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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 86

MARTESHA DAVIDSON,

Defendant-Appellant.

20 Eagle Street
Albany, New York 12207
April 26, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

ROBERT R. LALONDE, ESQ.
LAW OFFICES OF ROBERT R. LALONDE
Attorneys for Appellant
1109 East State Street
Ithaca, NY 14851

BARBARA D. UNDERWOOD, SG
NEW YORK STATE ATTORNEY GENERAL'S OFFICE
Attorneys for Respondent
The Capitol
Albany, NY 12224

ROBIN A. FORSHAW, ESQ.
NEW YORK STATE JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS
Attorneys for Respondent
161 Delaware Avenue
Delmar, NY 12054

Meir Sabbah
Official Court Transcriber

1 JUDGE PIGOTT: Chief Judge DiFiore is
2 recused in this particular case, People v. Martesha
3 Davidson.

4 Mr. Lalonde, welcome.

5 MR. LALONDE: Thank you, Judge. Good
6 afternoon. Robert Lalonde for Martesha Davidson.

7 This case is about the power of the special
8 prosecutor that was created - - -

9 JUDGE PIGOTT: Would you like any rebuttal
10 times?

11 MR. LALONDE: I'm sorry - - - no. Thank
12 you.

13 Special prosecutor which was created by the
14 Protection of People with Special Needs Act - - - yes.

15 JUDGE RIVERA: So counsel, did - - - did
16 defense counsel re low - - - excuse me, below attack
17 the Constitutionality of the statute?

18 MR. LALONDE: Well, Your Honor, I think he
19 did. He filed a letter of motion to dismiss, and in
20 that letter of motion, he did cite three points. And
21 point 1 was that it was only the locally elected DA
22 who's got the power under the New York Constitution
23 to prosecute.

24 And then he went on to make two other
25 points, one was there is no probable cause to arrest,

1 and then the third point was challenging the power of
2 the special prosecutor to appear in the local court.
3 And it was - - - it was that - - -

4 JUDGE RIVERA: Yeah, I looked at that
5 letter. That probable cause in the same paragraph,
6 it's sort of the closing statement after that first
7 sentence that you are correct, where it says, under
8 the Constitution, only the DA has the authority to
9 prosecute. I agree with you, that is what that said.
10 The rest of the paragraph doesn't seem to really go
11 any further than that.

12 Can he just say it's unconstitutional, or
13 the DA is the only one who under the Constitution has
14 the authority; is that enough for - - -

15 MR. LALONDE: Well, I think it is.

16 JUDGE RIVERA: - - - the town court to know
17 the nature - - -

18 MR. LALONDE: I - - -

19 JUDGE RIVERA: - - - of this Constitutional
20 argument?

21 MR. LALONDE: I think it is. I mean, he -
22 - - he's clearly saying it's only the local DA who,
23 under the New York State Constitution, I mean, that -
24 - - that phrase - - -

25 JUDGE RIVERA: Is that a separation of

1 powers argument, or is that some other argument?

2 What's the nature of the Constitutional
3 argument?

4 MR. LALONDE: Well, that's not clear.

5 JUDGE RIVERA: Um-hum. At the hearing - -
6 -

7 MR. LALONDE: But - - -

8 JUDGE RIVERA: At the hearing on this, did
9 they ever talk about the Constitution, and the nature
10 of this Constitutional argument, and the theory?

11 MR. LALONDE: What I am - - - what I am
12 arguing, in terms of preservation, is that sentence;
13 that's what's there.

14 JUDGE RIVERA: Um-hum.

15 MR. LALONDE: You know, there was not - - -

16 JUDGE FAHEY: You know what, I'm a little
17 confused on that because it seems - - - I think you
18 can argue that it was - - - the issue was preserved,
19 but it seems like this issue was waived.

20 In the brief - - - I got Appellate Brief
21 Page 4, "The Appellant is not arguing that Article 20
22 of the Executive Law is unconstitutional," and it
23 goes on to say only the foregoing analysis. Can you
24 tell us what - - - it seems to me like you've waived
25 this issue.

1 MR. LALONDE: Sure. Well, Your Honor - - -

2 JUDGE FAHEY: Expressly waived this issue.

3 MR. LALONDE: At the Intermediate Appellate
4 Court, I did raise a direct Constitutional argument.
5 I said, hey, this statute is not Constitutional. I
6 did not make that argument here. But - - -

7 JUDGE FAHEY: So - - - so my reading of the
8 Appellate Brief is correct, it is expressly waived -
9 - -

10 MR. LALONDE: Well - - -

11 JUDGE FAHEY: - - - you see it - - - let me
12 just finish the thought.

13 MR. LALONDE: I'm sorry.

14 JUDGE FAHEY: It creates a problem because
15 the AG is only here - - - is - - - in an amicus
16 brief, and if you've expressly be waived it, then I
17 don't see how they can argue on the Constitutionality
18 issue also.

19 MR. LALONDE: Your Honor, I disagree that I
20 have waived it, and it was not my intent to waive the
21 Constitutional issue. I raised it in the way I did,
22 because I thought that that would probably be - - -
23 that that would have the most chances of success.

24 JUDGE FAHEY: Well, we will have to decide
25 it, but I don't want to make it - - - not let you

1 make your argument, but I'm just saying, I just
2 wanted do point it out.

3 JUDGE STEIN: If the Constitutionality is
4 doubtful, as - - - if we ascribe some arguable merit
5 to the AG's argument, would that be relevant to our
6 analysis of the statutory interpretation?

7 MR. LALONDE: Yes, I think it would. What
8 - - - what I am saying is that the special prosecutor
9 is only authorized to appear before grand jury or in
10 county court, that that's the plain text of the
11 statute, and that to interpret the statute otherwise,
12 to allow them to prosecute as they have in this
13 particular case - - -

14 JUDGE STEIN: Could create Constitutional
15 problems.

16 MR. LALONDE: - - - creates a
17 Constitutional problem; that's - - - that's the
18 that's the Constitutional argument I am making here.

