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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

MICHAEL CUBERO,  
  
Appellant.

NO. 68  
(papers sealed)

-----

20 Eagle Street  
Albany, New York  
September 4, 2019

Before:

ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

GEORGE J. HOFFMAN, JR., ESQ.  
Attorney for Appellant  
P.O. Box 264  
East Greenbush, NY 12061

CAITLIN J. HALLIGAN, ESQ.  
GIBSON, DUNN & CRUTCHER LLP  
Attorney for Respondent  
200 Park Avenue, 47th Floor  
New York, NY 10166

BARBARA D. UNDERWOOD, ESQ.  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK  
Attorney for Intervenor  
28 Liberty Street  
New York, NY 10005

Karen Schiffmiller  
Official Court Transcriber



1 JUDGE RIVERA: The last case on the calendar,  
2 People v. Cubero, number 68.

3 Counsel?

4 MR. HOFFMAN: Good afternoon, may it please the  
5 court, George Hoffman representing the appellant, Michael  
6 Cubero on this matter. If I could reserve two minutes for  
7 rebuttal, please?

8 JUDGE RIVERA: Yes, sir.

9 MR. HOFFMAN: Thank you.

10 The Appellate Division erroneously restricted its  
11 power by refusing to withhold decision in this matter and  
12 remit it for further factual development - - -

13 JUDGE FAHEY: Let me ask this.

14 MR. HOFFMAN: - - - to the trial court.

15 JUDGE FAHEY: Do we even have to reach the issue  
16 of the Appellate Division's exercise of its power or  
17 whether to not it correctly defined its interest of justice  
18 jurisdiction? Couldn't we just set this aside, send this  
19 for a 440, and - - - and make a determination as to whether  
20 or not there was any consent given or whether - - - and  
21 then the issue of consent will be clear in a record, and  
22 then can brought - - - be brought before us?

23 MR. HOFFMAN: Well, Your Honor, I - - - I don't  
24 know that a 440 would be - - - while, yes, it's certainly a  
25 - - - an avenue to do it, the fact of the matter is, it's



1 not analogous or similar to the interest of justice  
2 jurisdiction, because you - - -

3 JUDGE FAHEY: Well - - -

4 MR. HOFFMAN: - - - do have to have that good  
5 cause showing - - -

6 JUDGE FAHEY: I understand that, but - - - but -  
7 - - I - - - I understand it's not exactly the same, and I'm  
8 not saying that I agree or disagree with the Appellate  
9 Division's analysis of their interest of justice  
10 jurisdiction. But that's a much broader question than the  
11 question that's before us right now, that affects the  
12 fundamental operation of the courts in a variety of  
13 different settings, that it's almost impossible for any of  
14 the parties here today to have properly have briefed that  
15 question before us.

16 But the question of - - - of whether or not there  
17 was consent given, whether or not Judge Rivera's dissent is  
18 the foundation for an ineffective assistance of counsel  
19 claims, those are fair questions that could be brought up  
20 and we can then argue the underlying legal question there,  
21 and - - - and focus in on what's really at issue here,  
22 which is whether or not the court had the jurisdiction to  
23 do what it did, and whether or not the special prosecutor  
24 was able to bring that charge.

25 MR. HOFFMAN: Well, I - - - part of my problem,



1 Judge, is this - - - this appeal started, as you indicated,  
2 as a challenge to the special prosecutor's authority. Now  
3 it's essentially transposed into a Constitutional analysis  
4 of the Appellate Division's jurisdiction.

5 JUDGE FAHEY: Right, but that - - - that's - - -  
6 that's, of course, because the issue was not preserved  
7 below.

8 MR. HOFFMAN: It - - - it wasn't preserved below,  
9 admittedly.

10 JUDGE FAHEY: Unlike a number of other Third  
11 Department cases that may or may not be coming up to us,  
12 that that issue - - - that issue has been preserved in  
13 other cases.

14 MR. HOFFMAN: Well, it - - - it has, Your Honor,  
15 and - - - and ironically, that's part of the issue in this  
16 case. The attorney general at the Third Department  
17 actually advocated for the Appellate Division to remit this  
18 matter to the trial court for further factual development.  
19 Then during the course of that argument, they said, well,  
20 three other cases are coming up that may be more properly  
21 preserved. Unfortunately, that means Mr. Cubero sits and  
22 waits for other cases that may or may not have been  
23 appealed at that time - - -

24 JUDGE FAHEY: I see.

25 MR. HOFFMAN: Since our decision, those cases



1 have been decided. And actually every court that has  
2 considered this very issue has determined, or has adopted  
3 the position advanced by the appellant, and first  
4 articulated by Judge Rivera, that the special prosecutor  
5 does not have independent prosecutorial authority.

6 JUDGE GARCIA: But it seem - - - does seem like  
7 the only issue here for us today is whether or not the  
8 Appellate Division - - - the argu - - - the issue you're  
9 putting forward - - - properly understood their interest of  
10 justice power. I don't see how we can reach anything else.

11 MR. HOFFMAN: Correct. I - - - I agree, Your  
12 Honor. I don't know that you can reach the issue with  
13 respect to the special prosecutor's power.

14 JUDGE FEINMAN: So - - - so if that's the case -  
15 - - I'm sorry.

16 JUDGE GARCIA: But why - - - why I consider this  
17 a particularly bad vehicle for that issue is this issue  
18 that you would send it - - - have it sent back for, may or  
19 may not even be dispositive here, because no one's decided  
20 the Constitutional issue. So it - - - it could be a court  
21 - - - this court - - - finds that delegation of  
22 prosecutorial authority Constitutional. It could be we  
23 find it per se, unconstitutional, in which case, this issue  
24 means nothing.

25 MR. HOFFMAN: Well, Your Honor, I - - - I tend to



1 disagree. While this court has not decided this particular  
2 Constitutional issue, every other court that has considered  
3 it, has - - -

4 JUDGE GARCIA: But the Appellate Division here  
5 didn't decide that issue at the time. So they would have  
6 been - - -

7 MR. HOFFMAN: But they have intent, Your Honor.

8 JUDGE GARCIA: They would have been sending this  
9 back for a nondis - - - potentially nondispositive issue.  
10 It's not the ordinary case, where you could say, should we  
11 sent it back or not, and if we find out the answer is X, X  
12 will dispositive here. It isn't or it wasn't at the time.

13 MR. HOFFMAN: It - - - it may not have been - - -

14 JUDGE GARCIA: So why would we decide an issue,  
15 as Judge Fahey said, of such court-wide jurisdictional  
16 importance in a - - - in a case that has such different  
17 types of facts, when it seems one way to interpret this  
18 would be, given that it wasn't dispositive, they declined  
19 to reach this.

