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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

NO. 77

DINO J. CALLARA,

Respondent.

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20 Eagle Street  
Albany, New York  
September 10, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Callara.

3 MR. BRUCE: Good afternoon. My name is Anthony  
4 Bruce. I am Special Assistant District Attorney in this  
5 case. May it please the court.

6 And I would ask the court for about two and a  
7 half minutes of rebuttal.

8 CHIEF JUDGE WILSON: Two and a half? I - - - I  
9 think we can manage that. Yes, we can.

10 MR. BRUCE: I'm trying to judge what's going on.

11 I stand before this court in the somewhat awkward  
12 position of having to defend my own appointment as a  
13 special district attorney in Orleans County. This fact  
14 alone highlights most clearly the point of the amicus  
15 brief, the dearth of qualified attorneys willing to serve  
16 as special district attorneys in rural counties.

17 In this case of first impression, the People are  
18 asking this court to rule that after a district attorney is  
19 removed, the court's appointment of a special district  
20 attorney who only lacked residency at the time of the  
21 appointment is by itself an irregularity.

22 JUDGE SINGAS: That's a pretty big irregularity.  
23 I mean - - - right here.

24 MR. BRUCE: Okay. I'm sorry.

25 JUDGE SINGAS: 701 says specifically that there

1 should be a residency requirement. And we've stated in  
2 Leahy that you have to follow that letter of the law pretty  
3 closely. So it's - - - it's a - - - it's not just a  
4 residency requirement. It's one of the main staples of the  
5 statute. How do we just ignore that?

6 MR. BRUCE: Well, you don't just ignore it. You  
7 look at the other cases that are out there in which this  
8 case - - - in - - - in which - - -

9 JUDGE TROUTMAN: But shouldn't we look at the  
10 statute itself that gave the ability for you to be  
11 appointed in the first instance?

12 MR. BRUCE: Oh, no doubt. But if you look at  
13 Haggerty v. Himelein, People v. Daniel Y., and People v.  
14 Carter, among others, People v. Dunbar, similar situations  
15 have come up under other statutes, for instance, 702 and  
16 Public Officers Law Section 3.1.

17 JUDGE SINGAS: But were those - - - were those -  
18 - - those had to do with assistant district attorneys  
19 versus the district attorney; is that right? Am I thinking  
20 about that cor - - -

21 MR. BRUCE: They do. But I suggest to the court  
22 that that's a distinction without a difference. An  
23 appointed special assistant district attorney or district  
24 attorney or whatever, where there's a residency  
25 requirement, you either are, or you aren't.

1 JUDGE CANNATARO: But isn't there a - - - I mean,  
2 there is a difference if the district attorney is in place  
3 to supervise the special assistant district attorney. That  
4 jurisdictional concern that seems to be - - - seems to be  
5 being articulated through the residency requirement is  
6 ameliorated there because there is someone resident  
7 directly above that person.

8 MR. BRUCE: Well, I think what Your Honor is  
9 suggesting is there's a - - - there's a level of  
10 supervision there that doesn't apply to the special - - -  
11 the - - -

12 JUDGE CANNATARO: A special district attorney?

13 MR. BRUCE: - - - under 701. But I suggest that  
14 that's a distinction without a difference.

15 JUDGE CANNATARO: Well, I'm saying that is one  
16 possible explanation for the holding in that type of case,  
17 such - - - like, Dunbar that you were talking about?

18 MR. BRUCE: I don't disagree with you.

19 JUDGE CANNATARO: Well, you should, because - - -

20 MR. BRUCE: Well, no, in those cases, there was a  
21 district attorney in the picture. In the situation I was  
22 in, there was not a district attorney in the picture.

