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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 15

MARINA VIVIANI,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 16

JUSTIN HOPE,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 17

NICOLE HODGDON,

Respondent.

20 Eagle Street
Albany, New York
February 10, 2021

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



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Official Court Transcriber



1 JUDGE RIVERA: Last three appeals to be heard
2 together on today's calendar, People v. Marina Viviani,
3 People v. Justin Hope, People v. Nicole Hodgdon.

4 We'll start, of course, with the Special
5 Prosecutor.

6 If you would, Counsel?

7 MS. HALLIGAN: Thank you, Your Honor. And may it
8 please the court, Caitlin Halligan representing the Justice
9 Center as Special Prosecutor. I'd like to reserve three
10 minutes for rebuttal, if I may?

11 JUDGE RIVERA: You have them.

12 MS. HALLIGAN: Thank you, Your Honor.

13 The Attorney General at this court will take the
14 extraordinary step of holding that the legislature may not
15 authorize the Governor to appoint a special prosecutor with
16 concurrent jurisdiction over crimes against a particularly
17 vulnerable group of New Yorkers.

18 JUDGE RIVERA: Counsel, if the court disagrees
19 with you - - - as I understand one of the core arguments
20 you're making - - - if the court disagrees with you
21 regarding the Governor's authority, right, do you then lose
22 the case? Does the - - - does your entire position turn on
23 whether or not we agree about the Governor's authority?

24 MS. HALLIGAN: Absolutely not, Your Honor,
25 because what's at stake here is a decision by both the



1 Governor and the legislature. The legislature here
2 exercised authority which this court has confirmed
3 repeatedly. And the Constitution also makes clear that it
4 has to allocate prosecutorial duties. Nothing in the
5 Constitution allocates prosecutorial power to any public
6 official. And so that is reserved to the legislature.

7 JUDGE RIVERA: But we have - - - we have said,
8 Counselor, right, that the - - - that it is the core
9 function of the district attorney to prosecute. That's
10 what they do, and of course, the Attorney General,
11 constitutionally, had that authority.

12 MS. HALLIGAN: Well, Your Honor, the Attorney
13 General, under Article 5 - - - the Attorney General's
14 functions can be diminished, set by the legislature. But
15 to go to the question about the district attorney, and
16 specifically to focus on the cases that Your Honor and the
17 Attorney General refer to in - - - in Your Honor's dissent
18 in Davidson. I'd like to address those, if I can, because
19 we think that they provide no basis for curtailing the
20 legislature or the Governor's power here.

21 And there are two sets of cases. The first is
22 Wogan, and the second are Schumer and Haggerty. So I'd
23 like to address them both. First of all, with respect to
24 Wogan, the Attorney General says that allowing the special
25 prosecutor to exercise concurrent jurisdiction, but to do



1 so independently, with the safeguards present in the
2 statute, runs afoul of Wogan. It is not applicable here.

3 Wogan makes clear that what was at stake there
4 was a complete transfer, and I will quote here, "of all
5 real authority of a constitutional officer" and the
6 legislature there vested, "All of the powers with a
7 different statutorily created officer", and that meant - -
8 -

9 JUDGE GARCIA: Your Honor, if I might ask a
10 question at this point?

11 Counsel, just to stay with Wogan; I'm sorry to
12 interrupt, but as I understood Wogan, it - - - it was a
13 county clerk position and what they had transferred, let's
14 call it, to this deputy, was for the county court
15 clerkship. And I'm - - - I'm not sure I'm quite clear on
16 what that meant. I - - - I thought that was a portion of
17 the overall role of the county clerk, this clerk of the
18 county court portion of that in Wogan. So I - - - I didn't
19 read it, and I might be misreading it, to be that they had
20 transferred the entire duties of the county court - - - the
21 county clerk position.

22 MS. HALLIGAN: I think the best reading, Your
23 Honor, is that all of the duties were transferred because
24 the court says that the legislature can't transfer "all
25 real authority" and authorize the new clerk to fulfill all



1 the duties of the constitutional clerk or to the exclusion
2 of the county clerk. So I think the fairest reading is
3 that it was the entire basket.

4 But in any event, Your Honor, what is done with
5 Section 552 is a very small slice of powers that would
6 otherwise be given exclusively to the district attorney.
7 But - - -

8 JUDGE STEIN: Well, I - - - I read, actually,
9 Wogan a little bit differently. I think I - - - I read
10 Wogan as referring to the essential functions - - -

11 MS. HALLIGAN: Yes.

12 JUDGE STEIN: - - - and whether it means, you
13 know, everything or - - - or just certain authority that
14 the constitutional officer has, and I - - - you know, so I
15 - - - here, I think, with your reading of the statute, the
16 - - - the question becomes, even if it's concurrent
17 authority or whatever, what is the essential function of a
18 DA? Is it the discretion of who, when, and how to
19 prosecute someone? And if that is the case, then why isn't
20 that the case with this particular statute?

21 MS. HALLIGAN: So the duties of the district
22 attorney, Your Honor, are set forth by the legislature in
23 County Law 700. And what the Attorney General is
24 suggesting is that under this court's decision in Schumer
25 and in Haggerty, that none of that power can be transferred



1 to another official. That's not what those cases say.

2 Both of those cases make clear that what the - -
3 - what can't happen is that neither the Attorney General
4 nor the district attorney can freely transfer powers that
5 have been given to it by the legislature. But the
6 touchstone is what the legislature has decided.

7 Here's what Schumer says. Schumer says that "the
8 powers of the district attorney are conferred upon her by
9 statute" and that the "transfer may be accomplished only by
10 executive or court order", and there cites two provisions
11 which do transfer powers from the district attorney,
12 Section 63(2) and Section 701.

13 So that's exactly what happens here. The
14 legislature transferred a small piece of the district
15 attorney's power, concurrently, not exclusively, to another
16 officer, and that's exactly what - - -

17 JUDGE STEIN: Well, that - - - that - - - that's,
18 I think, the point. I mean, I - - - or part of the point,
19 is that the - - - the DA and the Attorney General have
20 historically been given prosecutorial powers. And you
21 know, I - - - I'm not aware of any historical use of such
22 powers by the Governor.

23 And so when the legislature gives the Governor
24 the power to say, okay, in this particular instance, I'm
25 going to give the DA's authority to the AG, that's really



1 transferring from one of those two historical prosecutorial
2 offices to another and is a little - - - and - - - and you
3 know - - - and that would certainly be as far, you know,
4 under 60 - - - under Section 63, what generally occurs. So
5 that seems to me to be a little bit different from what we
6 have here.

7 MS. HALLIGAN: I think the first - - -

8 JUDGE FAHEY: Judge, in - - - just to follow up
9 and then you can an - - - then you can answer. I - - - I
10 don't mean to cutoff your answer, but the way I read
11 Haggerty - - - it's a '97 Court of Appeals case - - - it
12 referred to the essence of the DA's authority as a
13 discretionary power to determine who, whether, and how to
14 prosecute. It seems to feed directly into a refinement of
15 the analysis that took place in Wogan, and to support Judge
16 Stein's point.