20 MR. HOFFMAN: Well - - - well, Your Honor, I - -  
21 - I think the playing field has changed since the Appellate  
22 Division's decision in this matter, and that very Appellate  
23 Division has now adopted Judge Rivera's position - - -

24 JUDGE GARCIA: All we're looking at is this  
25 decision.



1 MR. HOFFMAN: And I - - - I understand that and  
2 I'm getting to that, Your Honor.

3 JUDGE GARCIA: I am saying that we could read  
4 this decision, I think, as saying, given this isn't even a  
5 dispositive issue we would send it back on potentially,  
6 we're not going to reach it. And they certainly have  
7 authority to do that.

8 MR. HOFFMAN: Well, Your Honor, I - - - I think  
9 the issue of prosecutorial authority - - - and there have  
10 been cases by the Appellate Division since the Appellate  
11 Division's decision in this.

12 JUDGE FAHEY: How - - - let's just stay with  
13 sending it back, because it - - - to follow up on Judge  
14 Garcia's point, sending it back, the Appellate Division's  
15 jurisdiction. The Appellate Division does, of course, send  
16 things back for reconstruction hearings; there's no  
17 question of that.

18 So the question is really, are they sending it  
19 back here to create a record or to reconstruct a record  
20 based - - - or - - - or reconstruct an issue or a  
21 determination based on a record that was before the court.  
22 Because otherwise, if they're recreating, then we're really  
23 talking about 440; we're really talking about matters  
24 outside the record. But if they're reconstructing, then  
25 it's a perfectly appropriate function for the Appellate



1 Division to do then.

2 MR. HOFFMAN: Well, Your Honor, I - - - I think  
3 that - - -

4 JUDGE FAHEY: What - - - where does it fall in  
5 your analysis?

6 MR. HOFFMAN: I - - - I think we would be  
7 reconstructing whether the prosecution has jurisdiction.

8 JUDGE FAHEY: All right, so - - - so where - - -  
9 what is there in the record that would be the basis of the  
10 re - - - the reconstruction that you're relying on?

11 MR. HOFFMAN: Well, unfortunately, Your Honor,  
12 the lone reference in the record is a mention of a DA  
13 providing storage materials.

14 JUDGE FAHEY: Okay, so that - - -

15 MR. HOFFMAN: But - - -

16 JUDGE FAHEY: - - - that's not reconstruction  
17 hearing material.

18 MR. HOFFMAN: But the fact of the matter is, this  
19 court in Gilmour, said, prosecutorial authority is the  
20 State's burden to establish. And the State certainly did  
21 not establish this by a lone reference to storage  
22 materials.

23 JUDGE WILSON: Well, in Gilmour - - -

24 MR. HOFFMAN: The very statute at issue in this  
25 matter requires consultation with the prosecutor. If





1 consulting (sic) regarding the storage of materials is  
2 what the legislature intended, I'd be shocked.

3 JUDGE STEIN: But since when do you get a second  
4 chance to put in proof on an issue that is - - - that goes  
5 to the issue in the case - - -

6 MR. HOFFMAN: That - - - that the - - -

7 JUDGE STEIN: - - - that you didn't do at the  
8 trial. I - - - so - - -

9 MR. HOFFMAN: Well, again, Your Honor, if - - -

10 JUDGE STEIN: - - - I - - - I see - - - I see  
11 preserve - - - reconstruction as very different. It's not  
12 going back to give you another chance to put in evidence.  
13 It's saying, did this occur or didn't it occur at the  
14 trial?

15 MR. HOFFMAN: Understandable, Your Honor. And if  
16 we're using Gilmour as the guidance here - - -

17 JUDGE FAHEY: Well, you - - - you can - - - you  
18 can see that this wasn't preserved, right?

19 MR. HOFFMAN: Yes, Judge.

20 JUDGE FAHEY: Okay.

21 MR. HOFFMAN: Absolutely.

22 JUDGE FAHEY: So let me - - - let me ask you  
23 this.

24 MR. HOFFMAN: And we conceded to that in the  
25 Appellate Division.



1 JUDGE FAHEY: So you're - - - so you're asking us  
2 to create a mode of proceeding type of error here?

3 MR. HOFFMAN: For - - - for a prosecutorial  
4 authority, for a jurisdictional issue. If courts are  
5 saying prosecutorial authority is a jurisdictional issue  
6 that need not even be preserved, then that's essentially a  
7 hollow decision if the court doesn't have the authority to  
8 then say, we don't have enough on these facts. We should  
9 send it back for further determination of that particular  
10 issue.

11 JUDGE STEIN: But doesn't our decision in  
12 Davidson - - -

13 MR. HOFFMAN: In Gilmour - - - I'm sorry, Judge  
14 Stein.

15 JUDGE STEIN: Doesn't our decision in Davidson  
16 implicitly say it's not a mode of proceedings error,  
17 because we declined to address the unpreserved issue?

18 MR. HOFFMAN: You did decline to address the  
19 unpreserved issue, Judge, but since then, just in the last  
20 four months, the Second Department and the Fourth  
21 Department have both said, prosecutorial authority is a  
22 jurisdictional issue. It strikes at the very heart of the  
23 criminal justice process. This special prosecutor convened  
24 a grand jury, obtained an indictment - - -

25 JUDGE STEIN: But - - - but the issue here isn't



1 that. The issue here is whether consent was given. That's  
2 - - - that's the issue that you're asking to create a  
3 record on. And - - - and that's not the same as  
4 prosecutorial authority.

5 MR. HOFFMAN: It - - - it's not, Your Honor, but  
6 as the court indicated in Gilmour - - - well, it is the  
7 same as prosecutorial authority, because the only way  
8 prosecutorial authority exists under the Third Department's  
9 interpretation and Judge Rivera's interpretation of the  
10 statute, is if the elected district attorney gave their  
11 consent to the special prosecutor appearing and  
12 prosecuting. That's the only way.

13 JUDGE STEIN: Yeah, but we haven't held that. I  
14 - - - I think that goes back to - - - to Judge Garcia's  
15 question.

16 MR. HOFFMAN: Judge Rivera has. Every court that  
17 has considered it since then.

18 JUDGE FEINMAN: So - - - so - - - so it's sort of  
19 holding - - -

20 MR. HOFFMAN: This court hasn't but the Appellate  
21 Division has.

22 JUDGE FAHEY: Slow - - - slow down.

23 JUDGE FEINMAN: And it's not a holding.

24 MR. HOFFMAN: And I'm not arguing the juris - - -  
25 or the - - - the issue of special prosecutor authority, but



1 it's tied in to the argument regarding the jurisdictional  
2 issue here.

3 JUDGE RIVERA: Well, I - - - I - - - I understood  
4 - - - you'll correct me - - - I understood your - - - your  
5 first argument to be that the statute is unconstitutional.  
6 Doesn't matter - - - doesn't matter. On its face, it's  
7 unconstitutional. You don't need a record to measure. I  
8 thought this was your first argument.

9 MR. HOFFMAN: And - - - and that's the issue we  
10 raised at the Appellate Division initially, Your Honor,  
11 yes. But then following your line of reasoning, and the  
12 reasoning that has now been adopted by the Third  
13 Department, there is a saving provision, possibly, if the  
14 district attorney consented.