23 JUDGE CANNATARO: Right.

24 MR. BRUCE: But I suggest that's a distinction  
25 without a difference.

1 JUDGE SINGAS: I - - - I think I'm going to push  
2 back on that because I think in your situation, it  
3 implicates the separation of powers issue. Because there's  
4 been somebody appointed who the people did not elect. If  
5 an assistant DA acting under the authority of a district  
6 attorney, I think is very different. And I'm not just  
7 saying that because I was a district attorney, but I think  
8 there's a huge difference between the elected DA of a  
9 county and an assistant DA.

10 MR. BRUCE: Separation of powers, I think, is - -  
11 - there - - - there's a two-step process in appointing a  
12 special assistant - - - a special district attorney.  
13 Number one, the district attorney goes to the county court  
14 judge in this case and says I have to be relieved in this  
15 case because I have a conflict of interest.

16 JUDGE SINGAS: Right.

17 MR. BRUCE: That's - - - that's the separation of  
18 powers instance. Once that's done, you get to an almost  
19 ministerial act where the county court judge appoints, in  
20 this situation, me as the special district attorney.

21 JUDGE TROUTMAN: But there are parameters within  
22 which the court can act to replace the district attorney  
23 who is disqualified; is that correct? 701 - - -

24 MR. BRUCE: Yes.

25 JUDGE TROUTMAN: - - - provides that vehicle for

1 that replacement to happen, correct?

2 MR. BRUCE: Yes.

3 JUDGE TROUTMAN: And - - - and certainly we want  
4 prosecutors, the district attorney who is disqualified to  
5 just - - - to so state it and so that the case can proceed.  
6 And certainly it is an awkward situation that you're in  
7 because it was the judge who did the appointing - - -

8 MR. BRUCE: Correct.

9 JUDGE TROUTMAN: - - - and had the responsibility  
10 of ensuring at the time the appointment was made initially  
11 that it was within the confines of the law that allowed for  
12 the appointment in the first instance, correct?

13 MR. BRUCE: Yes. But unfortunately that didn't  
14 happen here. You had a district attorney - - -

15 JUDGE TROUTMAN: Correct.

16 MR. BRUCE: - - - who didn't realize the  
17 shortcoming. You had me who didn't realize the  
18 shortcoming. And you had a county court judge who didn't  
19 realize the shortcoming.

20 So I got appointed, albeit living outside the  
21 county and outside the contiguous county, and I proceeded  
22 to act as a special district attorney in this case.

23 JUDGE RIVERA: So you've said that - - - I just  
24 want to clarify. So there was no point in time from the  
25 appointment till this moment, I guess, that you've resided

1 in the county?

2 MR. BRUCE: None.

3 JUDGE RIVERA: Okay. Thank you.

4 JUDGE HALLIGAN: Can I ask you - - -

5 MR. BRUCE: Or in a contiguous county.

6 JUDGE HALLIGAN: - - - to - - - to go back? When  
7 you started, I think you were raising the - - - the  
8 challenges of finding attorneys in rural counties, which I  
9 realize is a - - - is a - - - can be a real challenge in  
10 fact. It seems to me the legislature has several times  
11 amended the statute by way of addressing that concern. And  
12 so why isn't that the proper path to deal with that  
13 challenge in parts of the state, as opposed to the argument  
14 that you're presenting to us today?

15 MR. BRUCE: Well, in - - - in appointing me, it  
16 was in the moment. There was a case out there that had to  
17 be handled. And I'm only presuming this, obviously, there  
18 - - - there - - - no time to go to the legislature and get  
19 the statute amended.

20 JUDGE HALLIGAN: Right. I - - - I don't mean by  
21 way of resolving your case in particular. But by way of  
22 addressing any concerns that there might be about the  
23 challenge of finding an attorney in the contiguous county.  
24 It seems that the legislature has been cognizant of that  
25 hurdle and taken some steps to ameliorate it, even if those

1 steps were not sufficient to - - - to permit your  
2 appointment specifically.