19 JUDGE RIVERA: Well, you see, even with
20 what you acknowledge is the statement in the brief,
21 that you're not challenging the Constitutionality, it
22 is true that other than the reference to the statute,
23 you are talking about the Constitutional powers - - -

24 MR. LALONDE: Exactly.

25 JUDGE RIVERA: - - - that are at play in

1 this case.

2 MR. LALONDE: That is exactly the argument
3 I am making. To interpret the statute in the way I
4 am asking court to interpret the statute, does not
5 render the statute unconstitutional. However - - -

6 JUDGE FAHEY: Doesn't it - - - doesn't that
7 make - - - isn't it inconsistent though with the
8 whole purpose of the statute? I mean, this statute
9 created 260.24, right, it was created at the same
10 time and specifically to prosecute the crimes that
11 the special prosecutor was appointed to do in. That
12 was the whole purpose of the statute.

13 So I - - - it seems inconsistent for - - -
14 if we're going to say that a special prosecutor only
15 could prosecute felonies but not misdemeanors, and
16 yet we create - - - I guess it was an A misdemeanor
17 260.24, it doesn't make any sense; the statutory
18 history doesn't support it. That inconsistency seems
19 difficult to reconcile.

20 MR. LALONDE: Judge, I might not be
21 understanding the question, but - - -

22 JUDGE FAHEY: The special prosecutor, your
23 argument is, could only prosecute felonies, not
24 misdemeanors.

25 MR. LALONDE: What - - -

1 JUDGE FAHEY: Right. We're - - - we're on
2 the same page on that one.

3 MR. LALONDE: Judge, we are not on the same
4 page on that.

5 JUDGE FAHEY: Okay, go ahead.

6 MR. LALONDE: I believe the special
7 prosecutor can prosecute misdemeanor cases - - -

8 JUDGE FAHEY: Okay. All right.

9 MR. LALONDE: What I am saying is that in
10 order to do that, to prosecute any case, they must
11 present the case to a grand jury.

12 JUDGE FAHEY: I see. Okay.

13 MR. LALONDE: And that the issue or the
14 problem, you've got the special prosecutor, governor
15 appointed, in no way elected, and they can, at least
16 in this case, unilaterally make the decision to come
17 in and file charges, and that's without any - - -
18 really any port of - - - any sort of input from - - -

19 JUDGE ABDUS-SALAAM: What if - - -

20 JUDGE STEIN: Wouldn't they need the
21 consent of the DA though?

22 MR. LALONDE: I'm not opposed to this court
23 interpreting the statute that way, that's not what
24 I'm asking the court to do. I - - -

25 JUDGE STEIN: Was there consent here? Or

1 do we know - - -

2 MR. LALONDE: There is no - - - but I guess
3 I had some personal beliefs based on talking to the
4 prior attorneys, but I don't think there is a record
5 regarding that. And I - - - I'm not opposed to this
6 court, you know, laying out some sort of framework
7 where, you know, consultation, consent, permission
8 from the local DA - - -

9 JUDGE RIVERA: Well, let's go down that
10 rabbit hole for a moment, and I certainly will be
11 asking the other lawyers. What's the nature of this
12 consent? Does it mean, yes, go right ahead and
13 prosecute, or does it mean, I have to supervise, the
14 DA has to be aware of every strategic choice, and
15 approve every strategic choice?

16 What does that mean "consent"?

17 MR. LALONDE: Well, I think it means - - -
18 I think - - - I think it does mean approval. You
19 know - - -

20 JUDGE RIVERA: To pursue a prosecution.

21 MR. LALONDE: Yes. And it - - -

22 JUDGE ABDUS-SALAAM: But what if - - - what
23 if the DA doesn't respond - - - what if the special
24 prosecutor request, and the DA doesn't respond, how
25 do we interpret that? Is that consent or is that,

1 you know, just ignoring?

2 MR. LALONDE: Well, I think there has to at
3 least be some - - - at the outset, there's got to be
4 some kind of request or contact from, you know, the
5 one prosecutor to the other. I - - -

6 JUDGE ABDUS-SALAAM: Doesn't the statute
7 say that the special prosecutor must consult with the
8 DA, or give notice to the DA?

9 MR. LALONDE: It certainly does. I mean,
10 Section B, if they are applying for warrants, they
11 have to - - - they have give notice. Section - - -
12 Section C, if they are appearing front of, you know,
13 grand jury, they have to - - - they have to consult.
14 I - - - I guess I didn't come prepared to,
15 you know, suggest the framework for what that really
16 means. What I - - - what I'm concerned about is what
17 happened in this case, which is, you know, I think
18 there was - - - there was a New York State trooper
19 who went out and investigated this case, and met with
20 the Tomkins County District Attorney, and the
21 decision was made not to file charges, and then it
22 was the Justice Center's investigator who, you know,
23 reinvestigated, and then it was the special
24 prosecutor who went ahead and filed charges.

25 JUDGE GARCIA: Isn't that exactly what the

1 statute is designed to do, because people weren't
2 prosecuting these cases?

3 MR. LALONDE: Well, I - - - I don't
4 disagree that that's what the statute is designed to
5 do. What I am saying is that, if under those
6 circumstances, the special prosecutor wants to bring
7 a case, they have to present it to a grand jury.
8 Because at least that gives a defendant, you know,
9 some sort of - - - some sort of protection from this
10 - - - this non-elected, governor appointed only
11 prosecutor. That at least under, you know, that kind
12 of situation, there is - - - there is grand jury
13 protection.

14 JUDGE RIVERA: So the legislative history
15 about concurrent authority then doesn't really matter
16 under your grand jury argument, right?

17 MR. LALONDE: Well, I think that's right.
18 I mean, if - - - if they truly are allowed to have
19 concurrent authority, I think that - - - I think that
20 begins to raise the Constitutional concerns.