15 This court has been very clear on multiple  
16 occasions that the district attorney has the authority to  
17 determine who, when, and even whether to prosecute.

18 JUDGE FEINMAN: So I - - - I'd like to come back  
19 for a second - - -

20 MR. HOFFMAN: I'm sorry.

21 JUDGE FEINMAN: - - - to the interest of justice  
22 jurisdiction question, and what's the statutory basis in  
23 the statute, in the CPL, for saying that the Appellate  
24 Division improperly restricted its interest of justice  
25 jurisdiction?



1 MR. HOFFMAN: And - - - and I - - - there doesn't  
2 need to be a statutory basis. We're arguing there's an  
3 inherent authority - - -

4 JUDGE FEINMAN: So you're just saying there's an  
5 inherent broad review power - - -

6 MR. HOFFMAN: There's an inherent authority to  
7 address justice.

8 JUDGE FEINMAN: And where does that come from?

9 MR. HOFFMAN: In multiple cases from this court  
10 where the court has said, the courts possess broad powers -  
11 - -

12 JUDGE GARCIA: Can you give us an example of one  
13 Appellate Division case that has done this?

14 MR. HOFFMAN: That has done this? Yes. There's  
15 a Second Department decision in People v. Grigg, and they  
16 actually went further than what we're asking here.

17 JUDGE GARCIA: What's the cite for that? I'm  
18 sorry, Counsel.

19 MR. HOFFMAN: 73 AD3d, 806, Your Honor. And in  
20 People v. Grigg, the court specifically said, we're going  
21 to address our interest of justice jurisdiction to reach  
22 this issue, and remit it for further factual development.  
23 I'm - - - I'm saying you don't necessarily have to exercise  
24 your interest of justice jurisdiction. As Judge Lynch  
25 indicated, by withholding decision, obtaining further



1 factual development, the matter would then return to the  
2 Appellate Division when they could make a decision whether  
3 they should exercise their interest of justice jurisdiction  
4 - - -

5 JUDGE RIVERA: Yes, but that partic - - -

6 MR. HOFFMAN: - - - having all the facts.

7 JUDGE RIVERA: Right, that particular approach  
8 means that the trial judge and the trial court is  
9 responsible for what? Overseeing the development but  
10 reaching no conclusions about it?

11 MR. HOFFMAN: Reporting back to the Appellate  
12 Division. There are a number - - - for over a century,  
13 there are cases holding the decision - - - withholding the  
14 decision and remitting it - - -

15 JUDGE STEIN: But there - - - aren't those cases  
16 where - - -

17 MR. HOFFMAN: - - - and asking for a report back.

18 JUDGE STEIN: - - - where the issue is either - -  
19 - was preserved or it was a stat - - - it was a required -  
20 - - a legal requirement that the - - - that the appellate  
21 court directed the trial court to do, that hadn't been done  
22 on - - -

23 MR. HOFFMAN: Well - - - well, Your Honor, Pe - -  
24 -

25 JUDGE STEIN: Aren't those - - -



1 MR. HOFFMAN: People v. Grigg, right here, is an  
2 example - - -

3 JUDGE GARCIA: What was the issue in Grigg?

4 MR. HOFFMAN: - - - where the court said it's an  
5 unreserved issue.

6 JUDGE STEIN: Yeah, but you said - - - you said  
7 it's done all the time. I'm just - - - I'm just - - - I'm  
8 just trying to - - - to ascertain whether, in fact, that's  
9 true, or whether we have one case in, you know, decades in  
10 which it's happened, which I think - - -

11 MR. HOFFMAN: And - - -

12 JUDGE STEIN: - - - would make a difference.

13 MR. HOFFMAN: And Your Honor, I'm sorry, I'd have  
14 to research further, but this is one case that did jump out  
15 in my research, where the court specifically said, it's an  
16 unreserved issue; we're exercising our - - -

17 JUDGE STEIN: I assume - - -

18 MR. HOFFMAN: - - - interest of justice  
19 jurisdiction.

20 JUDGE STEIN: I assume that if it was a - - - a -  
21 - - you know, a consistent practice that there would be  
22 lots and lots of these cases, and you probably would have  
23 found them.

24 MR. HOFFMAN: Again, as the amicae brief pointed  
25 out, there are - - -



1 JUDGE FAHEY: Well, one of the - - -

2 MR. HOFFMAN: - - - thousands of cases.

3 JUDGE FAHEY: - - - one of the - - - one of the  
4 distinctions that always come up is an unpreserved issue be  
5 - - - un - - - versus an unpreserved factual basis for the  
6 issue.

7 Here, the way I understand your argument, you - -  
8 - you want them to go back to find out if there's a factual  
9 basis for an issue that was never raised and never  
10 preserved. You object at trial to something that happened,  
11 or - - - or a counsel fails to object to what's a clear  
12 error; no one rules on it, and the Appellate Division then  
13 says, we're going to reach this issue, because it was a  
14 clear error on the record of what was here, but it was not  
15 preserved.

16 That objection wasn't preserved. All right. So,  
17 and they say, we had an off-the-record conversation, Your  
18 Honor. Okay. Well, you send it back for a hearing and you  
19 try and find out if any such thing took place. That is not  
20 the same thing as - - - as the creation of a record  
21 entirely new. And that's really what I think 440 is for.

22 So I - - - I - - - I'm struggling here to find  
23 out how it falls within this category. And - - - and  
24 whether or not the Appellate Division made a mistake in the  
25 in - - - in their interest of justice jurisdiction seems a



1 much, much broader issue and totally unnecessary to reach  
2 to resolve the issue that you're concerned about.

3 MR. HOFFMAN: And - - - and Your Honor, and I do  
4 see my time has expired, so if I could just respond to your  
5 question. As this court indicated in Gilmour, establishing  
6 prosecutorial authority is not an onerous burden. There it  
7 was obtaining a letter of whether an agency head requested  
8 the AG's involvement.

9 JUDGE FAHEY: I'm not familiar with it, but the  
10 first - - -

11 MR. HOFFMAN: Here - - - here, it's a matter of -  
12 - -

13 JUDGE FAHEY: Let me just finish. I'm not  
14 familiar with it, but the first thing I would say is, was  
15 the issue brought before the trial court, and did somebody  
16 ask them to bring the letter in to establish that  
17 jurisdiction?

18 MR. HOFFMAN: And - - - and that I don't know,  
19 Your Honor, but in that court - - -

20 JUDGE FAHEY: So that's - - - that - - -

21 MR. HOFFMAN: - - - in that - - -

22 JUDGE FAHEY: Slow down. That's the question for  
23 us today.

24 MR. HOFFMAN: And in that case, this court said  
25 it's the State's burden to establish whether the prosecutor



1 had prosecutorial authority. People v. Gilmour said - - -

2 JUDGE RIVERA: Okay, Counsel, you'll have your  
3 rebuttal. Thank you.

4 MR. HOFFMAN: Thank you.

5 JUDGE RIVERA: I'm sorry, Judge. Yes?

6 JUDGE WILSON: Judge Rivera, may I just ask? I  
7 just want to go - - -

8 JUDGE RIVERA: Sorry, Judge Wilson has a  
9 question.

10 JUDGE WILSON: Counsel, I'm sorry. I just have -  
11 - - I just have one - - - one more sort of - - - I want to  
12 go back to something both Judge Garcia and Judge Fahey were  
13 getting at. I know that there's a reading of the Appellate  
14 Division decision that says we don't have the power to  
15 reach this. But they also say, if the statute can't be  
16 narrowed and is unconstitutional, we could reach that in  
17 our interest of justice jurisdiction, even though it wasn't  
18 preserved.