3 MR. BRUCE: I don't disagree with you, Your  
4 Honor.

5 JUDGE TROUTMAN: Is Niagara County contiguous - -  
6 -

7 MR. BRUCE: Yes.

8 JUDGE TROUTMAN: - - - to Orleans? And was there  
9 an effort to find a qualified attorney within?

10 MR. BRUCE: Honestly, I don't know what efforts  
11 were made.

12 JUDGE TROUTMAN: And so then, isn't it difficult  
13 to say that the problem is that there aren't necessarily  
14 qualified attorneys available within the confines of the  
15 statute?

16 MR. BRUCE: Judge, I would like to stand here and  
17 tell you exactly what the district attorney did in this  
18 situation. I can't. Whether he went to Niagara County or  
19 Genesee County or any of those counties, I honestly can't  
20 answer your question. I got the call, I said yes, so here  
21 I am.

22 CHIEF JUDGE WILSON: So let me ask you. Sorry,  
23 right in front of you. Let me ask you for your thoughts  
24 about this. Going back to the point that - - - one of the  
25 points that Judge Halligan made - - - that the legislature

1 recognized the shortages in - - - in many of the upstate  
2 counties and amended the statute to allow for contiguous  
3 counties. So there are then, I think, two ways to think  
4 about what might have been in the legislature's mind.

5 The legislature might have thought this is  
6 jurisdictional. And the problem here we're addressing is a  
7 jurisdictional problem. And so we're going to expand it  
8 and allow people but limited jurisdictionally. So this is  
9 going to be a defect automatically if it happens.

10 Or they might have thought to themselves we're  
11 expanding it, and what we're thinking is as long as the  
12 defendant either doesn't notice or doesn't object, there's  
13 not going to be a problem. But if the defendant either  
14 notices - - - what - - - notices and objects, then the  
15 person's going to be disqualified. Do you have a reason to  
16 - - - any reason to think they were thinking of one or the  
17 other there?

18 MR. BRUCE: I don't, Your Honor.

19 CHIEF JUDGE WILSON: It seems to me that's the  
20 question here, right? This is clearly a restriction. It's  
21 question is whether it's jurisdictional, and because of the  
22 amendment of the statute, we have to ask ourselves what was  
23 the legislator thinking? Were they trying to give - - -  
24 were they, essentially, trying to - - - if the defendants  
25 didn't know what was going on, then the prosecutor's going

1 to be okay. If the defendants knew what was going on and  
2 agreed, that's not a problem because they like you, then  
3 that's okay too. And maybe - - - you know, they might be  
4 better off with you than the DA.

5 MR. BRUCE: Well - - -

6 CHIEF JUDGE WILSON: Or they might object, and  
7 then they've got to find somebody else.

8 MR. BRUCE: The revisions - - - the amendments to  
9 701 are a direct result of problems in Orleans County.

10 CHIEF JUDGE WILSON: Absolutely. Absolutely. It  
11 was an Orange County - - - Orleans County judge, I think,  
12 who proposed that.

13 MR. BRUCE: Right.

14 CHIEF JUDGE WILSON: Yeah.

15 MR. BRUCE: I agree with Your Honor. What their  
16 - - - what their thoughts - - - what the legislature's  
17 thoughts were don't appear from - - -

18 CHIEF JUDGE WILSON: Yeah.

19 MR. BRUCE: - - - any of the - - - any of the  
20 bills. So - - -

21 CHIEF JUDGE WILSON: Yeah.

22 JUDGE RIVERA: Well, one might think, given that,  
23 again, this is a - - - a problem that the legislature is  
24 well aware of, and that's why you have some of the  
25 amendments that they would have clarified exactly this.

1 Right? Because they're expanding it. And they might very  
2 well have said, well, if there's no objection from the  
3 defendant. They could have written it in a way - - -  
4 right? To make clear that there was still even more ways  
5 to address the very serious challenges that occur in these  
6 counties.