21 JUDGE FAHEY: You waived that. Yeah.
22 Okay.

23 MR. LALONDE: Okay. Thank you.

24 JUDGE PIGOTT: Thank you.

25 Ms. Underwood, good afternoon.

1 MS. UNDERWOOD: The New York Constitution
2 recognizes only two officers with prosecutorial
3 power. The county DAs and the attorney general, both
4 elected officers.

5 This is the first time the legislature has ever
6 purported to create a new special-purpose prosecutor who
7 is not accountable to either the district attorney, or the
8 attorney general. If this court were to endorse the
9 practice, there well may be many more. The renew - - -

10 JUDGE RIVERA: If the statute requires
11 consultation or consent, does that address the
12 concern?

13 MS. UNDERWOOD: No, it doesn't require
14 consent unless you read that into it. I think the
15 plainest under - - - we would suggest that you could
16 read that into the statute, but the language is
17 consultation, and not con - - -

18 JUDGE RIVERA: So what would that mean
19 under the statute?

20 MS. UNDERWOOD: Pardon me?

21 JUDGE RIVERA: To the extent that you say
22 that the statute is therefore unconstitutional, what
23 - - - what is the statute anticipating as
24 consultation?

25 MS. UNDERWOOD: Well - - -

1 JUDGE RIVERA: I'd assume you mean less
2 than approval.

3 MS. UNDERWOOD: Yes. I understand
4 consultation to be a different word from consent, and
5 to be deliberately chose - - - chosen that way. Were
6 you to construe it to mean the same thing, I think
7 that would take care of the Constitutional - - -

8 JUDGE FAHEY: That would be tough because
9 people consult with me all the time, and disagree
10 with me right after that, so it's pretty common.

11 MS. UNDERWOOD: Well - - -

12 JUDGE RIVERA: Maybe I can follow up on the
13 question I was asking before. So what would be - - -
14 what would be the scope of consent? Is it
15 supervision by the DA, is it that the DA must approve
16 strategic choices; what does consent mean - - -

17 MS. UNDERWOOD: Well - - -

18 JUDGE RIVERA: - - - to survive the
19 Constitutional question?

20 MS. UNDERWOOD: Yes. I'd like to take that
21 question into two parts if I could. Because as to
22 misdemeanors, we have this common-law tradition of
23 prosecution by non-prosecutors, by police officers,
24 by complainants, by victims in some circumstances.
25 And even as to that, this court has said there needs

1 to be approval by the district attorney, an ultimate
2 responsibility. But it seems for that, that it might
3 be sufficient for the district attorney to approve
4 the general practice, as distinguished from close
5 monitoring of every case.

6 JUDGE RIVERA: Is that Soddano?

7 MS. UNDERWOOD: Yes.

8 JUDGE RIVERA: Um-hum.

9 JUDGE PIGOTT: Without - - - without - - -
10 are you saying that the statute is poorly drafted?

11 MS. UNDERWOOD: Well, I'm saying it wasn't
12 drafted to deal with the problem I'm talking about
13 here. And one of the reasons we're here, I think, is
14 that perhaps - - - is to bring this - - - the
15 Constitutional issue to this court's attention, and
16 to try to find a solution to it.

17 Because I - - - there is no doubt that the
18 - - - that the Justice Center is a useful, important
19 way of bringing resources, and expertise, and so
20 forth, to bear on a problem; it could easily have
21 been - - - it could - - - altered slightly to deal
22 with a Constitutional problem.

23 And if this court approves this
24 arrangement, there is nothing, no distinction
25 analytically between this and a special, unelected,

1 unaccountable prosecutor for any crime du jour for -
2 - -

3 JUDGE PIGOTT: Isn't it - - - isn't it a
4 bit of a stretch to say the legislature left to the
5 common law misdemeanor prosecutions in a - - - in a
6 statute such as this?

7 MS. UNDERWOOD: I don't think the
8 legislature intended to do that, I'm suggesting two
9 different wit - - - the - - - analytical ways to
10 approve the prosecution, even though not alluded to
11 directly in the statute.

12 JUDGE PIGOTT: But that - - - that would -
13 - - so in a way, I know I'm putting words in your
14 mouth, you're agreeing with Mr. Lalonde that there is
15 no statutory provision allowing the Justice Center to
16 - - - to bring misdemeanors in local village courts
17 or town courts.

18 MS. UNDERWOOD: Well, our argument overlaps
19 his to a considerable degree. It's not - - - it's
20 not identical, that is to say, our position is that
21 under the statute - - - the statutory construct,
22 which doesn't distinguish between misdemeanors and
23 felonies, seems to - - - seems unconstitutional in
24 the sense that it creates a prosecutor who is not
25 accountable in any way, either to the district

1 attorneys or to the attorney general. Where - - -

2 JUDGE STEIN: And requiring that
3 misdemeanors be brought to the grand jury doesn't
4 solve your problem.

5 MS. UNDERWOOD: Correct. Correct, I don't
6 think the grand jury has - - - is a substitute for
7 the attorney general or the district attorneys. But
8 I do think that this prosecution, which is a
9 misdemeanor prosecution, could stand if it were
10 understood to be - - - if the prosecutor understood
11 to be authorized not by the statute alone, but by the
12 common law authority of law enforcement officers to
13 bring misdemeanor prosecutions. Now, that doesn't
14 solve the situation for felony prosecutions, but this
15 is not a felony prosecution.

16 JUDGE GARCIA: Counsel.

17 JUDGE RIVERA: And so let's talk about the
18 felony. So that would be resolved either saying it's
19 unconstitutional, or that we somehow read into the
20 statute, consent - - -

21 MS. UNDERWOOD: That's correct.

22 JUDGE RIVERA: - - - yes, and now we're
23 back to my question of consent.

24 MS. UNDERWOOD: And what would - - -

25 JUDGE RIVERA: You've sort of answered it

1 on the common law side.