17 MS. HALLIGAN: I would disagree, Your Honor.
18 Here's why.

19 JUDGE FAHEY: Okay.

20 MS. HALLIGAN: Haggerty, as well as Schumer, make
21 clear that the question is what has the statutory framework
22 set forth? So in Haggerty, for example, the court there
23 holds that an assistant attorney general can assist a
24 district attorney, that it does not run afoul of Section
25 63(12). There is nothing in Haggerty or in Schumer or in

1 Wogan, for that matter, which suggests that the legislature
2 is barred, constitutionally barred - - -

3 JUDGE FAHEY: Let - - - let's take - - - let's
4 take a step back, though, for a second. Concurrent
5 authority means that different prosecutors can do different
6 things on the same case. Does - - - doesn't that create a
7 nightmarish public policy scenario for dealing with social
8 problems that arise? It - - - it doesn't make sense, that
9 argument.

10 MS. HALLIGAN: Well - - - well, Your Honor, I
11 think that the experience of the Special Prosecutor shows
12 exactly the opposite, and I would draw Your Honor's
13 attention to - - -

14 JUDGE FAHEY: Well, I - - - I would stop you
15 there. I think that's because the people involved are
16 reasonable, intelligent people who are trying to do the
17 right thing with a difficult problem. I think you're right
18 about that, that they've conducted themselves fine. I
19 don't think that's the problem.

20 The question is not for - - - for how they
21 particularly conducted themselves here. I think the
22 question really goes to the core of what could happen in
23 the future. And concurrent authority in a prosecutorial
24 setting would seem to be contrary to basic principles of
25 public policy because then you could pick and choose your



1 prosecutors.

2 MS. HALLIGAN: Well, Your Honor, a couple - - - a
3 couple of responses to that, if I can. First of all, with
4 due respect, the public policy question is one for the
5 legislature to address, and it has addressed it here. And
6 the legislature here acted unanimously, in that it only set
7 up special prosecutors three times in the state's history.
8 And each of those three incidents were in the face of very
9 serious problems, which it felt it could only solve with
10 that approach.

11 JUDGE STEIN: Yes, but each - - - each of those
12 times, it was - - - it was between, you know - - - there -
13 - - there was - - - it was between the - - - the AG and the
14 - - - the DA, and their - - - and - - - and their - - - and
15 - - - and people working under them or with them. Right?
16 And - - - and that's - - - I mean, that's - - - and that's
17 exactly the question that we're asking here is, is that
18 kind of supervision, maintenance of retention of ultimate
19 responsibility, you know - - - do we - - - do we have any
20 examples of when that wasn't the case, in - - - in which
21 the court has approved that kind of arrangement?

22 MS. HALLIGAN: Yes, Your Honor. And I'd like to
23 set to the side for the moment, if I can, the question of -
24 - - of ultimate authority and come back to that, retention
25 of authority.



1 For this court to hold that both the legislature
2 and the Governor are completely prohibited here, I think
3 there needs to be something specific in the Constitution.
4 There is none.

5 You asked if there are other examples. County
6 Law 701, as well as the two statutes that provide for
7 filling of a vacancy of a district attorney slot, which is
8 Section 496 and the 920 - - - sorry, 400 and 926 - - -

9 JUDGE STEIN: But - - - but don't - - - don't
10 both of those apply in - - - apply in situations where the
11 DA, for - - - for all practical purposes, either is
12 literally not there, the - - - the position is vacant, or
13 cannot act in the role of the DA because of some other
14 limitation?

15 MS. HALLIGAN: That's right, Your Honor, but the
16 question here is whether or not the Constitution prohibits
17 anyone other than the AG or the DA from exercising
18 prosecutorial authority. And so the answer to that is yes
19 or no, and it cannot be the case - - -

20 JUDGE RIVERA: All right. So Counsel, let me
21 interrupt there. I'm going to - - - I'm going to circle
22 back to, I believe, where Judge Fahey was - - - was trying
23 to go with - - - with his inquiry.

24 So let's assume we agree with what you just said.
25 Let's - - - let's just go with that for one moment. Sort



1 of where - - - where does that end? Isn't the logical sort
2 of extension of this argument, where we end up, is that the
3 legislature can take any kind of case at any time, an
4 entire class of case, away from the district attorney? And
5 if that is true, why isn't that really an evisceration of
6 the core responsibility of that constitutional officer, the
7 one who is elected, not appointed?

8 And that's my problem --

9 MS. HALLIGAN: I think --

10 JUDGE RIVERA: -- eventually with your rule. No,
11 that's okay. You'll have time to answer, please.

12 MS. HALLIGAN: Okay. All right. So - - - so
13 Your Honor, you - - - when we started our exchange earlier,
14 you said, assume we disagreed with you about the Governor's
15 authority. I would say, first of all, I think there is a
16 strong argument and this court suggests so in Johnson, that
17 the governors take their power, provide authority to do
18 this, without the legislature acting.

19 With respect to the legislature, I would say that
20 there is no reason to think that the legislature - - -
21 which acted unanimously here, which is unusual, and has
22 done so very sparingly - - - would enact a series of
23 statutes which strip the district attorneys of all
24 prosecutorial power. And I would also say to you that - -
25 -



1 JUDGE RIVERA: Yes, but - - - but - - - but
2 again, we're dealing with the doctrine.

3 MS. HALLIGAN: That's correct - - -

4 JUDGE RIVERA: If we adopt your view - - - if - -
5 - excuse me. If we adopt your view, then there would be no
6 way that they could cede their powers otherwise. They
7 could cede their powers; they can remove anything. I'll
8 take it a historical example, right. Domestic violence,
9 historically, has been one where there has been some
10 reticence from law enforcement to prosecute. So there were
11 legislative changes to address that. But that entire area
12 was not taken away from district attorneys, right, because
13 that would have eviscerated their core responsibility to
14 prosecute.

15 So I - - - it is a point well taken, of course,
16 that you make, and you see it, and of course, and the
17 purpose of the legislation, that the legislature is trying
18 to respond to - - - to these challenges in a way that it
19 deemed appropriate and fair. But un - - - under your
20 approach, there is no end to this.

21 MS. HALLIGAN: If I may just respond - - -

22 JUDGE RIVERA: Yes, of course.

23 MS. HALLIGAN: - - - to your point, Your Honor.

24 JUDGE RIVERA: Yes.

25 MS. HALLIGAN: I - - - I am fully confident that



1 if the legislature ever acted in a way that, as you
2 suggested, took away a wide swath of the district
3 attorney's power, that this court would stand ready to
4 ensure that that constitutional office is not eviscerated.
5 That's what the court did in Wogan when all of those powers
6 were transferred.