7 MR. BRUCE: We could - - - we could sit here and  
8 theorize about this all afternoon.

9 JUDGE RIVERA: Well, I'm just saying with respect  
10 to the jurisdictional question.

11 MR. BRUCE: I don't - - -

12 JUDGE RIVERA: I don't know if you wish to  
13 respond to this observation.

14 MR. BRUCE: I - - - I honestly can't answer your  
15 question, Judge.

16 JUDGE RIVERA: Okay.

17 JUDGE GARCIA: Counsel, it seems to me that there  
18 is really no issue that your appointment is not consistent  
19 with the statute. Right?

20 MR. BRUCE: Correct.

21 JUDGE GARCIA: So the issue here - - - there was  
22 no objection, and this proceeding went forward?

23 MR. BRUCE: Not for quite a long period of time.

24 JUDGE GARCIA: So it seems that the issue really  
25 is, was an objection required? Right? Is this a

1 jurisdictional problem? And that seems to me to fall  
2 somewhere in the middle of our cases, in a way, where you  
3 have on the one end beyond the subject matter of an ability  
4 to prosecute, right? Cases. And on the other side, you  
5 have ADAs who didn't live in the county, or which are kind  
6 of sub officials, right? Of a district attorney.

7 But here we have a DA appointment - - -  
8 substitute in a way - - - for the district attorney  
9 position itself. Where does that fall there? Because if  
10 they don't need to make an objection, it's preserved, and  
11 your appointment isn't valid under the statute. But if  
12 they do, it's not preserved. Right?

13 MR. BRUCE: Well - - -

14 JUDGE GARCIA: So it's a jurisdictional defect in  
15 your authority?

16 MR. BRUCE: I submit it's not.

17 JUDGE GARCIA: Why?

18 MR. BRUCE: I submit it's not because you have to  
19 go to the reasoning that this court has put out in the  
20 other cases that have interpreted the Public Officer's Law  
21 and Section 702. That it's simply an irregularity, and  
22 that it's an irregularity that can be considered at the  
23 point in time when it comes to light, not an irregularity  
24 or not a jurisdictional matter that invalidates everything  
25 that's gone before the point in time when the irregularity

1 is discovered.

2 JUDGE GARCIA: But I think the counterargument to  
3 that would be this is more like a district attorney not  
4 having authority, not like an ADA not having the authority.  
5 Right? And that has gone to our constitutional officer  
6 type of analysis for a district attorney. And granted,  
7 here, I think one difference is the district attorney asked  
8 for this, right?

9 MR. BRUCE: District attorney asked for it.  
10 Everything - - - everything I did was in line with the  
11 order that I got from the county court judge. I didn't go  
12 out in terms of subject matter jurisdiction and prosecute  
13 someone I wasn't authorized to prosecute. I didn't go out  
14 and - - - and do cases I wasn't authorized to do.

15 I - - - I hewed the line of the order from the  
16 county court judge, and I prosecuted Mr. Callara in this  
17 case. It was an irregularity. If you look at the cases  
18 that have come before this court, before the court has  
19 looked at those and said, not a problem. And - - - and I  
20 submit that in this case, that's what the court should do.  
21 I see my time is up. I'll yield.

22 MR. DAVENPORT: Good afternoon, Your Honors. May  
23 it please the court.

24 JUDGE GARCIA: Could you start with that point on  
25 - - -



1 JUDGE TROUTMAN: Yes.

2 JUDGE GARCIA: - - - why is this a jurisdictional  
3 issue?

4 MR. DAVENPORT: Certainly, Your Honor. And in  
5 listening to the reasoning that Your Honors were putting  
6 forth a lot of what I intended to cover in my oral argument  
7 was covered by Your Honors, and I know that that was a  
8 question that you guys had.

9 And what I would submit to Your Honors is that  
10 this is a subject matter jurisdiction issue because of the  
11 sole fact that it - - - it - - - it deals with not just  
12 following the contours of the statute. Because County Law  
13 701 and County Law 702, there's both a statute - - - it - -  
14 - it has enforcement and requirements that must be met.