2 MS. UNDERWOOD: Right. And what would the
3 - - - what would the consent mean? Well, I think the
4 consent would have to be that the district attorney
5 is ultimately responsible for the decisions that are
6 made. It is not the case that that means the
7 district attorney personally has to be intimately
8 involved in every strategic decision.

9 What it means is - - - for example, in this
10 case, if you - - - if you imagine this was a felony,
11 the record can be read, I believe the defendant reads
12 it to say that the district attorney didn't want
13 there to be a prosecution.

14 JUDGE GARCIA: Or it can be read that - - -

15 MS. UNDERWOOD: Or - - -

16 JUDGE GARCIA: - - - he really didn't care.

17 MS. UNDERWOOD: That's correct.

18 JUDGE GARCIA: But here is my - - -

19 MS. UNDERWOOD: But those are two different
20 - - -

21 JUDGE GARCIA: - - - but here is my
22 concern, and I raised it before. There were a series
23 of horrific reports that led to this legislation.
24 Right? We can all agree those were terrible events,
25 nobody was - - - legislature felt nobody was

1 prosecuting them, in this case, the DA wasn't going
2 to prosecute. You're asking us to declare this
3 statute, at least in your first point,
4 unconstitutional. Is there any plan by the attorney
5 general, if we agree with you, to take over in some
6 way, or to coordinate some response to address that
7 issue?

8 MS. UNDERWOOD: Is there a plan, well, we
9 have proposed a plan. If you don't read into the
10 statute - - -

11 JUDGE GARCIA: No, but let's say we go with
12 your point one, it's unconstitutional, do you have
13 any plan then to take over, or to somehow coordinate
14 this? Is that - - -

15 MS. UNDERWOOD: Our recommendation would be
16 that the dis - - - that the Justice Center get
17 consent from the - - - they could just - - -

18 JUDGE GARCIA: But let's say we don't go,
19 let's say we believe your first argument - - -

20 MS. UNDERWOOD: No, but even if you don't -
21 - -

22 JUDGE GARCIA: - - - it's unconstitutional.

23 MS. UNDERWOOD: Even if you don't go with
24 that - - - even if you don't go with that, there is
25 nothing to stop - - -

1 JUDGE GARCIA: So the answer is, no, right?
2 I mean, if we declare the statute unconstitutional,
3 there is nothing then. So we're back to square one
4 in terms of this population.

5 MS. UNDERWOOD: I think what we need is a
6 minor adjustment to the statutory scheme. It can be
7 accomplished in one of several different ways. It
8 can be accomplished by reading the requirement into
9 the statute, it can be accomplished by your saying
10 that that is required, and the adjust - - -

11 JUDGE GARCIA: But your first point is,
12 "The New York Constitution does not permit the
13 legislature to create a special prosecutor for class
14 of cases independent of a county district attorney or
15 the attorney general." That doesn't say or read
16 something into the statute to me.

17 MS. UNDERWOOD: Well, what we've said in
18 points 2 and 3 is, here is how you can solve the
19 problem.

20 JUDGE GARCIA: An alternative. But if I -
21 - - the way I read it, if we find what we want - - -

22 MS. UNDERWOOD: They're not - - - they're
23 not alternatives.

24 JUDGE RIVERA: Based on our precedent of
25 trying to read this particular statute, or any

1 statute in a way that would make it Constitutional,
2 that this is your suggestion of how this court could
3 do so based on the language and the text - - -

4 MS. UNDERWOOD: That is correct. We have
5 no interest in dissolving the operation of the
6 Justice Center.

7 JUDGE GARCIA: I believe that. But if we
8 decline to read the language in - - - then your
9 position is it's unconstitutional.

10 MS. UNDERWOOD: My position then would be
11 that the legislature should amend the statute - - -

12 JUDGE GARCIA: Okay.

13 MS. UNDERWOOD: - - - to put the
14 requirement in that - - - of ultimately - - - of
15 district attorney consent.

16 And the Justice Center's final point in
17 their brief, in response to our amicus brief says
18 that, that's not so hard to - - - it's not what they
19 want, but that that could be accomplished; I don't
20 want to speak for them.

21 JUDGE RIVERA: But I thought they conceded
22 that this is what they do in practice.

23 MS. UNDERWOOD: Well, what they concede is
24 that they - - - they consult, they notify, I don't
25 believe they have said - - -

1 JUDGE RIVERA: The consent, right.

2 MS. UNDERWOOD: - - - that they get
3 consent.

4 JUDGE RIVERA: Can I ask - - - just go back
5 to, I think something that Judge Garcia mentioned
6 before.

7 Let's say the DA either, as I think he
8 suggested, is not interested, takes no position on
9 it, or, as perhaps counsel was suggesting before, has
10 done an investigation and decided that's not probable
11 cause, I wish not to deploy my resources from my
12 office to this particular prosecution. Can the
13 Justice Center then go ahead; is that consent?

14 MS. UNDERWOOD: Well, it depends on - - - I
15 mean, we discussed several possibilities. If the
16 district attorney had decided that he doesn't want to
17 deploy his re - - - or she doesn't want to deploy her
18 resources, and consents to the special prosecutor
19 proceeding, that would be fine. If on the other
20 hand, she has concluded that this defendant - - -
21 that there is no evidence and this defendant
22 shouldn't be prosecuted, that isn't consent.

23 And I would think that on - - - that a
24 remand to determine that on the facts of this case
25 might be an appropriate way of resolving this case,

1 depending - - -

2 JUDGE RIVERA: So under your approach, a DA
3 either has to, on their own, decide that they are
4 going to pursue this prosecution because they find
5 probable cause, or decide, I think this is probable
6 cause, I'm willing to consent to the special
7 prosecutor to do it.