7 JUDGE RIVERA: But Counsel - - - and then it'll
8 be the last question, so we can let the other attorneys
9 have their opportunity, and you have your rebuttal - - -
10 but - - - but, Counsel, at - - - at what point is too much?
11 Two cat - - - two other cat - - - two other categories of
12 crimes, three, four? Where - - - where do we draw that
13 line?

14 MS. HALLIGAN: Your Honor, not here is the answer
15 to your question. And if for example, the court - - - the
16 - - - the legislature decided to strip away all violent
17 crimes, this would be a much harder case. It's not where
18 we are, Your Honor.

19 JUDGE RIVERA: Thank you.

20 JUDGE WILSON: Judge Rivera, I'm sorry; I have a
21 question - - -

22 JUDGE RIVERA: Yes, go ahead.

23 JUDGE WILSON: - - - out of left field for Ms.
24 Halligan, but I didn't want to derail the prior discussion.
25 Could you explain the procedure by which you



1 became the Assistant Special Prosecutor for the Justice
2 Center and what your reporting relationship is to the
3 Justice Center or Ms. Dunn?

4 MS. HALLIGAN: Well, generally, the Attorney
5 General's Office would defend a state agency. The Attorney
6 General here has taken a very unusual position that the
7 statute as construed to allow the Special Prosecutor
8 independent authority is not constitutional. And so for
9 that reason, the Justice Center had to obtain counsel in
10 order to represent it in this proceeding, and that is why I
11 am here today, Your Honor, instead of - - -

12 JUDGE WILSON: And then you - - -

13 MS. HALLIGAN: - - - the Attorney General.

14 JUDGE WILSON: And you report to Ms. Dunn in that
15 capacity? She has supervisory authority over you?

16 MS. HALLIGAN: To - - - to Ms. Dunn, yes, who is
17 the Special Prosecutor who is here with me today.

18 JUDGE WILSON: Thank you.

19 JUDGE GARCIA: Judge Rivera, if I could ask one
20 last question?

21 JUDGE RIVERA: Yes, of course. Yes, Judge.

22 JUDGE GARCIA: Thank you.

23 Counsel, just before we move on, your view on
24 there is this notion that if we find infirmities with the
25 statute, that we can read consent and ultimate authority



1 provisions into the statute. And I want to just be sure I
2 understand your position, which I think is, if you read the
3 statute as written to provide for the consultation and the
4 notice and also with the general provisions, that that
5 alone would satisfy a need for coordination with the
6 district attorneys without having to impose other
7 requirements that aren't in the statute.

8 MS. HALLIGAN: Absolutely, Your Honor, and I
9 would also say that the cases which the Attorney General
10 cites in Sickle and Soddano do not provide any support for
11 requiring retention of authority where the person
12 prosecuting the case is designated by statute.

13 And secondly, the other special prosecutors for
14 OCTF and the Special Narcotics Prosecutor and certainly
15 County Law 701 have no similar requirement, and the
16 uncertainty in terms of litigation and the delays that that
17 would introduce would completely thwart the goals of this
18 statute in terms of helping prosecute these crimes in a
19 timely fashion.

20 JUDGE GARCIA: Thank you.

21 MS. HALLIGAN: And I'm happy to address any of
22 those specifics, but I know I've run over my time, whatever
23 the court directs.

24 JUDGE RIVERA: Yes, thank you. Okay.

25 Mr. Pollok?



1 Unmute, please.

2 MR. POLLOK: I was just asking if you could hear
3 me.

4 Thank you. May it please the court, my name is
5 Michael Pollok. I'm representing Maria - - - Marina
6 Viviani.

7 And the Special Prosecutor spent most of her
8 argument in asserting that the statute gives a slice of
9 power to the Special Prosecutor. And I - - - and in
10 response to that, I would simply read the statute itself,
11 which is set - - - Executive Law 522(2)(c), last sentence,
12 it says the special prosecutor or his or her assistant "may
13 exercise all the powers and perform all the duties in
14 respect of such actions or proceedings which the district
15 attorney would otherwise be authorized or required to
16 exercise or perform."

17 That is clearly in contravention of Wogan. That
18 is all of the power. And I think I'm the only person that
19 raised this issue, but I am asserting that this court
20 actually does not have jurisdiction to hear this case,
21 because at the very least, it's a mixed question of fact
22 and law, under People v. Warren, 61 NY 2d. 886 - - -

23 JUDGE STEIN: Well, Counsel, are - - - are we
24 deciding - - - aren't we deciding whether the statute is
25 constitutional, rather than whether, you know, any facts to



1 do with this case? We don't have to decide those facts, do
2 we?

3 MR. POLLOK: Well, if the statute is
4 constitutional, the question then becomes, did the district
5 attorney's office comply with the statute? And in this
6 case, we had a fact-finding hearing. And the - - - and the
7 court held - - - the Supreme Court held that no, the
8 district attorney did not maintain ultimate jurisdiction
9 over - - -

10 JUDGE STEIN: But so - - - so you're suggesting
11 that if we came to that conclusion that it was
12 constitutional, that there are limitations on our review of
13 the determination made by the courts below as to whether
14 they - - - they - - - they complied with the requirements
15 of the statute, right?

16 MR. POLLOK: That's what Warren would hold, and
17 this is - - -

18 JUDGE STEIN: Okay.

19 MR. POLLOK: - - - fact-driven. In this - - - in
20 my case - - -

21 JUDGE STEIN: But that doesn't prevent us from
22 getting to the - - - to the broader issue.

23 MR. POLLOK: I - - - I don't - - - well, it's a
24 mixed question of law, so you would have to decide whether
25 you would exercise your discretion and to review that. But



1 in a mixed question of fact and law, my understanding is
2 that the factual determinations should not be disturbed, so
3 I guess it would arise - - -

4 JUDGE RIVERA: Well - - - well - - - well, let's
5 say that we - - - we've decided that there is a question of
6 law given this issue about the constitutionally - - -
7 constitutionality of the statute as interpreted by the
8 Special Prosecutor; that is at issue and properly before
9 us, so let's stay with that for one moment.

10 So then, Counsel, is it your position that there
11 is no way to interpret the statute to save it? It is just
12 unconstitutional; the limiting approach that has been
13 adopted by the Third Department, and that I have discussed
14 in my dissent in Davidson, that - - - that - - - that there
15 is - - - or some other way - - - there is just no way to
16 read this statute and save it?