19 So I wonder when you - - - when you think about,  
20 not what they said, but - - - but the totality of what they  
21 did, this really what - - - was a discretionary decision  
22 not to go down that route.

23 MR. HOFFMAN: Well, I - - - I think the reason -  
24 - - their basis for not going down that route was precisely  
25 what we've been discussing, that additional facts may be



1 necessary. And they were saying unless it's a reversal or  
2 modification, we can't go down that - - -

3 JUDGE WILSON: But of course, it might have been  
4 a reversal, right? You - - - there are - - - you wouldn't  
5 have to get to those facts at all if the statute can't be  
6 narrowed and is unconstitutional.

7 MR. HOFFMAN: Correct. If it's - - -

8 JUDGE WILSON: Right?

9 MR. HOFFMAN: If it's a straight unconstitutional  
10 statute and there are no saving provisions, then the court  
11 could reach that.

12 JUDGE WILSON: And their interest of justice  
13 jurisdiction, would - - - they could reach that.

14 MR. HOFFMAN: Yes.

15 JUDGE WILSON: And because they chose not to  
16 evaluate that question, it really was a discretionary  
17 decision by them not to exercise their interest of justice  
18 jurisdiction, and so perhaps there's not really not an  
19 issue for us here at all.

20 MR. HOFFMAN: Well, Your Honor, the way I read  
21 that decision was, they said, even if they could reach  
22 that, that these factual matters prevented them from  
23 reaching that decision. So I - - - I don't necessarily  
24 agree with your reading.

25 JUDGE WILSON: Okay.



1 JUDGE RIVERA: Thank you, Counsel.

2 MR. HOFFMAN: Thank you.

3 JUDGE RIVERA: You have rebuttal.

4 MS. HALLIGAN: Good afternoon, Your Honor, and  
5 may it please the court, Caitlin Halligan for the Justice  
6 Center. With me is Rachel Dunn, who is the Justice  
7 Center's special prosecutor.

8 Judge Fahey, I think you asked exactly the  
9 critical question here, which is, isn't the challenge that  
10 they have now raised in the Appellate Division for the  
11 first time, and now before this court, appropriate under  
12 the statutory framework set forth in the CPL under a  
13 Section 440.10 challenge, and it certainly is. There is no  
14 precedent for the Appellate Divisions to exercise their  
15 interest of justice jurisdiction on an unpreserved claim in  
16 a way which allows for a remittal and the development of a  
17 factual record on a new issue.

18 Now my adversary has pointed the court to a case  
19 called People v. Grigg. And I agree with him that it is  
20 the one case out of many, many for decades and decades that  
21 looks, on its face, like it bears the closest resemblance  
22 to this. Even if it were squarely on point, it is an  
23 outlier. It is one case.

24 But as the attorney general pointed out in their  
25 brief, that decision was essentially disavowed by this



1 court a couple of years ago, in a case called People v.  
2 Jurgins. And so, even if that case were binding, and even  
3 if it was a case that had had any other corollary or - - -  
4 or any other courts that had adopted the same view - - -  
5 I'm - - - I'm - - - I'm - - - Jurgins is cited, Your Honor,  
6 in the reply brief that the attorney general filed in  
7 response to the amicus brief. I think it's on page 22 or  
8 23. You can find the discussion there.

9 So this court has - - - has disavowed it, but in  
10 any event this - - -

11 JUDGE RIVERA: How do you read the Appellate  
12 Division's majority's decision? Do you - - - do you read  
13 it the way Judge Wilson suggests - - -

14 MS. HALLIGAN: I think that you could read it  
15 that way, and we noted that in - - - in our brief to this  
16 court, Your Honor. I think that you could read it as  
17 deciding that it was a discretionary exercise. And in - -  
18 - in many, many Appellate Division decisions, where there  
19 is a request made to exercise interest of justice  
20 jurisdiction, you will see a very similar line saying, we  
21 decline to exercise our interest of justice jurisdiction.  
22 And that is not because, in those instances, the court  
23 believes it lacks authority to do so, but because it  
24 decides that is - - -

25 JUDGE WILSON: Can I ask you about - - -



1 MS. HALLIGAN: - - - as a discretionary matter  
2 not to.

3 JUDGE WILSON: Can I ask you about Gilmour for a  
4 moment?

5 MS. HALLIGAN: Yes.

6 JUDGE WILSON: Why is it incorrect - - - or is it  
7 an incorrect reading of Gilmour that if the authorization  
8 does not appear on the face of the record, the conviction  
9 is reversed and the indictment dismissed? Because there,  
10 there was a letter and we held it was insufficient, and we  
11 didn't say, let's send it back to see if there's some other  
12 evidence or anything like that. We said, in - - -  
13 insufficient, reversed, indictment dismissed.

14 MS. HALLIGAN: Well, Your Honor, I think that - -  
15 - that in - - - in any case in which there is some sort of  
16 error that is asserted, that the factual record has to be  
17 clear. And this court has said it repeatedly. In McLean,  
18 it said it. In Kinchen, it said it. The error has to be  
19 plain on its face.

20 And so, to the extent that this court were to  
21 disagree with our reading on the Constitutional question,  
22 and obviously, we think that the statute is perfectly  
23 Constitutional if it allows an independent exercise of  
24 prosecutorial authority. But even if the court were to  
25 disagree, the saving construction, that was proffered by



1 the attorney general and embraced by Judge Rivera in her  
2 dissent in Davidson, is plainly something that cannot be  
3 determined with - - - without some factual inquiry into the  
4 question of whether there was consent.

5 And that makes this no different than any other  
6 case, like McLean, in which this court has said over and  
7 over again, that the error, even if unpreserved, must be  
8 apparent from the face of the record.

9 JUDGE WILSON: But it - - -

10 MS. HALLIGAN: Judge Fahey - - -

11 JUDGE WILSON: But it's - - - it's only the  
12 saving construction that then draw - - - if - - - if you  
13 accept the saving construction, the case is then exactly  
14 like the authorization required in Gilmour. Isn't that  
15 right?

16 MS. HALLIGAN: Well, I think that it's closer. I  
17 don't think that - - - that - - - that we would agree that  
18 the savings construction was inappropriate. But the  
19 Appellate Division certainly did not consider that approach  
20 either. And the attorney general, while disagreeing with  
21 us on the core Constitutional question, has obviously  
22 advanced that saving construction along the lines of - - -  
23 of what Judge Rivera set forth in - - - in her dissent in  
24 Davidson.