8 But if they've actually done an
9 investigation and decided there is no probable cause,
10 they cannot choose to either sit back and take no
11 position on it, or delegate and say, if you want to
12 prosecute, that's your business, but I'm not going to
13 spend the resources, because I don't think there's
14 probable cause.

15 MS. UNDERWOOD: Well, when it's a resource
16 question, they would presumably consent. When it's a
17 judgment about the validity of the prosecution, I
18 think that's not consent, and that then should bar
19 the special prosecutor from moving forward.

20 JUDGE RIVERA: And - - - I know your light
21 has gone off, and so if I may.

22 MS. UNDERWOOD: I'm happy to - - -

23 JUDGE RIVERA: So if - - - if they are just
24 overburdened, because - - -

25 MS. UNDERWOOD: Yes.

1 JUDGE RIVERA: - - - if they can part the
2 legislation, the history suggesting it's - - - the
3 demand is on the DA office, the lack of perhaps
4 resources - - -

5 MS. UNDERWOOD: Or expertise, or whatever,
6 yeah.

7 JUDGE RIVERA: - - - to do all these
8 cases, or expertise, yes. And so they haven't made a
9 decision either way. Under your approach, they can
10 consent to allow someone else to make this decision.
11 Why isn't that a delegation of a core essential duty
12 and obligation of the district attorney?

13 MS. UNDERWOOD: I think they ultimately
14 have responsibility under that construct, and that
15 when you delegate to somebody else under your - - -
16 under the cases of this court, you ultimately have
17 the authority to overrule them, but you can still
18 appoint somebody that you think is wise, and expert
19 and, you know, who will - - - or in the ordinary
20 course be making these decisions and consent to that
21 arrangement.

22 JUDGE RIVERA: So you see it as an
23 appointment, when you say this consent?

24 MS. UNDERWOOD: Well, they're very - - -

25 JUDGE RIVERA: I'm allowing you to do this

1 part of what I would ordinarily do under the
2 circumstances, and you must come back to me so that I
3 can decide whether or not - - -

4 MS. UNDERWOOD: Well, you must make some
5 sort of report to me, I can make - - - I can - - -
6 some of these are in small places, there are various
7 ways that a relationship between the district
8 attorney and the special prosecutor could - - -

9 JUDGE RIVERA: Um-hum.

10 MS. UNDERWOOD: - - - be manifest.

11 JUDGE RIVERA: But a special prosecutor
12 thinks, I think that's probable cause here, we need
13 to move forward, and the DA says, no, I don't agree.

14 MS. UNDERWOOD: Well, I - - -

15 JUDGE RIVERA: The DA has the ultimate
16 responsibility, correct?

17 MS. UNDERWOOD: I think the DA has the
18 ultimate responsibility, that's right. I - - - it
19 seems unlikely on the evidence of how this particular
20 statute came into being, but one could imagine other
21 special prosecutor statutes, more high visibility
22 matters, whether it would be a profound difference of
23 opinion, and somebody has to have the authority. And
24 that's really why - - - why we're here.

25 JUDGE ABDUS-SALAAM: How does that work,

1 counsel, when there is overlapping authority, or for
2 example, you know, Martin Act prosecutions - - -

3 MS. UNDERWOOD: Um-hum.

4 JUDGE ABDUS-SALAAM: - - - where the DA has
5 the authority to do it and - - -

6 MS. UNDERWOOD: There's concurrent - - -

7 JUDGE ABDUS-SALAAM: - - - it's concurrent
8 jurisdiction; how does that work?

9 MS. UNDERWOOD: Well - - -

10 JUDGE ABDUS-SALAAM: Does the DA have to
11 get the AG's consent?

12 MS. UNDERWOOD: No, when there is
13 concurrent jurisdiction, either prosecutor can move
14 forward, and doesn't have to consult - - - doesn't
15 have to consult the other. And there are sometimes,
16 rarely, but sometimes conflicts about this. But the
17 Constitution contemplated two prosecutors; it didn't
18 contemplate three, or four, or five, or ten.

19 And all those problems of concurrent
20 jurisdiction are proliferated when there are more
21 prosecutors. And I think - - - I think that's the
22 difference if there is a Constitutional choice that's
23 been made here.

24 If I can just say one thing, and that's that the
25 attorney general here is here to protect the

1 Constitutional limitation on multiplying prosecutors, and
2 to try to save this statute, this prosecution, and future
3 prosecutions, by invoking the authority of the
4 Constitutional prosecutors, the district attorneys, and or
5 the attorney general.

6 JUDGE PIGOTT: Thank you, Ms. Underwood.

7 Ms. Forshaw, good afternoon.

8 MS. FORSHAW: Good afternoon.

9 Before I begin, I do believe that there are some
10 preservation issues in this case. There's some issues
11 with respect to whether or not these Constitutional claims
12 are preserved. Certainly there was a sentence in the
13 defendant's motion in the trial court, claiming that only
14 county DAs have the authority to prosecute.

15 That's certainly not the argument that the
16 attorney general is making. The attorney general is
17 making the argument that county DAs and the attorney
18 general have the authority to prosecute. And in fact, the
19 attorney general is not a Constitutionally created
20 prosecutor. This court has said on numerous occasions
21 that the attorney general only has the authority to
22 prosecute that's given by the legislature.

23 So I think this case presents a really simple
24 question. And that - - -

25 JUDGE RIVERA: The ADA is an elected

1 official.

2 MS. FORSHAW: He is an elected official,
3 absolutely. But the question is, is the legislature,
4 which has been given by this court, exclusive
5 authority to determine who should prosecute in a
6 particular case?

7 JUDGE STEIN: Or is that just a question of
8 dividing up the responsibilities, rather than
9 choosing what entities, among any, can actually
10 prosecute?

11 MS. FORSHAW: Well, this court has said
12 that the legislature can choose to give prosecutorial
13 authority to the governor, the attorney general, or
14 DAs. And that was People v. Johnson.