17 MR. POLLOK: That's our position. There's no way
18 to save this statute based upon the language I just read to
19 you, interpreting Wogan - - -

20 JUDGE RIVERA: But there's also language in the
21 statute that otherwise indicates that the special
22 prosecutor must indeed support and not interfere with the
23 work of the district attorney, must consult with the
24 district attorney. Why - - - why doesn't that lend itself
25 to this more cabined reading that, of course, the Attorney

1 General's Office has advocated from the very beginning?

2 MR. POLLOK: Well, I don't see how you get around
3 the other language in the statute, which is, they have
4 absolute full authority as a - - - as a - - - as a
5 prosecutor, without being an elected constitutional
6 officer.

7 JUDGE RIVERA: Yes, but the - - - the limiting -
8 - - the limit - - -

9 MR. POLLOK: And I don't think the - - -

10 JUDGE RIVERA: If I can interrupt, Mr. Pollok.
11 The limitation would be that, of course, if the district
12 attorney consents that they can proceed as the prosecutor,
13 the district attorney having the ultimate responsibility,
14 that seems to harmonize and allow for the special
15 prosecutor to serve as a prosecutor when - - - when the
16 district attorney believes that that is the best way to
17 proceed, and agrees to the prosecution.

18 MR. POLLOK: Well, I - - - I can't agree with
19 that either because under Wogan, not only must a prosecutor
20 maintain ultimate prosecutorial authority, the prosecutor,
21 the district attorney, must have the authority to remove
22 the - - - the lawyer at will. That's language from Wogan.
23 And under any scenario with this statute, the Justice
24 Center acts independently.

25 In my case, the district attorney's office was



1 not involved in plea discussions. They did not appear on
2 calendar calls. They had nothing to do with discovery.
3 Basically, they said, here's your grand jury time; do
4 whatever you want. So we don't know whether - - - because
5 the ADA in the case didn't testify at the fact-finding
6 hearing or submit an affidavit - - - an ADA, by the way,
7 who's married to a Justice Center employee, although I
8 don't know why this - - - my client was prosecuted, if that
9 was the reason - - -

10 JUDGE WILSON: Well, now that sounds like a
11 question of fact.

12 MR. POLLOK: Right. But we never had - - - we
13 never - - - I was never able to cross-examine that - - -

14 JUDGE WILSON: Judge Rivera, may I ask a question
15 of counsel?

16 JUDGE RIVERA: Of course.

17 JUDGE WILSON: So Counsel, how - - - how would
18 you have us interpret the "Nothing herein shall interfere
19 with the ability of district attorneys" language in the
20 statute? How would - - - how should we interpret that?

21 MR. POLLOK: I think that's very vague. I - - -
22 I don't think it's - - - it's applicable language. I think
23 it's - - - it's - - - it's countermanded by the language
24 that these special prosecutors have "all the powers and
25 perform all the duties in respect of such actions or



1 proceedings." I mean, it cancels out that interference.
2 If - - - if there's consultation, and the district attorney
3 gives them grand jury time, then they have full power, even
4 though they're unelected and they're not constitutional
5 officers.

6 The - - - the whole purpose of - - - and there,
7 if you read the intervenor's brief, I think they lay out a
8 good history of the constitutional conventions that have
9 been held in the state, where the concept of expanding
10 prosecutorial powers was rejected over and over again.

11 And I - - - the Constitution does not allow the
12 usurpation of the discretionary power also, that - - -
13 whether or not the case should be prosecuted in the first
14 place. That is being usurped because you're having - - -
15 the Justice Center can, in this case, have an employee
16 married to a Justice Center employee arrange for grand jury
17 time and go to the grand jury. I doubt that Mr. Soares
18 even knew that the case was being presented. I doubt he
19 had the opportunity to even - - -

20 JUDGE STEIN: Well, but if we were to read the
21 statute as requiring the DA's knowing consent and ultimate
22 - - - retention of ultimate authority and responsibility,
23 then in that case, if the DA felt that there was something
24 improper about the Special Prosecutor prosecuting this
25 particular case, then - - - then wouldn't that allow the DA



1 to say, uh-huh, I'm going to handle this, and I may or may
2 not prosecute it.

3 MR. POLLOK: Judge, I don't know. I don't - - -
4 there's no remedy in the statute. I don't know - - - if
5 you get into a conflict like that, you'd have to go to
6 court, and the DA would have to argue they're interfering,
7 and the Justice Center could say, no, we're not; we have
8 the authority to exercise all powers and perform all duties
9 of the district attorney's office.

10 JUDGE RIVERA: But, Counsel, I - - -

11 JUDGE FEINMAN: Well, so if I understand - - -

12 JUDGE RIVERA: But the - - -

13 JUDGE FEINMAN: Sorry.

14 JUDGE RIVERA: If I may just finish? I think
15 what Judge Stein is describing for you is an appropriate
16 limitation that would say, regardless of whether or not the
17 special prosecutor wants to go in and move forward, if the
18 district attorney decides otherwise, or if the district
19 attorney doesn't approve some of those strategic choices,
20 that it's ultimately for the district attorney to decide.

21 And if this court renders a decision that says
22 so, that resolves the issue. I think that - - - if - - - I
23 believe that is what Judge Stein was trying to discuss with
24 you. Why wouldn't that be an appropriate way to read the
25 statute, to preserve the core functions of the District



1 attorney, achieve some of the purpose of the legislation,
2 and protect the defendant from, you know, someone who
3 doesn't have jurisdiction to try to prosecute them?

4 MR. POLLOK: Because you still have - - -

5 JUDGE FEINMAN: Well, and then part of answering
6 a question, I have a slightly different one, which is, why
7 isn't what Judge Rivera and Judge Stein asking simply
8 rewriting the statute, as opposed to saying, ma - - -
9 legislature, you - - - you've passed an unconstitutional
10 statute; go back and try it again? And you might want to
11 write in some of the protections or - - - or not, that are
12 discussed in the Davidson dissent.

13 MR. POLLOK: Well, I - - - I imagine that's what
14 will happen if the court finds the statute unconstitutional
15 as written. The court can set forth, under Wogan, what the
16 parameters are. I don't see how that can be - - - how can
17 that can happen, unless the Justice Center prosecutors
18 become employees of the - - - of the county district
19 attorneys under Wogan, because they must be removable at
20 will. And that's from the - - - from the decision. That's
21 part of the criteria.

22 I - - - I'm all for having more prosecutors
23 protect the needs of - - - of special victims, but there
24 are other ways to do it. You can hire more assistant
25 district attorneys. There's the whole question of a - - -



1 an unelected prosecutor having statewide jurisdiction, when
2 the Constitution clearly requires diffused power between
3 the county district attorneys. That part of the - - -
4 they're each elected. They are each accountable to their
5 constituents.

6 And the decision to prosecute somebody for a
7 crime, obviously, is an extreme power. And before you can
8 grant statewide power to all the offenses that the Justice
9 Center can prosecute, which is all of Article 130, there
10 should be some kind of control and - - - and supervision by
11 a constitutional officer. That's our position.