15 But 701 has the added requirement or the added  
16 reason why it must be strictly adhered to because it deals  
17 with separation of powers concerns. And because what we're  
18 talking about here is not just simply an ADA who's still  
19 acting under the authority of the DA and acting under the  
20 authority of the people that the district attorney serves.  
21 We're also talking about somebody who is acting  
22 independently, not under the supervision, not under the  
23 direction of that person who's been an elected official by  
24 the people of that county.

25 JUDGE GARCIA: And that isn't - - -



1 JUDGE TROUTMAN: And how is waiver, if at all,  
2 implicated, then?

3 MR. DAVENPORT: Well, Your Honor, I - - - I  
4 believe that waiver is not implicated because this is a  
5 subject matter jurisdiction issue. It's a mode of  
6 proceedings issue.

7 JUDGE HALLIGAN: So then, whatever the risk - - -  
8 I'm not suggesting it was true here, but whatever the risk  
9 of gamesmanship, by waiting to divulge that you know that a  
10 special district attorney doesn't meet the residency  
11 requirement, that just is - - - is - - - is what it is?  
12 Nothing to be done.

13 MR. DAVENPORT: I believe so Your Honor. And the  
14 reason why I say that is because the legislature was very  
15 clear with its wording, with its limitation on who can move  
16 forward as a district attorney, in this case, a special  
17 district attorney. And that this court has been very clear  
18 over and over again that this statute, it's - - - it's very  
19 - - - it's power is - - - it's immense. And so it can't be  
20 expansively interpreted.

21 JUDGE CANNATARO: But that doesn't really speak  
22 to waivability. I mean, is - - - in - - - the description  
23 of the - - - I get that the subject matter jurisdiction  
24 issue is an important one, and certainly it would subject  
25 the whole proceeding to dismissal. But is there no point

1 at which this could go on for so long that - - - you know,  
2 it's just too late to assert that?

3 MR. DAVENPORT: Well, I don't believe so, Your  
4 Honor. And I believe that this court already reached that  
5 question in People v Leahy. There wasn't an objection that  
6 was raised in that case, and there was no question that was  
7 brought by the court at that time of whether or not there  
8 was prejudice. And I believe implicit within the fact that  
9 there's no analysis of there being prejudice also means  
10 that there isn't a question of whether or not it was waived  
11 or whether or not - - - that it was capable of being  
12 waived. Because the violation in it - - - in itself is  
13 already proof dispositive that this was a mode of  
14 proceeding subject matter jurisdiction error that requires  
15 voiding the indictment.

16 And so in People v. Leahy there was no evidence  
17 that there was - - -

18 JUDGE GARCIA: Leahy - - -

19 MR. DAVENPORT: - - - that the challenge was ever  
20 brought.

21 JUDGE GARCIA: - - - Leahy seems to me the  
22 classic case on this side, which is you get appointed,  
23 you're appointed for a particular case, and you go outside  
24 that direction of the appointment. That seems you've gone  
25 beyond the subject matter of your appointment, clearly.

1 And you have no authority to prosecute that crime as  
2 subject of your appointment.

3 This seems somewhat different, right? This seems  
4 to be kind of a hybrid of qualification with appointment,  
5 right? So you've been appointed as a district attorney by  
6 the court, but - - - and you've stuck with what you were  
7 supposed to prosecute, but you weren't appointed properly  
8 because you didn't meet the qualifications under the  
9 statute.

10 MR. DAVENPORT: Well, you're correct, Your Honor,  
11 that it's certainly a different issue and it's a different  
12 way of looking at ultimately what is the same issue, which  
13 is not strictly following what the requirements of the  
14 statute are. So one of the requirements is residency.  
15 Another requirement is that you abide by and follow only  
16 the scope of the order, and that you only prosecute what  
17 you have been ordered to prosecute.