15 JUDGE STEIN: And they are all elected - -
16 - they are all elected officials.

17 MS. FORSHAW: They are all elected
18 officials, right? And it was an elected official,
19 the governor, that was given the authority to appoint
20 the special prosecutor in this case.

21 JUDGE PIGOTT: Well, do you - - - do you
22 agree with Ms. Underwood that you need consent, or
23 are you arguing that you only need to consult?

24 MS. FORSHAW: I don't believe that the
25 statute can be read to require consent.

1 JUDGE PIGOTT: Okay. And that leads to
2 what I gleaned from the attorney general's brief. If
3 the legislature tomorrow said, you know, we think
4 guns are a problem. We are going to - - - we're
5 going to appoint a special office, special prosecutor
6 on guns.

7 And not only that, we think drugs are a
8 problem, and so we're going to - - - we're going to
9 appoint a special office, and a special prosecutor on
10 that.

11 And we also think domestic violence is a
12 problem, so we're going to appoint a special
13 prosecutor, and set up a special office on that.

14 Are all those okay? And do they - - - and
15 one - - - and assuming for a minute that we have
16 those, does the DA have any say in who's going to get
17 prosecuted and who is not going to get prosecuted in
18 their respective counties?

19 MS. FORSHAW: I believe that under this
20 court's case law, and consistent with the
21 Constitution, the legislature could do that. I
22 believe that what the check is on the legislature of
23 course, is the political process. Legis - - - the
24 legislature is unlikely to do something like that,
25 which may be presumably wildly unpopular with the

1 citizens - - -

2 JUDGE PIGOTT: Well, that's - - - that's
3 somebody else's problem.

4 MS. FORSHAW: - - - who elect them. Right.

5 JUDGE PIGOTT: I'm just - - - I'm just
6 thinking legally, because they make the argument that
7 you're, you know, you're really cutting into the
8 elected officials' authority.

9 And I can - - - I can see consult, but if
10 this - - - this new prosecutor says to the district
11 attorney in, let's say, Erie County, I don't care
12 what you do, I want a grand jury, I'm going after
13 these people, and by the way, you better set aside
14 some office space for me, because I'm bringing thirty
15 prosecutors, forty investigators, and we're going
16 after him; can you do that?

17 MS. FORSHAW: Well, I think the legislature
18 in this case prevented that from happening, because
19 there is specific language in the statute that
20 indicates that the Justice Center's special
21 prosecutor shall not interfere with the ability of
22 district attorneys to investigate and prosecute
23 crimes.

24 JUDGE PIGOTT: Oh no, I'm - - - make me the
25 prosecutor up in Erie County, I'm not going to

1 only to the extent that there are a number of
2 provisions that require the Justice Center to give
3 notice to district attorneys, and to consult with
4 district attorneys.

5 JUDGE RIVERA: Okay. So let's - - - let's
6 parse that out. What's the difference, in your mind,
7 under the statute, between notice and consult?
8 Because the independents you just described sounds to
9 me like it's only notice. So what - - - how - - -
10 what has ratcheted up - - -

11 MS. FORSHAW: Um-hum.

12 JUDGE RIVERA: What - - - what is
13 consultation - - -

14 MS. FORSHAW: Right.

15 JUDGE RIVERA: - - - as you read the
16 statute?

17 MS. FORSHAW: Well, with respect to notice,
18 notice is, here is this case that we - - - that we
19 believe alleges criminal conduct. Okay.

20 JUDGE PIGOTT: Can I stop you there?

21 MS. FORSHAW: Yes.

22 JUDGE PIGOTT: Say, here is this
23 investigation?

24 MS. FORSHAW: We - - - we could say here is
25 this investigation.

1 JUDGE PIGOTT: Okay.

2 MS. FORSHAW: The way the statute is
3 written, when the Justice Cen - - -

4 JUDGE PIGOTT: We're - - - we're
5 investigating the thirty nursing homes in Wayne
6 County.

7 MS. FORSHAW: Um-hum.

8 JUDGE PIGOTT: Notice, Done.

9 MS. FORSHAW: Right.

10 JUDGE PIGOTT: Right. That's - - - and
11 that's all you need.

12 MS. FORSHAW: Right.

13 JUDGE PIGOTT: And now you could - - - and
14 now you're in, and out you go.

15 MS. FORSHAW: Right. Well, no. And then
16 before appearing in a grand jury or in the county
17 court, we have to consult with the district attorney
18 - - -

19 JUDGE PIGOTT: Well, that's because you - -
20 -

21 MS. FORSHAW: - - - with respect to
22 scheduling.

23 JUDGE PIGOTT: Don't you need him - - -

24 JUDGE RIVERA: Okay. So what does that
25 mean; what's the consultation?

1 JUDGE PIGOTT: Don't - - -

2 Excuse me, Judge. I just - - -

3 Don't you - - - don't you need him to impanel
4 it, or do you have the power to impanel it?

5 MS. FORSHAW: We don't have the power. And
6 that's why the consultation is important. It's
7 limited to those kinds of scheduling matters for
8 which - - -

9 JUDGE PIGOTT: Is it scheduling, or is it
10 consent? I mean, if the DA says, I'm not letting you
11 in my grand jury, can you get in?

12 MS. FORSHAW: Probably not.

13 JUDGE PIGOTT: So you really need his
14 consent.

15 MS. FORSHAW: Well, no. The statute talks
16 about consultation. I think that if they - - - what
17 you're talking about is an objection, not consent.
18 And I think that's very different.

19 JUDGE PIGOTT: No. You can call it an
20 objection, but if he says you're not coming into my
21 grand jury, you're not coming in. You're going to
22 sue him, and say under our statute all we have to do
23 is ask him, it's an unreasonable denial, and we - - -
24 we're entitled to his grand jury.

25 MS. FORSHAW: Our - - - our policy is to

1 consult, and to collaborate, and to seek cooperation.