12 I don't think, as a factual matter, the Justice
13 Center satisfied any of the criteria in Wogan. They were
14 given the opportunity here to establish those facts, that
15 there was consultation. The prosecutor who gave the grand
16 jury access to the Justice Center declined to testify or
17 provide an affidavit.

18 So they have not met the burden under Wogan. And
19 they couldn't anyway because the Justice Center employees
20 are not removable at will. And the statute has given them
21 far too much power to exercise all prosecutorial powers,
22 which - - - which usurp the constitutional officer's
23 authority under the Constitution.

24 JUDGE RIVERA: Thank you, Counsel.

25 MR. POLLOK: Thank you, Judge.



1 JUDGE RIVERA: Yes.

2 Counsel?

3 MR. BARTOSIK: Thank you.

4 May it please the court, my name is James
5 Bartosik. I'm from the Albany County Public Defender's
6 Office on behalf of respondent, Nicole Hodgdon. And I'm
7 asking the court to affirm the Third Department decision,
8 upholding the county court's dismissal of the indictment,
9 based on unconstitutional prosecution of the defendant.

10 I - - - I think on its face, there are a lot of
11 different things that the legislature could have done
12 constitutionally to alleviate some of these issues that it
13 found, but the Executive Law 552 is not one of those
14 things. And I - - - I think that's inherent in the
15 language of the statute.

16 First of all, that it's not described as a
17 district attorney in statute, and that it actually has
18 district attorney powers which are problematic, because
19 they're typically reserved for the district attorney or the
20 Attorney General.

21 And as Mr. Pollok was suggesting, the electoral
22 issue is certainly important to this analysis. This court
23 has found in prior case law, that there's an implicit
24 understanding in the New York State Constitution that all
25 prosecutorial power for criminal offenses is reserved for



1 Attorney Generals or district attorneys. And - - -

2 JUDGE WILSON: Judge Rivera, if I may interrupt
3 counsel here for a second?

4 JUDGE RIVERA: Yes.

5 JUDGE WILSON: So could - - - could you respond -
6 - - you may have already just done that - - - but to Ms.
7 Halligan's argument that you can't find anywhere in the
8 Constitution that prohibits the legislature from appointing
9 - - - creating, essentially, another prosecutorial agency?
10 You used the word implicit. If it's implicit, is there
11 anywhere you - - - you would direct us for that
12 implication?

13 MR. BARTOSIK: Your Honor, I would just - - - it
14 is implicit, based on the fact that the - - - the Consti -
15 - - and I mention this in my brief, but the fact that the
16 framers of the New York State Constitution created the
17 Attorney General's position and the district attorney's
18 position and specifically make them elector - - - electable
19 positions, right, with - - - with certain terms that can be
20 removed, that implies that the prosecutorial power is
21 reserved to those two, otherwise that led the - - - the
22 framers of the Constitution would have provided for another
23 prosecutorial agency that had, again, concurrent
24 jurisdiction or concurrent - - - concurrent authority with
25 the district attorney and the Attorney General. And there



1 is no provision for that.

2 JUDGE FEINMAN: I - - - I'm not sure I agree with
3 your characterization that they created only the AG and the
4 district attorney because the AG existed as an officer back
5 in colonial times. You know, when you go back towards how
6 we got to where we are in our current Constitution. So
7 certainly, the AG was the supreme, if you will,
8 prosecutorial agent, and then later, they created district
9 attorneys.

10 And so the question is, why can't the
11 legislature, along with the executive, now create yet
12 another type of prosecutor? What is the language in the
13 Constitution, the current version - - - and I know it's
14 been through a lot of iterations - - - that forbids it?

15 MR. BARTOSIK: Your Honor, I don't believe there
16 is any language that forbids the legislature, but my under
17 - - - my argument or my understanding is that had there
18 been the authority for another - - - for another agency to
19 act as a prosecutor of these criminal offences, then the
20 Constitution would have provided for that. Otherwise, the
21 prosecutor has to act as a subordinate to either the
22 Attorney General's Office to the District - - - local
23 district attorney's Office, and that's exactly what has
24 been happening in the - - - many of the cases that the
25 Justice Center has mentioned in their briefs.



1 The - - - the Governor has that take-care clause.
2 It's not - - - there's no debate about the take-care clause
3 and the Governor being able to appoint a special
4 prosecutor. But historically, the Governor will appoint
5 the Attorney General's Office to prosecute crimes in select
6 areas when there's an identifiable need.

7 And in this case, the court - - - the Governor
8 could have appointed a special prosecutor to prosecute
9 these crimes that were identified by the legislature if
10 they had done it under the Attorney General's Office and
11 created a special wing subordinate to the Attorney General.

12 JUDGE FAHEY: Can - - - can I - - - can I ask a
13 question here?

14 JUDGE RIVERA: Of course.

15 JUDGE FAHEY: I - - - I - - - I think Judge
16 Feinman's question is an important question because I think
17 it's clear in my reading of the Constitution that we're not
18 referring to a constitutional provision that's definitive
19 here. In the same way that we - - - we talk about the
20 Governor's power, we're talking about the - - - the takes-
21 care power, as it referred to. None of those provisions
22 are definitive, in terms of the exercise of this power.

23 Instead, it seems to be the argument is based on
24 what I refer to as state constitutional principles. And
25 the ultimate constitutional principle here is that, the way



1 I understand it is, that you cannot diminish the power of
2 an elected official, and that seems to be the theory that
3 runs through cases like Wogan and Haggerty and Soddano.

4 And so isn't a more correct answer here that
5 there is not a constitutional provision; Judge Feinman is
6 correct. Instead, there are state constitutional
7 principles that are expressed from constitutional phrases
8 and state - - - and case law, that consistently say that
9 you cannot diminish an elected official's position - - - or
10 excuse me, authority because you are undermining the
11 people's elected representative, which is uniquely distinct
12 from any appointed representative that comes up.

13 And that to do that in that context, means that
14 one person has to be the ultimate authority, and to have
15 one branch of government take away another elected
16 official's powers or authority is to undermine that very
17 fundamental principle of democracy. Isn't that what we're
18 talking about here? We aren't talking about - - - Judge
19 Feinman's right. I - - - I couldn't find a constitutional
20 principle that specifically says the DA has this power, and
21 you can't take it away from him. Instead, what we have is
22 a principle that elected official's powers cannot be
23 diminished.

24 MR. BARTOSIK: I wholeheartedly agree with that,
25 Your Honor. And I - - - I think that it is not in the



1 Constitution; it is something that's implicit, something
2 that's historically derived, and something that has been
3 evolving over the course of, you know, hundred - - -
4 several hundred years.

5 JUDGE FAHEY: And you - - - you can see why it -
6 - - it doesn't then make it as hard and fast, as - - - as
7 we - - - we like these arguments to be. It's a more
8 difficult and a more nuanced argument as a result.