25 Two - - - two points with respect to Davidson.



1 One is, that that should dispose of this case. As you  
2 indicated Judge Stein, the court there declined to address  
3 the issue, and it also upheld the Appellate Division's  
4 decision not to do so either.

5 JUDGE WILSON: But that seems sort of circular to  
6 me in - - - in the following way. If you look at the  
7 briefs in Davidson - - -

8 MS. HALLIGAN: Yes.

9 JUDGE WILSON: - - - no party argued that this  
10 was the sort of error that didn't need to be preserved,  
11 right. Nobody said this is an O'Rama type error. And now  
12 what you're saying is, even though nobody raised the  
13 question of whether this was an error that didn't need - -  
14 - need to be preserved, the court, by declining to reach  
15 it, has reached the question of whether it needs to be  
16 preserved.

17 MS. HALLIGAN: Well, I think that this court  
18 could not decide this question here, about whether the  
19 Appellate Division correctly declined to exercise its - - -  
20 its interest of justice jurisdiction, even if it decide - -  
21 - even if you were to decide that the reading that you  
22 asked my adversary about was not, in fact, what the  
23 Appellate Division intended. In other words, that it was a  
24 question of authority and not discretion. I don't think it  
25 could decide this case in Mr. Cubero's favor, consistent





1 with Davidson.

2 There was no dispute in Davidson, I think, about  
3 whether or not the court could - - - the Appellate Division  
4 could decide this question if it had not been preserved.  
5 But presumably there was - - - there was clearly a  
6 difference of opinion about whether it had been properly  
7 preserved. The dissent in footnote 2 at page 1090  
8 indicated the one with the attorney general, its view that  
9 it had been properly preserved. And the majority indicated  
10 that it had not been preserved, and therefore it could not  
11 reach it.

12 And so I think the only conclusion you can draw  
13 from that, even though it doesn't spell it out in quite as  
14 long an analysis as - - - as you're suggesting, Judge  
15 Wilson, is that it lacked the authority to do so.

16 And that's really the only answer, I think, that  
17 you can reach, given the statutory framework here, which  
18 lays out very clear authority that the Appellate Division  
19 has, when it exercises its interest of justice  
20 jurisdiction. It lays out as an alternative Section  
21 440.10. So the - - - the defendant here, is not without  
22 any recourse. As this court has suggested - - -

23 JUDGE RIVERA: Well, I - - - I certainly might  
24 not have spent so much time, even if it's in a footnote, on  
25 preservation, if it's not necessary.



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MS. HALLIGAN: Well - - -

JUDGE RIVERA: I mean, why - - - why go through that with the - - - in response to the majority if one can say, it doesn't matter, we can reach it anyway?

MS. HALLIGAN: Well, my - - - my point, Your Honor, is that the legislature in setting forth the appellate jurisdiction of the Appellate Divisions, has been clear that 440.10 is an alternate route. And this court has - - - has reiterated time and time again. Judge Fahey just as recently as a few years ago in your Mack decision, you said that one of the reasons that a mode of proceeding error - - - which is not being asserted here - - - has to be construed so narrowly is that there is tremendous concern about whether there would be strategic behavior and - - - and an ability to go back and forth. And - - -

JUDGE FAHEY: Well, sure, gaming the system. But what - - - one of the things that strikes me, and one of the difficult and interesting questions I guess here, is how is the law established that you can rely on an ineffective assistance of counsel claim. And - - - and - - - and here, the theory, if I understand it correctly, is that - - - that the - - - the idea properly articulated in the dissent can constitute a legal error by counsel by not pursuing that particular theory at the trial level.

And it's an issue that frankly I don't even want

1 to get into. It's - - - it's a much more gnarly issue than  
2 - - - than you would normally find in this kind of case.  
3 And I think that's why I started out by saying I think the  
4 more direct approach, rather than saying that the dissent  
5 constitutes the law, and that's an error, and therefore,  
6 you can reach it here in some way. A much more direct way  
7 is through a 440 hearing, that will then resolve the case,  
8 and as the other cases work through the system, then the  
9 issue will be properly addressed on - - - on - - - where  
10 there's a proper factual record, which we don't have here,  
11 so.

12 MS. HALLIGAN: And along those lines, Your Honor,  
13 we have filed leave in the three Appellate Division - - -  
14 an application for leave - - - in the three Appellate  
15 Division cases in which this question is squarely presented  
16 out of the Third Department. It's a clean vehicle.  
17 There's no question about preservation. Those letters have  
18 been submitted. They're awaiting response by the other  
19 side.

20 JUDGE RIVERA: Yeah, but if it can be reached  
21 here, he doesn't have to languish waiting for that to make  
22 its way, in the hope that it'll get to this court, and  
23 we'll decide the issue, right?

24 MS. HALLIGAN: Well - - - well, two points, Your  
25 Honor. First of all, we would certainly be prepared to



1 brief and argue that case in an expeditious manner, in  
2 light of the concern that you are raising. I would expect  
3 that the attorney general - - - obviously my friend,  
4 General Underwood can speak to this herself, but that they  
5 would want this court to address the question, not just the  
6 question of the Constitutionality and the proper  
7 construction, but also to provide some guidance, which is  
8 imperative, to the trial courts, if you do decide that some  
9 consent is required, what the parameters of that consent  
10 are, because clarity is really essential.

11 And so - - - so, you know, we think that that can  
12 be resolved in an expeditious manner, if the court chooses  
13 to grant leave in those cases, which are already - - -

14 JUDGE RIVERA: Well, of course, this case is  
15 here, so one could reach the question - - - I'm not sure  
16 that one can, even with his argument.

17 MS. HALLIGAN: And I don't mean to minimize that  
18 concern, Your Honor. But - - - but I do think that what  
19 lies in the balance is a rule of law that he is urging upon  
20 the court that would completely upset settled practice.  
21 There are many, many, many cases, which are cited in our  
22 brief, and the attorney general's brief, in which the  
23 Appellate Divisions have correctly concluded that they lack  
24 interest of justice jurisdiction where there is further  
25 fact finding that is required.



1           And - - - and so we don't think that there is any  
2 basis for this court to do that in the face of the statute,  
3 and the many precedents from this court underscoring the  
4 importance of preservation.

5           JUDGE RIVERA: Thank you, Counsel.

6           MR. HOFFMAN: I see my time has expired. Thank  
7 you.

8           JUDGE RIVERA: Thank you.

9           MS. UNDERWOOD: May it please the court, Barbara  
10 Underwood, for the attorney general. The attorney general  
11 intervened in this appeal in the Appellate Division, as we  
12 have in a number of cases, to defend the Constitutionality  
13 of the special prosecutor's statute, as construed to comply  
14 - - - as we think it needs to be construed to comply with  
15 the Constitution. And so if this court is going to reach  
16 that issue, I would like to spend some time addressing it.