2 JUDGE PIGOTT: I think you are
3 misunderstanding. I understand. You people are
4 cloaked in gold. You are pure as the driven snow,
5 you're only going to do what's right. Someone else
6 might disagree. And if there is a disagreement, my
7 question is not, of course we'll never do that. If
8 you're going to do it, I mean, do you need the DA to
9 say - - - to consent to your use of his grand jury?

10 And you're saying, no. And so if he says,
11 well, you're not using it, then isn't there a
12 conflict here?

13 MS. FORSHAW: We haven't faced that
14 situation.

15 JUDGE PIGOTT: Oh.

16 MS. FORSHAW: So I don't really know the
17 answer to that. Typically, we obtain the
18 acquiescence; we don't obtain affirmative consent or
19 affirmative approval. And I think the legislature
20 was very clear not to read those requirements into
21 the statute. And I - - -

22 JUDGE STEIN: What if they did object. You
23 say that objection isn't the same as consent, what if
24 - - - what if the DA said, I don't - - - I don't want
25 you to do this. What if that happened after the

1 grand jury was impaneled?

2 MS. FORSHAW: I think at that point, it
3 would probably be too late, because at that point,
4 the grand jury has acted.

5 JUDGE STEIN: Well, no. What if the grand
6 jury hasn't acted? It's been impaneled, so you have
7 what you need from the DA to move forward, and then
8 the DA says, you know what, no, I don't think so.
9 Then what happens? So there is - - - there is an
10 outright objection, the grand jury hasn't met, you
11 know, nothing has commenced, but there you have it.
12 Then what do you do?

13 MS. FORSHAW: Probably at that point, the
14 Justice Center would walk away and hope that the - -
15 - that the DA does the right thing.

16 JUDGE STEIN: But you don't think that you
17 would have to walk away; that would be a choice.

18 MS. FORSHAW: I don't think we would have
19 to; I think that what we would do is we would try to
20 persuade the district attorney to review the case and
21 to permit us, or to - - -

22 JUDGE PIGOTT: Doesn't that imply consent?

23 MS. FORSHAW: I don't think so. I think
24 that, you know, there is no obligation for
25 affirmative consent.

1 JUDGE PIGOTT: What are you trying to
2 persuade him to do?

3 MS. FORSHAW: We would be trying to
4 persuade him to either present the case himself to
5 the grand jury, or to allow the Justice Center.

6 JUDGE PIGOTT: Doesn't that sound like
7 consent?

8 MS. FORSHAW: Not - - - not at all.

9 JUDGE PIGOTT: Okay.

10 MS. FORSHAW: Not at all.

11 JUDGE PIGOTT: Can ask you the flip side?
12 Suppose the district attorney in some county wants
13 you. Can you - - - do you have to come?

14 MS. FORSHAW: We don't have to come, we
15 typically do come, and that's been a rarer situation.
16 I mean, what we do often is we provide assistance,
17 sometimes we jointly prosecute cases, sometimes we
18 prosecute by ourselves, and sometimes we hand the
19 investigation over to the district attorney so that
20 the district attorney can pursue it.

21 I mean, district attorneys know their counties
22 more than we do.

23 JUDGE RIVERA: Yes. If you're pursuing - -
24 - I just want to clarify. Your position is that - -
25 - and the DA has felt comfortable with you pursuing

1 it, is your position that you do not have to seek
2 further consultation with respect to strategic
3 choices, you don't have to report to the DA, your
4 position is once the DA approves you to pursue a
5 prosecution, then you're independent, you run that
6 prosecution the way you believe it should be run; is
7 that - - - is that your position - - -

8 MS. FORSHAW: Absolutely.

9 JUDGE RIVERA: - - - the way the statute
10 should be read?

11 MS. FORSHAW: Absolutely. I mean, it would
12 be foolish of us not to talk to the district
13 attorney, because as I said, the district attorney
14 knows their county, knows jurors in their county, so
15 it would be foolish, as a prosecutor, not to engage
16 in conversations, and we certainly do.

17 JUDGE ABDUS-SALAAM: Counsel, could I go
18 back to something you said earlier about - - -

19 MS. FORSHAW: Sure.

20 JUDGE ABDUS-SALAAM: - - - which elected
21 officials have prosecutorial authority, and you
22 mentioned the governor. When does governor have
23 prosecutorial authority?

24 MS. FORSHAW: The governor doesn't have
25 direct prosecutorial authority, but what this court

1 has said is the legislature can delegate law
2 enforcement functions to the governor, the attorney
3 general, or the district attorney.

4 The legislature has not directly given
5 prosecutorial authority to the governor, but there
6 are a number of statutes in which the governor can
7 appoint, or create, or activate legislative authority
8 - - - prosecutorial authority, including activating
9 the attorney general to have prosecutorial authority.

10 JUDGE PIGOTT: Back to this case, in
11 Tompkins County here, the DA apparently decided that
12 there was no reason to prosecute this case.

13 MS. FORSHAW: Right.

14 JUDGE PIGOTT: You apparently decided there
15 was. How does that get resolved if - - - obviously,
16 if you don't need his consent or her consent, you're
17 fine.

18 MS. FORSHAW: Right.

19 JUDGE PIGOTT: But if you do, then you're
20 out of luck, right?

21 MS. FORSHAW: As Mr. Lalonde indicated,
22 after an initial state police investigation, the
23 district attorney decided not to bring criminal
24 charges. There was an additional investigation, and
25 certainly, just because the state police investigate

1 and might not find enough evidence for the DA to feel
2 comfortable prosecuting, doesn't preclude the Justice
3 Center from conducting additional investigation. And
4 in fact, we would be obligated to. Because even if
5 we are not pursuing a case criminally, we also
6 conduct an administrative investigation so that we
7 can take action against caregivers who are accused of
8 abusing or neglecting vulnerable people.

