awareness of the plight of the homeless on that day.[22] In addition, it is not uncommon in our internet era for social activists to assign one of a group's members the task of documenting the acts of others for later use at trial. Sometimes it is filmed and the video is posted on the Web to exponentially disseminate their message and hopefully gain broad public support.[23] Certainly, a casual observer might wonder whether defendant Acuff was fulfilling that role on September fifteenth. [24] Yet, even if that were so, this is not a case which cries out for harsh punishment should a conviction result from a trial after rejection of the People's ACD offer.

The Impact of a Dismissal on the Safety or Welfare of the Community

Since the unconditional plea bargain offered by the People would result in dismissal six months from now, it does not appear that the prosecution anticipates any specific threat to the safety of the community. The court concurs.[25]

The Impact of a Dismissal upon the Confidence of the Public in the Criminal Justice System

No one has argued in this case that if the defendants had been able to meet with a county representative onSeptember 15th the problems of Rochester's homeless would have been resolved that day, that week or even within the next month. Their arrests took place in mid-September when the manifest need for shelter and services for the homeless had not reached the

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22 Such personal sacrifice is the hallmark of issue-focused civil disobedience which seeks to raise public awareness of social issue advocates demand be addressed by public or private institutions. "Protest actions may be collective...but decisions to break the law are made by individuals, regardless of whatever influence or inspiration comes from others." *Id.* This category of collective action with individual sacrifice includes, but is not limited to: nineteenth century abolitionist activities; early twentieth century women's suffrage efforts; as well as the more recent civil rights protests of the 1950's and 1960's; anti-Vietnam war demonstrations and draft card burnings; Operation Rescue blockades; Earth First tree sitting and the Occupy Movement. In fact, while being tear gassed and clubbed, demonstrators who did not disperse at the 1968 Chicago Democratic Convention chanted "The whole world is watching."

23 Activities over the past year in the U.S. Supreme Court by a group designating itself as "99Rise" who are upset about the Court's decision in *Citizens United* fit that pattern. The protest by that group in the Supreme Court Chamber in February, 2014 is such an example. They repeated the same activities on January 21st of this year. *The Daily Record* Vol. 107 Number 15 at page 3 (1/23/15). Although one of the non-protesting members was arrested on the twenty-first for filming, the leader of the group suggested in an e-mail to reporter Mark Sherman that "more than one person had a camera on Wednesday and promised to post footage on line." Id.

24 After he complied with the officer's request that he leave Room 210, he "began videotaping the scene with [his] phone from outside the office." Affidavit of Ryan Acuff ¶ 30.

25 Cf. *People v Kleckner* 33 Misc3d 1219(A)(N.Y. Crim Ct., Mennin, J., 2011)(DIFJ denied - safety).

epic proportions presented in January or February. If the defendants were unable to schedule a meeting on that day, a reasonable alternative might have been to send a certified letter to the county official with whom they wished to meet with an enclosed copy of the entire letter they claim to have received from the county which declared a meeting with advocates "unnecessary". By so doing, they might have accomplished their goal without taking a chance on disrupting those working in room 210 and the rest of the COB by undergoing arrest. The public's confidence in law enforcement authorities to keep order in public buildings would have been assured and the defendants would have moved forward toward their goal to meet with county officials. If keeping the issue in the "public eye" was also a goal that day, that could have been met by providing the letter to various media outlets on September fifteenth.

It might not be unreasonable, however, for one to suspect that the defendants, as seasoned social activists, were hoping for the best (a meeting with county officials) while planning for the worst (no meeting), willing to risk arrest to force the issue and garner publicity for their cause. Such sincere acts of peaceful civil disobedience are a part of our democratic heritage, as is respect for the rule of law. While granting immediate dismissal might strengthen the former, it could seriously weaken the later in cases involving broad social issues the appropriate resolution of which are subject to debate along a wide spectrum of public opinion.

The case law in New York State supports that premise. A number of those cases order dismissal in the furtherance of justice when an individual is arrested while attempting to prevent immediate harm to a particular person.[26] Nonetheless, absent a compelling factor such as a defendant's youth,[27] cognitive challenges,[28] or "[a]n unusually sympathetic back story" [29]such dismissal is rarely granted in cases in which mature individuals consciously risk arrest protesting a societal issue which they fervently believe warrants such action. In a case wherein the People have already forgone full prosecution by offering an ACD, it is the court's view that a dismissal in the furtherance of justice would be more likely to have a negative impact on the public's

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26 *People v. Federman* 19 Misc.3d 478 (N.Y. Crim. Ct., Kennedy, J., 2008).