9 MR. BARTOSIK: Certainly, and I think part of the
10 Attorney General's Office, and I'm sure Ms. James will have
11 much more to say about this, but part of that theory is
12 that the - - - this statute works, only if the special
13 prosecutor is subordinate to the local district attorney.

14 And the - - - the question, I think, for this
15 court then in - - - as it applies to these facts, for both
16 - - - both Hodgdon and Viviani, is that if the special
17 prosecutor is subordinate to a district attorney, then what
18 is the constitutional requirement to render the - - - the
19 special prosecutor subordinate, right. How does the
20 special prosecutor act in a subordinate manner?

21 And that, I think, has been developed by this - -
22 - there's case law, Soddano and Van Sickle cases, where it
23 has been deemed acceptable that the district attorney can
24 allow others to prosecute, if kept aware of criminal
25 prosecutions in the county. And in those cases, it was



1 very presumptive that they allowed others to prosecute
2 cases, and there's - - - there was no real basis in those
3 cases to suggest that the district attorney's office was
4 even aware of those criminal prosecutions.

5 And this case, and the Viviani case, flipped that
6 line of case law on its head, because the chief assistant
7 district attorney of Albany County affirmatively states
8 that it never allowed or consented, despite its awareness
9 of the Hodgdon and Viviani cases and the Hope case, and did
10 not retain ultimate responsibility, which was one of the
11 requirements in Soddano.

12 And so if the district attorney office can
13 definitively contradict that awareness, that retention of
14 ultimate responsibility and consent, then how can awareness
15 be considered permission or consent in the future? And so
16 I think that's what the Third Department was referring to
17 in its decision, when it - - - it interpreted Judge
18 Rivera's affirm - - - Davidson opinion requiring notice,
19 consultation, and consent, and holding that that was
20 required knowing written consent and retention of ultimate
21 responsibility.

22 And I think that is the correct standard, that I
23 - - - I think the facts of this case show that an
24 affirmative standard - - - standard is necessary - - -
25 necessary to prevent prosecutions that would actually be



1 valid under the Van Sickle and Soddano standards, but in
2 fact, are unconstitutional.

3 And so, under these facts - - - I mean, and under
4 any of the - - - the standards, whether it's just notice,
5 consultation, and consent, I think that the Justice Center
6 failed to - - - to just - - - as Mr. Pollok noted, to
7 provide any support for that, but there were no - - - there
8 was no actual, you know, consent agreement, no language
9 indicating consent, and then the fact that the district
10 attorney's office actually came out and affirmatively
11 stated that it never consented to the prosecution renders
12 the Special Prosecutor's actions in this case completely
13 unconstitutional.

14 So even if it can be construed in a
15 constitutional manner, I think that the Justice Center
16 never lived up to that and I - - - I think it has, as a
17 result, become a more difficult standard for a special
18 prosecutor.

19 JUDGE RIVERA: No one else has any questions?

20 Thank you.

21 We'll move on to the Solicitor General.

22 Good afternoon.

23 MS. UNDERWOOD: Good afternoon.

24 The question - - - we've - - - we've been talking
25 about where in the Constitution does this restriction to



1 the DA and the Attorney General comes - - - come from? The
2 district attorney - - - first, the Attorney General alone,
3 and then the antecedents of district attorneys, were the
4 only state prosecutors in the colonial period and in the
5 early days of the republic. And that role was recognized
6 when they were placed into the Constitution in 1821.

7 JUDGE GARCIA: Counsel, I'm sorry.

8 Judge Rivera, if I may ask?

9 JUDGE RIVERA: Of course.

10 JUDGE GARCIA: Am - - - do I have this history
11 right, and your material's very helpful, but the Attorney
12 General really was the only constitutional law enforcement
13 officer, and then the legislature began to create district
14 attorneys by statute that didn't report to the Attorney
15 General. Is that right?

16 MS. UNDERWOOD: In 1664, the AG was the only
17 prosecutor. In 1796, there were entities called - - - or -
18 - - or there was an office called assistant attorney
19 general, but it what - - -

20 JUDGE GARCIA: They didn't report - - - they
21 didn't report to the Attorney General.

22 MS. UNDERWOOD: Correct, correct.

23 JUDGE GARCIA: And it wasn't - - - and then they
24 turned them into, as I understand it, district attorneys.

25 MS. UNDERWOOD: Yes, that's right.



1 JUDGE GARCIA: But why wasn't the legislature
2 doing then exactly what you say they can't do now? Because
3 wasn't the Attorney General a constitutional officer at
4 that time?

5 MS. UNDERWOOD: Well, we have a different
6 Constitution now and - - -

7 JUDGE GARCIA: But in a material way, it's - - -

8 MS. UNDERWOOD: Well, neither the district
9 attorney nor the Attorney General was in the Constitution
10 at that point. So they don't get named as constitutional -
11 - -

12 JUDGE GARCIA: I see.

13 MS. UNDERWOOD: - - - officers. And - - -

14 JUDGE GARCIA: So they were just carried - - -
15 the Attorney General was just carried over in the 1777
16 Constitution?

17 MS. UNDERWOOD: That's correct. And they first
18 appear in the Constitution in 18 - - - in 1821. So we have
19 these offices and they aren't named in the Constitution.
20 And then at the point at which they are the con - - - it's
21 the second Constitution, I guess - - - the DA and the
22 Attorney General are named in the Constitution, and the - -
23 - and the DA, at that point, was to be appointed by the
24 courts, and the Attorney General elected by the
25 legislature. Provisions about the DA and the Attorney

1 General first appear in the Constitution after some period
2 of time, and therefore those names - - - those positions
3 take their meaning from the practice that has preceded it.

4 So I - - - I think that - - - and - - - and then
5 what happens is, in 1846, they both become elected
6 officials. There continue to be provisions about how they
7 are to be - - - how they are to be selected. They're never
8 defined terms, but I don't think you could make the
9 district attorney's functions only be dog catcher for the
10 Attorney General.

11 JUDGE STEIN: Judge - - - Judge Rivera, can I ask
12 a question?

13 MS. UNDERWOOD: Yes.

14 JUDGE STEIN: Judge Rivera?

15 JUDGE RIVERA: Yes.

16 JUDGE STEIN: Thank you.

17 Counselor, I - - - I - - - I - - - this is a
18 little - - - moving a little beyond this core discussion,
19 but there's something that's been sort of perplexing me,
20 and that is that if - - - if we agree with your po - - -
21 position about what is required to - - - or, you know, what
22 reading of the statute is required to make it
23 constitutional, are we - - - would we be calling into
24 question the constitutionality of the organized crime task
25 force provision, which requires the consent of the - - - or



1 - - - or approval of both a DA and the Governor?