17           But this case really is not, as several - - - as  
18 - - - as has been made plain, is not really the right  
19 vehicle for deciding that question, because the challenge  
20 wasn't pre - - - preserved at trial, and the record is not  
21 adequate. And by the way, the claim was not - - - also not  
22 made that it's a mode of proceedings error. I mean, none  
23 of the lurking issues here have been properly presented or  
24 teed up.

25           JUDGE STEIN: What - - - what's your explanation



1 of why the Appellate Division can remit for a  
2 reconstruction hearing, but not - - - when an issue's been  
3 preserved, but not in - - - in - - - when an issue's  
4 unpreserved.

5 MS. UNDERWOOD: Well, it - - - I - - - I think  
6 there's just a fundamental difference. A - - - a  
7 reconstruction hearing is like finding the paper that  
8 didn't - - - that got lost. I mean, it's finding out what  
9 happened at trial. It's not bringing in an - - - an  
10 appeal, after all, is reviewing what happened at trial.

11 And so, re - - - establishing what happened at  
12 trial is necessary for an appeal on the record. But a - -  
13 - an inquiry into evidence that never was before the trial  
14 court is a whole other project, and as the legislature has  
15 made very clear, the ordinary path for litigating matters  
16 that are not on the record, that were not pre - - - not  
17 only not preserved, but not on the record and even  
18 available for review, is through collateral proceedings.  
19 It used to be coram nobis. Now it's - - - now it's 440.  
20 There's a perfectly good procedure for that.

21 JUDGE STEIN: If that's true, what - - - what  
22 would you think that our co - - - our correct de - - --  
23 decision and order would be here? Would it be to simply  
24 affirm? Would there be a remittal for a 440 hearing? Or  
25 what - - - what do you think would be the correct action?



1 MS. UNDERWOOD: There are sev - - - there - - -  
2 there - - - there are several possibilities. I - - - I  
3 think this court could affirm on the - - - and - - - and it  
4 could either affirm on the ground that the Appellate  
5 Division was correct, which is was, that there is no power  
6 to remit for fact finding on an unpreserved extra-record  
7 issue, that would have to be reached in the interest of  
8 justice.

9 Or it could affirm on the ground that the - - -  
10 as was suggested - - - that the Appellate Division opinion,  
11 which is somewhat opaque, could be understood as, all  
12 things considered, an exercise of discretion.

13 JUDGE WILSON: But the problem - - - the  
14 difficulty I have with your first option is that it assumes  
15 there are facts to be found, and there's, I think, a  
16 reasonable reading of Gilmour that says, if all - - - if  
17 prosecutorial authority is absent in the record that comes  
18 up on appeal, that's the end of the story. There was a  
19 letter there. The letter - - - it was from the counsel for  
20 the state police. The court held, because it was not from  
21 the head of the state police, even though the letter said  
22 "we", that was not sufficient. We didn't send it back to  
23 ask for any sort of hearing.

24 MS. UNDERWOOD: No, but that was a pre - - - that  
25 was a preserved question, evidenced - - - the - - - the



1 attorney general had the opportunity to present evidence.  
2 And as several people have suggested, there - - - there is  
3 a rule having to do with orderly procedure that you don't  
4 get a second chance to supplement the record.

5 That's a different matter from the case in which  
6 the issue was not raised. There is an absence of evidence.  
7 Gilmour was about evidence that wasn't sufficient to  
8 satisfy the court.

9 JUDGE FAHEY: The other - - - the other - - -

10 MS. UNDERWOOD: This is about nobody raised the  
11 issue, and there is no evidence.

12 JUDGE FAHEY: The oth - - -

13 JUDGE RIVERA: So the - - - so the evidence of  
14 the use of the office space, you take the position, that  
15 would not have been enough or is not enough.

16 MS. UNDERWOOD: Correct, correct. The use of  
17 office space - - -

18 JUDGE FAHEY: The oth - - - the other problem  
19 though - - -

20 MS. UNDERWOOD: - - - is perhaps relevant, but is  
21 not enough to make a judgment about whether there actually  
22 was consent and oversight and - - -

23 JUDGE RIVERA: And one cannot say, given that  
24 that's in the record, that there's an opportunity, as  
25 opposed to - - - I understand your point, which is, it's





1 one thing to try and get a second chance. It's another  
2 thing to have no chance.

3 MS. UNDERWOOD: You know, well, I - - - I don't  
4 think that that's comparably a deficient showing. It  
5 simply happened to be in the record. That happens  
6 sometimes. But the - - - the challenge was - - -

7 JUDGE RIVERA: An affirmative effort to show  
8 consent.

9 MS. UNDERWOOD: Uh-huh, yes, that's right. No,  
10 the - - - the special prosecutor was not put on notice that  
11 they had to make a showing, and so there had - - - they  
12 then scoured the record for some shards of evidence that  
13 might tend to show consent. But that's not the right way -  
14 - - that's not - - -

15 JUDGE FAHEY: The way I - - - the way I  
16 understand the defendant's argument, though, on the  
17 Appellate Division's actions, is that the Appellate  
18 Division - - - the - - - their theory, I'm - - - I'm not  
19 saying I agree with that - - - is that they improperly  
20 restricted their decision by saying that if an issue is  
21 going to be affirmed, it can't go back for a hearing. But  
22 if it's going to be reversed or modified, it can go back to  
23 hearing, and they point to the illogic of that, since you  
24 obviously don't know what you're going to do and if there's  
25 a fact in dispute until you've sent it back to find out the

1 answer on the factual question.

2 And - - - and that's why I turned again and say,  
3 this seems like a 440 issue, because that's - - - the - - -  
4 the issue that matters in this case, consent or not, and  
5 then if there wasn't consent, do you hit - - - then you  
6 have an appealable issue on the jurisdictional question,  
7 theoretically. And it - - - it doesn't touch at all the  
8 Appellate Division jurisdiction question, which is an  
9 entirely se - - - separate matter that is really not  
10 properly briefed before us in any way whatsoever, so.

11 MS. UNDERWOOD: I agree that it - - - that the  
12 way that - - -

13 JUDGE FAHEY: That - - -

14 MS. UNDERWOOD: - - - it came up makes it a very  
15 difficult to address that question appropriately - - -

16 JUDGE RIVERA: Well, it's a bit odd, isn't it,  
17 this - - - this position that the majority takes, because  
18 one would only worry about this missing or nonexistent fact  
19 or a lack of factual development if one thinks you need  
20 that fact - - -

21 MS. UNDERWOOD: Well, I understood the - - -

22 JUDGE RIVERA: - - - which is his first argument  
23 - - -

24 MS. UNDERWOOD: I understand that - - -

25 JUDGE RIVERA: - - - that you don't need that



1 fact.

2 MS. UNDERWOOD: - - - I took the Appellate  
3 Division to be saying, we haven't decided. It might be  
4 necessary. I supposed they're saying if there's enough  
5 probability that it's necessary, that we don't want to get  
6 into this issue, if we don't have a record. It lends  
7 itself therefore to - - - and - - - and they also said we  
8 could reach it, if it's a pure question of law, so it lends  
9 itself to this reading that the whole thing is a  
10 discretionary decision.