9 JUDGE FAHEY: You know, one of the things
10 we haven't gotten to is the core of the home rule
11 argument that the attorney general made. And it
12 seems to be, let's say it's a home rule argument,
13 that this is a general law, so it applies to every
14 county in the state, so as we move down the list on
15 the home rule question. Then we want to turn to the
16 Constitutional challenge that asserts that - - - by
17 the AG that the state legislature is barred from
18 transfer essential functions of elected
19 Constitutional officers to officers that are selected
20 by appointment. That's the way I understand that - -
21 - I'm quoting directly from their argument.

22 But that's not really what we're talking
23 about. Here, what we're talking about, prescribing
24 the powers of the district attorney, and I want you
25 to speak to that, because it seems that the

1 Constitution doesn't set out, or in one way or the
2 other, the duties of the district attorney, and
3 doesn't describe their essential functions. And it
4 seems that the legislature has been left with that
5 task.

6 And as quoting from county law, "All
7 prosecutions for crimes or offenses cognizable by the
8 courts which he or she should be elected or
9 appointed." And that is a legislative function, to
10 designate what those particular laws and functions
11 are. And that includes prescribing the essential
12 functions of the district attorney.

13 MS. FORSHAW: Absolutely. The - - - there
14 is nothing in the Constitution that explains exactly
15 what the district attorney's powers are. That choice
16 of what those powers are has been left to the
17 legislature, and the legislature passed the statute.
18 The County Law 700, that sets forth what the duties
19 are of the district attorney.

20 And just as the legislature can grant
21 powers to the district attorney, it can also take
22 those powers away. That has to be the only
23 construction that can be given to the fact that, as
24 this court has recognized, the legislature is the
25 exclusive body that has the ability to determine who

1 should prosecute.

2 JUDGE FAHEY: Well, the biggest example I
3 think of that is a superseder power of the governor,
4 under Executive Law 63, whatever.

5 MS. FORSHAW: (2).

6 JUDGE FAHEY: (2), okay. And then other
7 examples are County Law 701.

8 MS. FORSHAW: Correct.

9 JUDGE FAHEY: It seems that in those
10 instances, that the DA doesn't - - - it does not
11 really have exclusive authority to prosecute crimes
12 within the state. Clearly, they have authority to do
13 so. So the question then becomes, is the - - - is a
14 grant of concurrent jurisdiction valid?

15 MS. FORSHAW: Absolutely. There are a
16 number of situations in which different prosecutors
17 have concurrent jurisdiction. One example that was
18 mentioned was the Martin Act. Under the Martin Act,
19 the district attorneys can bring security fraud
20 cases, so can the attorney general.

21 JUDGE RIVERA: But they're both elected
22 officials.

23 MS. FORSHAW: That's correct. But the - -

24 -

25 JUDGE RIVERA: Why isn't that - - -

1 MS. FORSHAW: But the attorney general, as
2 an elected official, the only reason the attorney
3 general has the authority to prosecute in certain
4 instances is because either the governor activated
5 that power, or the legislature specifically gave him
6 that power.

7 JUDGE RIVERA: But isn't the Constitutional
8 argument not - - - not solely about the nature of the
9 duties and obligations, but also how the person is
10 selected, who they are accountable to. And in these
11 examples, the AG and the DA, they are accountable to
12 the elector, right? JC here, the special prosecutors
13 are accountable to the governor only.

14 MS. FORSHAW: The governor who is an
15 elected official. And so I do think it's exactly
16 analogous. And I think that these types of
17 distinctions are really more form over substance.
18 And I think substantively, it's not unique for - - -

19 JUDGE RIVERA: No, no, no. What is
20 analogous is the ADAs, right, to the DA. DA is
21 elected, ADAs are not.

22 MS. FORSHAW: Um-hum.

23 JUDGE RIVERA: That's - - - that's the
24 analogy, but not - - -

25 MS. FORSHAW: Right.

1 JUDGE RIVERA: - - - the special
2 prosecutor to the governor; I don't think that's
3 making your argument.

4 MS. FORSHAW: Yeah, I do - - - I do think
5 that it is, with all due respect. I do think that it
6 is analogous.

7 JUDGE RIVERA: But the essential nature of
8 the governor's job is not to prosecute.

9 MS. FORSHAW: And the essential nature of
10 the attorney general's job is also not to prosecute.
11 The attorney general has been given - - -

12 JUDGE RIVERA: But the DA, for certain it
13 is - - -

14 MS. FORSHAW: - - - limited authority.

15 JUDGE RIVERA: - - - and the special
16 prosecutors are defined as DAs, right?

17 MS. FORSHAW: The special prosecutor is
18 defined as a district attorney, absolutely.

19 JUDGE RIVERA: The point of that job is to
20 prosecute, right? Investigate and prosecute.

21 MS. FORSHAW: That's correct.

22 JUDGE RIVERA: Not - - - not these other
23 responsibilities of - - - and so forth of the
24 governor, right?

25 MS. FORSHAW: That's correct. That's

1 correct, but the - - - but that person is only
2 activated by having the governor actually appoint
3 them. Just like the governor has the authority to
4 activate the attorney general's authority by making a
5 request pursuant to Executive Law 63(3) or 63(2).

6 I would also like to point out, if I could
7 just have one second, that in fact, the record shows
8 that the Justice Center did notify the district
9 attorney in this case of our prosecution. In the
10 record, in the appendix at 15, that set forth in - -
11 -

12 JUDGE STEIN: But we don't know what if any
13 response there was.

14 MS. FORSHAW: Exactly.

15 JUDGE RIVERA: I'm sorry, what was the
16 number?

17 MS. FORSHAW: In the appendix, at page 15.

18 JUDGE RIVERA: 15, thank you.

19 MS. FORSHAW: The prosecutor notes in
20 response to the defendant's motion that the DA was
21 notified of our appearance.

22 JUDGE PIGOTT: Thank you, Ms. Forshaw.

23 MS. FORSHAW: Thank you.

24 (Court is adjourned)

25

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Martesha Davidson, No. 86 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

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