18 JUDGE SINGAS: So then one of those cases, I  
19 think somebody was not even an attorney. Right?

20 MR. DAVENPORT: That's correct.

21 JUDGE SINGAS: And that was excused. So - - -

22 MR. DAVENPORT: So that's correct, Your Honor.  
23 But that was under 702. And so that was, again, where that  
24 individual was acting under the authority of a district  
25 attorney, and there was no question of the district

1 attorney's ability to be able to - - - you know, act as the  
2 district attorney in that case and still supervising over  
3 the case.

4 But in this case it's different because you - - -  
5 you have from the outset somebody who is not able to, under  
6 the statute or by the power that's conferred to him by the  
7 voting - - - the voters for that - - - that county, the  
8 authority to be able to move forward with that prosecution.

9 JUDGE SINGAS: Yeah. I mean, I think we don't -  
10 - - don't disagree with that, but we're saying - - - some  
11 of us are thinking, why don't you have to object to that?  
12 You - - - that - - - that piece of mail that serves as the  
13 crux of this, which shows that the office was outside of  
14 the county and not adjacent to the county. Why not at that  
15 point, when you got that mail in the course of litigation,  
16 why isn't it incumbent upon you to say, you know what? I  
17 got this piece of mail. This isn't in the jurisdiction.  
18 And I'm asking now, does the prosecutor, special  
19 prosecutor, live in the jurisdiction or adjacent to it?  
20 And then we'll deal with it according to 701.

21 You know, I - - - I - - - we know what 701 says,  
22 but why don't you have to raise the issue when you can and  
23 not - - - and have to wait - - - not have to wait six  
24 years?

25 MR. DAVENPORT: So the burden of putting a proper

1 prosecution on, it falls on the People. And at no point in  
2 time does the burden then fall on the defendant to identify  
3 the error in the proceedings, identify the - - - the error  
4 in why the proceeding or how the proceeding was commenced  
5 in the first place. That's a subject matter jurisdiction  
6 issue that can be raised at any point.

7 So if you find out later on down the line that a  
8 trial was not run correctly and that there was a  
9 proceedings error that can - - - that's something that can  
10 be raised at any point because the court - - - the Court of  
11 Appeals has decided over and over again - - - this court  
12 has decided over and over again that the proceedings, the  
13 mode of the proceedings, and following an organized process  
14 for courts is something that is paramount, important, and  
15 it can be raised at any point.

16 JUDGE CANNATARO: Would you agree with the  
17 proposition that equitable considerations cannot come into  
18 play when you're talking about subject matter jurisdiction?

19 MR. DAVENPORT: Well, you know, I - - - I don't  
20 know if Your Honors need to reach that question here. My  
21 understanding from the case law is that there - - - these  
22 equitable considerations, they never do weigh into the  
23 decisions. If - - - if it's a finding that there was a  
24 subject matter motive proceedings error, the - - - the  
25 indictment is void or the - - - the proceedings must be

1 declared null and void. That's my understanding of the  
2 case law.

3 But there's also no evidence before Your Honors  
4 or within this record or before this court of there being  
5 any gamesmanship by my clients or any of his counsel  
6 representing him. So the question of whether or not there  
7 are equitable considerations here, and if there were  
8 gamesmanship, it's - - - it's not before Your Honors here.  
9 And it's just a strict application of the statute, which I  
10 believe that the court has answered.

11 JUDGE GARCIA: What if it was a nonattorney? So  
12 they lived in the county, but they appointed a nonattorney?

13 MR. DAVENPORT: Well, Your Honor, I - - - I still  
14 believe that if you're looking at what the statute  
15 requires, it - - - it still requires somebody who is a  
16 licensed attorney. And I think, again, that that would be  
17 something that - - -

18 JUDGE GARCIA: So the difference would only be  
19 that the court - - - because we said you don't have to be a  
20 licensed attorney, I think, as Judge Singas said, you know,  
21 in other cases. But the difference here would be because  
22 the court appoints a nonattorney, then it's a mode of  
23 proceedings error?