2 MS. UNDERWOOD: Not at all.

3 JUDGE STEIN: Why?

4 MS. UNDERWOOD: The dis - - - the com - - -
5 because the Governor's role - - - the organized crime task
6 force is lodged in the Attorney General's office, is headed
7 by a Deputy Attorney General, and the Governor can do
8 nothing with that alone. It is also true that the Attorney
9 General and the DAs can't do anything alone. There's a - -
10 - there's a collaboration here. The Governor's executive
11 power is implicated, but the - - - the Governor cannot pre
12 - - - cannot appoint a director to the organized crime task
13 force.

14 JUDGE STEIN: But isn't that diminishing the
15 authority, then, of the AG?

16 MS. UNDERWOOD: I don't think it is. I think
17 what - - - I think that the Governor's participation in the
18 decision does not render this person not an attorney - - -
19 a Deputy Attorney General. The Governor - - - I mean, I am
20 familiar with the stalemates that can arise, but the
21 Governor cannot appoint a deputy for the organized crime
22 task force without the agreement of the Attorney General.
23 Nor can the Attorney General appoint without the agreement
24 of the Governor. And so eventually, they come to an
25 agreement. But the person who is appointed is, therefore,



1 cho - - - consented to, approved, and appointed by the
2 Attorney General.

3 JUDGE RIVERA: And then what is the nature of
4 their power and relationship with the Governor, post the
5 appointment?

6 MS. UNDERWOOD: Post-appointment, the Governor's
7 role is that he - - - he - - - he can prevent - - - his - -
8 - his approval is needed for a prosecution but so for - - -
9 and at - - - for going into the grand jury and - - - and
10 commencing a prosecution, but so is that of the DA, so
11 again, he's got a veto power, but he cannot appoint a
12 director and he cannot commence a prosecution. He can
13 block the appointment, and he can block a prosecution, but
14 he cannot actually affirmatively bring a prosecution or - -
15 - or name a head of the organized crime task force.

16 JUDGE FEINMAN: And - - - and the Governor's
17 powers, vis-à-vis the organized crime task force, they
18 derive their constitutional support from the take-care
19 clause or from where?

20 MS. UNDERWOOD: Well, I think you would say the
21 take-care clause. I - - - I mean, I - - - the - - - the -
22 - - I don't know that this court or anybody has identified
23 the source of that power. The reason OCTF is in the law
24 department is that it was widely understood at the time
25 that no statewide prosecutor could be created, other than



1 in the Attorney General's office. That's the one - - - one
2 source of support for that is the McQuillan letter that's
3 in our addendum at page 4 and 5.

4 It was - - - it was generally understood that
5 while some proponents of the organized crime task force
6 wanted it to be freestanding, they felt that the
7 Constitution prohibited it. So there's been a long
8 tradition of an understanding that the only prosecutors in
9 the State have to be exercising authority either of a DA or
10 of the AG, and that the only statewide proc - - - and the
11 DAs are countywide, and the only statewide prosecutor is
12 the AG. And - - - and OCTF fits squarely within that
13 model. And then the - - -

14 JUDGE WILSON: Judge Rivera, if I might - - -

15 JUDGE RIVERA: Yes, of course.

16 JUDGE WILSON: - - - counsel a question?

17 Ms. Underwood, so turning to your sort of the
18 saving construction you're proposing, how, if at all, is
19 that different from the process and the supervision that
20 Ms. Halligan described that allowed her to be appointed?
21 Putting aside the question of whether Ms. Dunn had the
22 authority to appoint anybody at all. Take the Attorney
23 General, as an example. You can appoint a private attorney
24 to prosecute a case, but the Attorney General, it's my
25 understanding, has to retain supervision and ultimate



1 decision-making authority. Is that any different from your
2 saving construction?

3 MS. UNDERWOOD: Well, the difference is - - -
4 it's - - - it's - - - the principle is pretty similar. The
5 difference is that there is an institution called the
6 Justice Center that does many things, that has brought
7 together a group of people who have expertise, that has
8 resources that are appropriately and desirably devoted to
9 all of this, and the benefits of having this standing
10 institution are great. But the - - - the same features
11 that make it - - - the - - - the fact that it's a standing
12 institution makes it problematic as a prosecutor.

13 And so it's - - - it's individuals. Ms.
14 Halligan's firm, I don't believe, has been appointed by the
15 - - - by the Special Prosecutor.

16 JUDGE WILSON: Well, yeah, I mean, right. But -
17 - -

18 MS. UNDERWOOD: You know, so the individuals
19 could be cross-designated as assistant district attorneys.
20 That's one way to solve the - - - to solve the problem.

21 JUDGE WILSON: But let me - - -

22 MS. UNDERWOOD: Another, though, would be to just
23 interpret this statute, without having to cross-designate
24 them, as permitting them to prosecute with the approval and
25 ongoing right to retain control of the relevant district



1 attorney.

2 JUDGE WILSON: And I guess that's really - - -
3 that puts a point on my question, which is I - - - I don't
4 believe anybody is arguing - - - you're not taking the
5 position that the entirety of the Justice Center is
6 unconstitutional. They have myriad functions. It's really
7 - - - we're talking about the ability to prosecute
8 independently.

9 MS. UNDERWOOD: Correct.

10 JUDGE WILSON: And so were - - - my question
11 really is, were we - - - and I don't know what we're going
12 to do - - - but were we to conclude that the statute is not
13 constitutional as regards prosecutorial power, couldn't
14 your office or individual district attorneys, you know,
15 designate individual members of the Justice Center to
16 prosecute cases?

17 MS. UNDERWOOD: Ab - - - absolutely. I mean,
18 there is - - - there was a model for a while for that sort
19 of backup center when - - - when a capital case backup
20 center was - - - was created with resources and expertise.
21 There were prosecutors who staffed it. They provided
22 training. And they sometimes were cross-designated by
23 district attorneys - - -

24 JUDGE WILSON: Do you have any policy reason why
25 this organization wasn't placed within the Attorney



1 General's Office?

2 MS. UNDERWOOD: I wasn't - - - I - - - I - - -
3 I'll just speculate, because I don't know, that there was
4 an interest in establishing the principle that the Governor
5 can create an independent, freestanding prosecutor, and
6 that it was attempted in this case.

7 I - - - I want to say that over the years, there
8 have been numerous proposals for special prosecutors
9 independent of the DA and the AG. They have not been
10 implemented, at least in part, because of constitutional
11 concerns. They include proposed special prosecutors for
12 violation of the election law. A special prosecutor for
13 bias crimes. A special prosecutor for deaths caused by
14 police officers. And when the controversy about the
15 constitutionality of those has come up, in my experience,
16 people have said, well, they could do it for the - - - for
17 this Special Prosecutor, I guess they - - - you know, that
18 I - - - I guess it's okay.

19 So whether that was in the minds of the creators
20 of the Justice Center when they did it in the first place,
21 I don't know. But I do know that it has since then been
22 invoked as precedent for creating other independent special
23 prosecutors.