11 It is also true, though, that they said something  
12 about not having power to remit under certain  
13 circumstances. And so, the other way to deal with it is to  
14 take, as an assumption, their assumption. Their assumption  
15 is that they need more facts, and then to ask the legal  
16 question, do they have the power to remit to get more  
17 facts. This court has done that sometimes.

18 JUDGE RIVERA: It's hard to walk - - - it's hard  
19 to walk away from the opinion without see - - -  
20 understanding that the majority believes that the only way  
21 to uphold this statute is that the DA has to consent, and  
22 so they need a record to figure out if that's what happened  
23 here. It's very hard to read this majority otherwise.

24 MS. UNDERWOOD: Well, I would say that at the  
25 time - - - that now that we know what the Appellate



1 Division thinks - - - I certainly agree with you - - -

2 JUDGE FAHEY: But let's - - - let's say that - -

3 -

4 MS. UNDERWOOD: If you just look at the opinion  
5 on its face, it's a little harder to know exactly - - -

6 JUDGE FAHEY: But - - - but let's say that the  
7 real underlying issue here is, is consent necessary?

8 MS. UNDERWOOD: Right.

9 JUDGE FAHEY: Right, that's the issue.

10 MS. UNDERWOOD: Right.

11 JUDGE FAHEY: So if consent's necessary - - -

12 MS. UNDERWOOD: That's an important issue.

13 JUDGE FAHEY: - - - what - - - what form would  
14 you say that consent had to take?

15 MS. UNDERWOOD: Well, I think that one thing that  
16 has to happen is the attorney - - - is the district attorney  
17 has to understand that he has the ability to consent or  
18 not.

19 We have - - - there have been a lot of hear - - -  
20 not a lot - - - but a number of hearings on the issue of  
21 the consent in the trial court, where the issue was  
22 preserved, and - - - and often, but not always, the  
23 district attorney said, I signed a piece of paper saying it  
24 is agreed that the special prosecutor should handle this  
25 case, but I did that simply because I understood that he



1 had authority to do so. I didn't think I had an option.  
2 That's one thing the DAs sometimes say.

3 But there have been some cases where the DA said,  
4 oh, no, I agreed. I think this is a good idea. I agreed  
5 that it should go forward. I maintained my familiarity  
6 with the case. So I think that it is not a - - - a forgone  
7 conclusion what a hearing in this particular case - - - I  
8 have no idea what a hearing in this case would show, but  
9 this is not a DA, with respect to which there have been  
10 prior hearings, so we don't really know from other cases,  
11 how this DA thought about - - -

12 JUDGE GARCIA: Is there a standard practice going  
13 forward to educate DAs on what potentially may be the need  
14 here to issue some type of, I guess, knowing waiver?

15 MS. UNDERWOOD: We - - - we have - - - I - - - I  
16 won't say we have - - - have made a campaign, because it's  
17 an open question still, what the answer is on the law. We  
18 have attempted to make known our view widely. The special  
19 prosecutor is certainly - - - has been aware of it from the  
20 - - - from the beginning, and I think that one reason - - -  
21 well, in order to tee the issue up for decision, perhaps  
22 there needs to be a case where there wasn't consent, and  
23 you know, there's some questions about how to get the - - -  
24 the question of whether there is a consent requirement up  
25 to this court.



1           But I do think it's an important issue to decide.  
2           I - - - we have been appearing in these cases. I - - - I  
3           want to say that we did not urge remittal in this case at  
4           the Appellate Division. We said the issue isn't preserved.  
5           But if you reach it, because we don't know what the court  
6           is going to do, if you reach it, you will need to remit for  
7           fact finding. And we didn't focus really at that time on  
8           the question of the possible limitation on the power of  
9           remittal at that point.

10           JUDGE WILSON: So just - - - just to be clear, if  
11           an actor walked into a courtroom, and pretended to be the  
12           DA, and everybody knew it was an actor, and the defendant  
13           thought I'll get a better chance with Sam Waterston than I  
14           do with the real DA, you would say that has to be  
15           preserved, and if there's no objection made at the trial  
16           level, Mr. Waterston gets to be the DA.

17           MS. UNDERWOOD: Well, I think I would say it has  
18           to be preserved. There would be - - - if it were apparent  
19           on the face of the record, that would might - - - that - -  
20           - I mean, there are two problems here. It wasn't  
21           preserved, and there isn't an adequate record to decide the  
22           question, even if it were preserved.

23           So in your case, it still wouldn't be preserved,  
24           but I - - - I'm assuming that everybody knows that this is  
25           Sam Waterston - - -



1 JUDGE WILSON: But you would say - - - right,  
2 assume everybody knows that - - -

3 MS. UNDERWOOD: Yeah, so I - - -

4 JUDGE WILSON: - - - you would say it still needs  
5 to be preserved?

6 MS. UNDERWOOD: I - - - I would say it should be  
7 - - - maybe Sam Waterston had a delegation from the  
8 district attorney, you know? I mean, maybe there's a story  
9 here about why Sam Waterston is - - - is walking in to do  
10 this. I - - - I don't think - - - most of these cases have  
11 a story behind them. There was a case of an assistant  
12 district attorney, as you probably know, who wasn't a  
13 member of the bar and - - -

14 JUDGE WILSON: Right.

15 MS. UNDERWOOD: Okay. Anyway, I think it's an  
16 important issue. I hope that the court agrees that this is  
17 not the right case in which to decide it. And I will - - -  
18 just - - - just to make the record perfectly clear, we  
19 would be happy to expedite the pro - - - the - - - the  
20 briefing and argument in a case that does squarely present  
21 it without all these threshold jurisdictional problems. We  
22 think it's important to get this resolved.

23 JUDGE RIVERA: Thank you, Counsel.

24 MS. UNDERWOOD: Thank you.

25 JUDGE RIVERA: Sir?



1 MR. HOFFMAN: A bit briefly, Your Honors.

2 Judge Wilson, following up on your points, I  
3 think that's precisely why the court in Gilmour said it's  
4 the prosecution's burden to establish prosecutorial  
5 authority, so we don't have some random person walking in  
6 convening a grand jury, conducting a trial, convicting a  
7 defendant, and then advocating for the maximum possible  
8 sentence.

9 JUDGE GARCIA: But then wouldn't - - - in every  
10 case, would the prosecutor have to begin their case, by  
11 saying, well, now, I'm just going to present the court with  
12 some evidence to show I'm really a prosecutor?

13 MR. HOFFMAN: Not if it's the elected district  
14 attorney.

15 JUDGE GARCIA: What if it's an ADA?

16 MR. HOFFMAN: But - - - but if it's a special  
17 prosecutor - - -

18 JUDGE GARCIA: How do we know it isn't an actor?

19 MR. HOFFMAN: I - - - I don't think that's a  
20 heavy burden, Your Honor.

21 JUDGE GARCIA: I'm not an actor. I'm a member of  
22 the bar. Like, do they have to make that record in every  
23 case?