24 MR. DAVENPORT: Because the court is appointing a  
25 district attorney. And so when the court appoints a

1 district attorney, implied within that appointment would be  
2 that the person is professionally licensed and able to act  
3 as an attorney.

4 If - - - if somebody who is an unlicensed  
5 attorney were to move forward with the prosecution again, I  
6 don't think that that's a - - -

7 JUDGE TROUTMAN: So you - - - you see a  
8 distinction between the district attorney or the special  
9 prosecutor versus an assistant district attorney who may be  
10 unlicensed?

11 MR. DAVENPORT: I do. Because in the scenario  
12 with the district attorney, you're also dealing with the  
13 separation of powers concerns. And you're not dealing with  
14 that when you're - - - when you're talking about the  
15 appointment of an assistant district attorney.

16 JUDGE CANNATARO: Do you think there's any  
17 relevance to the distinction in the appointing authority?  
18 Because, you know, if - - - if it's the district attorney  
19 appointing a nonattorney assistant district attorney,  
20 that's a different scenario than the court making the  
21 appointment. Because I gather from the case is that the  
22 court has to be especially solicitous of separation of  
23 powers issues. That we might not maybe hold district  
24 attorneys to the same standard that we hold ourselves in  
25 how we view these violations of these reg - - -

1 requirements.

2 So I'm just wondering, do you think it's just  
3 assistant versus district attorney, or do you think who's  
4 doing the appointing matters as well?

5 MR. DAVENPORT: I think that that is a very fair  
6 interpretation of the case law. And I do think that there  
7 is an emphasis that has been placed by the courts in the  
8 prior decisions - - - this court in its prior decisions on  
9 the fact that it is a judicial appointment and you are - -  
10 -

11 JUDGE GARCIA: But is that more - - -

12 MR. DAVENPORT: - - - it would be a judicial  
13 expansion of power.

14 JUDGE GARCIA: I'm sorry. Is that more in the  
15 context as a separation of power concern, where the court  
16 does it, or where the district attorney requests that the  
17 court does it? Because it seems like there's less of a  
18 separation of powers problem where the district attorney  
19 themselves asks for the appointment?

20 MR. DAVENPORT: I - - - I do believe that there  
21 are still separation of powers concerns, Your Honor, when  
22 you're talking about whether that appointment is coming  
23 from either the district attorney or the - - - the judicial  
24 branch. I believe it would just come from two different  
25 branches with the - - - the district attorney, more of the

1 enforcement arm.

2 JUDGE GARCIA: But you could see I'm removing you  
3 because I think you have a conflict being more of an issue  
4 than, Judge, I have a conflict, please appoint somebody  
5 else?

6 MR. DAVENPORT: And - - - yes. Because in - - -  
7 in the latter scenario, you don't have the district  
8 attorney then stepping in and directing who to appoint in  
9 those - - - in those circumstances; that would be the  
10 judges and the - - - the - - - the court's decision in that  
11 scenario rather than the district attorney's.

12 And I do think that that is something that this  
13 court has emphasized repeatedly is, again, what Your Honor  
14 said earlier about looking to the contours of what the  
15 statute says and not expanding at all what those very clear  
16 requirements are from the legislative branch.

17 This court has said, both in its decisions  
18 related to special district attorneys, but as well as  
19 outside of those issues in those specific contexts, that  
20 the court is to enforce the law that's put in front of it,  
21 and not to expand its own law. And allowing the  
22 appointment to stand here would be an expansion of County  
23 Law 701.

24 And just to turn back really quickly, Your Honor.  
25 There is no good-faith exception as well, because I know

1 that that was a point that was brought up in the  
 2 respondent's brief as well. That the - - - the judge and  
 3 the district attorney acted in good faith with their  
 4 appointments, not believing that there were any issues with  
 5 the appointment, and that it was a - - - a ministerial  
 6 error.