27 *People v Grayert* 1 Misc3d 646, 649 (N.Y. Crim. Ct., Cooper, J., 2003)(17 year old anti-war protestor lying down on NYC sidewalk).

28 *People v Colon* 86 NY2d 861 (1995).

29 See e.g. *People v. LaFont* 43 Misc.3d 384 (N.Y. Crim. Ct., Statsinger, J., 2014)(recent surgery).

confidence in the criminal justice system.

Where the Court Deems it Appropriate,
The Attitude of the Complainant or Victim with Respect to the Motion

Putting aside the feelings of anyone working in room 210 on September 15th, no individual victim of the alleged violation of Penal Law Article 140 has expressed an interest in the outcome of this case. Thus, this court has no cause to consider the attitude of the complainant or victim in this case.[30]

Any Other Relevant Fact Indicating That
a Judgment of Conviction Would Serve No Useful Purpose

In the papers submitted and oral argument of this motion it has been suggested that by the court "plac[ing] it's imprimatur on the larger conduct here"[31] a DIFJ by the court would "give the vulnerable hope that somebody is fighting for them and that their needs are being addressed. "[32] However, the potential for a finding of guilt continues to rest squarely in the defendants' hands since the ACD they have been offered preserves their presumption of innocence resulting in a dismissal in the interest of justice in six months time. Arguably, with the "no strings attached" ACD offer, the District Attorney's office has already, in part, accomplished the defendants' second goal of hope for the homeless.

When illegal action is taken to mitigate immediate individual harm society, it may be appropriate to find that the spirit of the law trumps its letter. Dismissal might be in the interest of justice on those occasions when advocates engage in civil disobedience regarding broad social issues about which they care deeply as the basis for the illegal conduct. If courts were to routinely excuse intentional violations of law by good people convinced they were right in doing so because they were advocating for a compelling community cause the judicial branch might be seen as usurping responsibilities constitutionally assigned to the executive and legislative

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30 Statutorily, all criminal court cases are brought in the name of "the people of the state of New York as plaintiff against a designated person, known as the defendant." CPL § 1.20(1).

31 This citation is from the oral argument of counsel Edward Hourihan for the defendants responding to the court's question regarding the need for an immediate dismissal in the furtherance of justice rather than one entered in six months following the adjournment in contemplation of dismissal offered by the People.

32 This point is made in the affidavits of all three defendants on the impact of dismissal on public confidence in the judicial system.

branches. [33] As one editorial writer has observed a good judge "needs the independence of the Swiss" and be "as fair minded as the umpire behind the plate in a Yankees-Red Sox game."[34] Placing a judicial seal of approval on the position of or tactics employed by proponents of one side of a societal issue being debated is antithetical to those qualities which this court believes our community rightly expects a judge to possess.

Accordingly, based on the record before this court, the evidence does not demonstrate compelling proof why continuation of this case at this point would constitute an injustice. The defendants' motions for an immediate dismissal in the furtherance of justice are denied.

The foregoing constitutes the decision and the order of the court.

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Dated: February 6, 2015

Hon. Thomas Rainbow Morse, JCC

cc: Shani Mitchell, ADA
Edward P. Hourihan, Esq. (Counsel for the Defendants)

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[33] People of good conscience can disagree. For instance, as to the issue of abortion, the yearly polling by Gallup shows , consistent patterns since 1975, with between 48% and 55% expressing the opinion that it should be legal in only certain circumstances. Since 1980, the greatest gap between the percentage of people who consider themselves "pro-choice" and those who identify as "pro life" has been nine percentage points with the former being 47% and the later being 46% in 2014. See Http://www.gallup.com/poll/1576/Abortion.aspx?version page 1. What if on the anniversary of *Roe v Wade* pro-choice and pro-life advocates simultaneously staged sit-ins at the offices of legislators who didn't share their view on abortion? Would a court be required to dismiss all charges of trespass against all members of both factions to be fair to both sides of this issue which cuts to the core of the conscience, spiritual and religious beliefs of so many Americans? Would a court be required to do that for as long as such civil disobedience occurs? Would widespread repetitive dismissals truly further justice? Compare *People v Goetz* 73 NY2d 751, 753 (1988)(jury nullification "is not a legally sanctioned function of the jury and should not be encouraged by the court"); *People vWeinberg* 83 NY2d 262, 268 (1994)(same).

[34] Editorial by Rex Smith in the Albany Times Union on April 12, 2008.