24 MR. HOFFMAN: If - - - if it's a special  
25 prosecutor, I don't think that's a heavy burden to ask.





1 JUDGE GARCIA: But then it's only if it's a  
2 special prosecutor.

3 MR. HOFFMAN: That they say I'm the special  
4 prosecutor. I have the consent of the district attorney.  
5 The district attorney has retained full authority over this  
6 matter.

7 JUDGE GARCIA: First of all, that - - - we don't  
8 even know if that's necessary. Our court has never ruled  
9 on it.

10 MR. HOFFMAN: Correct.

11 JUDGE GARCIA: So you are saying that as, what a  
12 belt and suspenders, they should come in and say I have the  
13 consent of the district attorney? Where there's not even a  
14 legal requirement from this court that that happen.

15 MR. HOFFMAN: Well, this court has said it as to  
16 the attorney general in Gilmour.

17 JUDGE GARCIA: But in this case, in this special  
18 prosecutor, in this statute, this - - - every prosecutor  
19 should just come in, as a matter of course, off the bat,  
20 and say, I have the consent of the district attorney, even  
21 though there is absolutely no legal requirement from this  
22 court that they do that.

23 MR. HOFFMAN: There is no requirement from this  
24 court with respect to this special prosecutor, an unelected  
25 gubernatorial appointed prosecutor. But this court has



1 said, there is such a requirement for the attorney general,  
2 a duly elected official under the Constitution. So if  
3 there is one for the duly elected attorney general - - -

4 JUDGE GARCIA: But are your adversaries right - -  
5 -

6 MR. HOFFMAN: - - - how could there not be one  
7 for the special prosecutor?

8 JUDGE GARCIA: Are your adversaries right that  
9 that was a preserved challenge to the jurisdiction of that  
10 prosecutor?

11 MR. HOFFMAN: It - - - it was not addressed at  
12 all in - - - in this matter, Your Honor.

13 JUDGE GARCIA: No, but in that - - -

14 MR. HOFFMAN: In Gilmour?

15 JUDGE GARCIA: - - - Gilmour?

16 MR. HOFFMAN: I would have to go back and look; I  
17 apologize, Your Honor.

18 JUDGE GARCIA: Because that would be very  
19 different if somebody - - -

20 MR. HOFFMAN: But it - - -

21 JUDGE GARCIA: - - - came in and asked for that,  
22 then there might be an obligation, and what's the level of  
23 proof the prosecutor has to bring. But I think what you're  
24 suggesting is sort of this affirmative duty to establish  
25 your credentials in the beginning of the proceeding.



1 MR. HOFFMAN: Well, just in April, Your Honor,  
2 the Fourth Department in *People v. Wassell*, addressed  
3 prosecutorial authority as an unpreserved error, and there  
4 was no letter. Again, it was an attorney general case.  
5 There was no letter in the record, and as Judge Wilson  
6 indicated in *Gilmour*, the Fourth Department did the same  
7 thing. They dismissed saying there is no letter in the  
8 record in that case.

9 So I - - - I think this all comes down to what  
10 Judge Smith indicated in *People v. Lopez*. This court has  
11 to act to see that justice is accomplished. By - - - by  
12 putting form over the merits, you're not accomplishing  
13 justice. As Judge Rivera indicated, Mr. Cubero is sitting  
14 and waiting for an eight-year sentence to be completed,  
15 while courts try and sort out what happens with this  
16 statute, when he very well could have been prosecuted and  
17 indicted - - - indicted and prosecuted.

18 JUDGE GARCIA: Would that scenario be different  
19 if the Appellate Division had declined to address this in  
20 the interest of justice? Would your scenario about the  
21 effects of that be any different?

22 MR. HOFFMAN: If - - - I'm - - - I'm sorry, Your  
23 Honor. Could you - - -

24 JUDGE GARCIA: If this - - - instead of some of  
25 the language that's in this decision, if the Third



1 Department had just said, it's unpreserved, we could  
2 address it, we're not addressing it. He'd still have to  
3 wait, wouldn't he?

4 MR. HOFFMAN: He - - - he would, but that's not  
5 what the Third Department said.

6 JUDGE GARCIA: It's the system, isn't it?

7 MR. HOFFMAN: What the Third Department said is  
8 our hands are tied. We can't do anything.

9 JUDGE GARCIA: Right, but you seem to be making  
10 an almost equitable argument, that if we don't reach this,  
11 and we don't fix this, then people in this situation will  
12 have to wait whatever the length of the sentence may be,  
13 but isn't that the nature of an unpreserved claim?

14 MR. HOFFMAN: One would - - -

15 JUDGE GARCIA: I mean, they may not get to it - -  
16 - they may not reach it in the interest of justice?

17 MR. HOFFMAN: One would think given a  
18 jurisdictional issue that strikes at the heart of the  
19 criminal justice system, the court would want to address  
20 it.

21 JUDGE STEIN: Well, it - - - it - - - if - - -  
22 taking that one step further, if the Appellate Division had  
23 declined to address it in the interest of justice, would we  
24 have had the power to reverse that declination?

25 MR. HOFFMAN: I - - - I don't believe so, Your



1 Honor. But we - - - with judge - - - Justice Lynch's  
2 dissent, you would still have the issue of whether there's  
3 an inherent authority. But the court didn't say - - -

4 JUDGE RIVERA: Well, you'll be left with your  
5 ineffective assistance of counsel claim, and that may or  
6 may not get you somewhere.

7 MR. HOFFMAN: Correct. We still have that out  
8 there.

9 JUDGE RIVERA: Okay. Thank you, Counsel.

10 MR. HOFFMAN: Unless there are any - - -

11 JUDGE RIVERA: Sorry.

12 JUDGE FEINMAN: I want to be clear about what it  
13 is you are asking us to hold in this case.

14 MR. HOFFMAN: At - - - at this point, Your Honor?

15 JUDGE FEINMAN: Yeah, at this point.

16 MR. HOFFMAN: We're - - -

17 JUDGE FEINMAN: Like, if you were writing the  
18 decision. Let's say I said, go ahead, write the decision,  
19 how would you write it?

20 MR. HOFFMAN: At - - - at this point, we would be  
21 saying that the Appellate Division improperly restricted  
22 its interest of justice jurisdiction, that it does have the  
23 authority to withhold decision, not exercise its interest  
24 of justice jurisdiction. Simply withhold decision, send it  
25 back for further factual development on these two crucial



1 issues which the Appellate Division has now said are  
2 required to save this statute, and then return to the  
3 Appellate Division for them to determine whether they want  
4 to exercise their interest of justice jurisdiction or not.  
5 And that's what we would ask.

6 And - - - and if there are no further questions,  
7 thank you.

8 JUDGE RIVERA: Thank you.

9 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Michael Cubero, No. 68 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001  
Date: September 10, 2019