7 This court said in a matter of Soares v. Herrick  
 8 that a good faith - - - good faith failure to follow the  
 9 law is not excusable. In - - - in that circumstance, the  
 10 judge believed that the district attorney should have been  
 11 disqualified. And he acted in good faith when he appointed  
 12 - - - when he disqualified the - - - the district attorney  
 13 and appointed a new special district attorney.

14 But the court still said in those circumstances  
 15 that the fact that there was no actual conflict of interest  
 16 and that there shouldn't have been a disqualification,  
 17 means that there was a violation of County Law 701  
 18 displacing the very important district attorney election  
 19 appointment that we are looking to uphold with this  
 20 statute.

21 And with that, Your Honors, I will rest and let  
 22 my honor - - - my colleague address those points.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. BRUCE: Just a couple of points. Counsel  
 25 several times talked about this case being a subject matter



1 jurisdiction case. This case rests on whether in - - - in  
2 the People's view of it, whether under the - - - the  
3 language of 701, whether or not that is an irregularity  
4 because of the cases this court has decided under 702 and  
5 under the Public Officer's Law or whether it was, in fact,  
6 a jurisdictional defect. If he concedes it's a subject  
7 matter jurisdiction problem, then the People win. Because,  
8 as I indicated before, in my main argument, I followed, and  
9 the court is - - - there is nothing to say I didn't. I  
10 followed the strictures of judge - - - of - - - of the  
11 judge's order. I prosecuted one person for the crimes that  
12 were at issue and with respect to his order, and that's  
13 what I did.

14 Judges, we're not asking this court to  
15 expansively interpret Section 701. We're simply asking  
16 that in these narrow circumstances - - - the narrow  
17 circumstances of this case - - - after a court has removed  
18 a district attorney who sought self-recusal, that the  
19 appointment of someone ineligible only by reason of lack of  
20 residency, especially in the absence of an objection which  
21 this court has apparently recognized, does not require the  
22 invalidation of everything done by - - - in this case - - -  
23 me, prior to that objection.

24 CHIEF JUDGE WILSON: You think - - - I mean is  
25 that the fundamental question here, I think, is, as you

1           stated was - - - is this jurisdictional, or is it not  
2           jurisdictional? Right?

3                       MR. BRUCE: Yes.

4                       CHIEF JUDGE WILSON: And so let me drag you back  
5           to the legislative history just one more time. This is the  
6           original legislative history from 1974. I don't think this  
7           is conclusive, but let me see what you think about it. In  
8           the original legislation proposing Section 701, the  
9           original draft, the District Attorneys Association  
10          vehemently opposed the initial draft of the legislation  
11          because it would have allowed a court to appoint a special  
12          prosecutor whenever the DA didn't appear. There didn't  
13          have to be a conflict, just didn't appear. And they said  
14          there's a constitutional role for the district attorneys  
15          here. That would be a real problem, and we're violently  
16          opposed to this. The legislation was then amended to be as  
17          it read - - - you know, read originally, which is that only  
18          when the DA is conflicted as unable to proceed, can the  
19          court then go forward.

20                      That seems to me to cut a little bit towards the  
21          side of jurisdictional because of the separation of powers  
22          problem that the DAs were concerned about. But I'd like  
23          your thoughts.

24                      MR. BRUCE: I don't disagree with you, but you  
25          say, Your Honor, that it cuts towards jurisdictional. But

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I don't think - - - it eliminates, or it makes this into a jurisdictional question. It leaves you back with cases we've cited about - - - under Sections - - - under the Public Officer's Law, under Section 702. It - - - it's a situation where, yes, a mistake was made. It - - - it creates a problem, but it's not jurisdictional I submit, Judge.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Callara (Dino J.), No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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