24 JUDGE FAHEY: All right. Excuse me, Judge - - -

25 JUDGE RIVERA: Counsel, if I - - - if I can go



1 out - - - let me just ask this follow-up.

2 I'm sorry, Judge Fahey.

3 JUDGE FAHEY: Go ahead.

4 JUDGE RIVERA: Go back to this cross-designation
5 that you're talking about. So is - - - is what you were
6 describing in response to Judge Wilson's question that
7 whoever's already on the staff, or whoever might be hired
8 on the staff of the Justice Center for - - - to serve this
9 prosecutorial role would not be able to seek out the DA,
10 but the DA would have to seek them out? Is that what that
11 would mean?

12 MS. UNDERWOOD: I - - - I - - - I don't think
13 there's a restriction on who initiates the contact. The DA
14 would have to agree to cross-designate. But to - - -

15 JUDGE RIVERA: But I guess that's - - - I'm
16 sorry. I - - - I guess this is what I'm not understanding.
17 Is cross - - - when you say "cross-designate" is that a
18 particular term of art - - -

19 MS. UNDERWOOD: Yes.

20 JUDGE RIVERA: - - - in this context? Or is just
21 a special prosecutor reaches out and says, we're interested
22 - - - we've done this investigation, we're interested in
23 prosecuting, and the DA is informed, comes up to speed on
24 the facts and the issues, and consents - - - let's say,
25 puts it in writing; let's take that off the table - - - to



1 that - - - the office, the special prosecutor taking that
2 on, retaining in the DA's Office the ultimate decisions in
3 that prosecution.

4 MS. UNDERWOOD: The - - - my understanding of the
5 usual way the term cross-designate is used in both federal
6 and state practice is - - - an appointment of an individual
7 from another office to be, for the purpose of a case or a
8 series of cases, or whatever, an assistant district
9 attorney or an assistant U.S. attorney, or whatever it
10 might be. That's one way to do it.

11 But you could, I think, consistent with the
12 Constitution, do it a different way, which is what we've
13 proposed in this saving construction, which is to simply
14 have a consent to the institution that was created by the
15 legislature, approved by the DA to prosecute.

16 JUDGE RIVERA: Yes, because in that cross-
17 designation, if I'm understanding you correctly, then the
18 person is no longer an assistant special prosecutor, or
19 whatever the term might now be.

20 MS. UNDERWOOD: No, they are; they are. They're
21 just cross-designated. I mean, it's quite common for - - -
22 well, in fact, it's what happened in the case - - - I - - -
23 I think it's Haggerty; I'm not sure the name of the case,
24 but the - - - the case in which people from the Attorney
25 General's Office and actually the Attorney General, were



1 cross-designated as assistant district attorneys to assist
2 the district attorney in that - - - in - - - in a
3 particular case, and this court said, that was fine, you
4 didn't need a Governor superseder; it was okay. The
5 Governor could le - - - the Attorney General could lend
6 support to the district attorney by having some assistant
7 attorneys general cross-designated - - - in other words,
8 appointed, as Assistant district attorneys for the purpose
9 of a particular investigation or a particular case.

10 JUDGE RIVERA: Would - - - would - - - would that
11 approach leave open, if a district attorney says I don't
12 want to cross-designate, but I - - - I'll pursue - - - I'm
13 - - - I'm comfortable with the other approach, which is I'm
14 willing to consent in writing with ultimate responsibility
15 for the case?

16 MS. UNDERWOOD: Well, I think that both methods
17 would satisfy the Constitution. There'd be a question
18 about how to read the statute, if we were going to use the
19 stat - - - the - - - the - - - going to try to read
20 something into the statute, or for that matter - - -

21 JUDGE RIVERA: Yeah, but - - -

22 MS. UNDERWOOD: - - - the legislature were to
23 rewrite the statute. That would be another possibility.

24 JUDGE RIVERA: Right. It - - - it does seem to
25 be somewhat problematic. It doesn't seem to be the intent,



1 this cross-designation given - - - putting aside the - - -
 2 the language about concurrent authority, this other
 3 authority about - - - or this other requirement that it
 4 seek out - - - it - - - it notify the DA to seek to assist
 5 with the DA in a different way. I - - - it - - - it is
 6 true; one could massage that. But it does seem to me that
 7 on this point, Ms. Halligan is correct, that what the
 8 legislature - - -

9 MS. UNDERWOOD: Well - - -

10 JUDGE RIVERA: - - - is seeking to do is really
 11 designate this other office with these other officials.
 12 But I - - - I understand your point.

13 MS. UNDERWOOD: I think that's right. But I
 14 think there's nothing in the law that would prevent you - -
 15 - I - - - I - - - Ms. Halligan can answer this, but the - -
 16 - the Special Pro - - - the Justice Center has, for a
 17 couple of years now, been operating in a world in which the
 18 Third Department's rule is the law. And I would imagine
 19 that they have found a way to bring their cases to the
 20 district attorneys, either to be prosecuted by the district
 21 attorneys or to be cross-designated as assistant district
 22 attorneys to prosecute them themselves. I don't really
 23 know what they've done.

24 JUDGE FEINMAN: Is - - - is there any - - -

25 JUDGE FAHEY: Those - - - wait - - - so that I'm



1 - - -

2 JUDGE FEINMAN: Sorry.

3 JUDGE FAHEY: So that I'm clear - - -

4 JUDGE RIVERA: Judge Fahey.

5 JUDGE FAHEY: Excuse me, Paul. I - - - I'm
6 sorry.

7 Just so I'm clear. If your proposed remedy is
8 considered by the court, are - - - are you asking us to say
9 that, not that this was facially unconstitutional, but the
10 statute was unconstitutional as applied here, but it would
11 be saved by this construction?

12 MS. UNDERWOOD: Yeah, I guess I would write it a
13 little differently, if you're asking me to write it.

14 JUDGE FAHEY: Well, how would you write it? Tell
15 me.

16 MS. UNDERWOOD: I - - - I would say it would be
17 unconstitutional if construed the way the Special
18 Prosecutor has been construing it, which is --

19 JUDGE FAHEY: Um-hum.

20 MS. UNDERWOOD: -- to give them complete,
21 unfettered, independent, prosecutorial authority. But in
22 order to avoid that constitutional concern, we find - - -
23 we construe it to include a requirement of district
24 attorney approval and continuing responsibility, and we
25 read that into the provision that says nothing the special



1 prosecutor should do should interfere with the district
2 attorney and they have to con - - - they have to notify - -
3 - and to consult about some things, and don't - - -

4 JUDGE FAHEY: You don't have to write the whole
5 opinion, Ms. Underwood. Just - - - just this one part I've
6 got a question about. All right.

7 MS. UNDERWOOD: Okay.

8 JUDGE FAHEY: All right. Thank you for your
9 response.

10 MS. UNDERWOOD: Okay.

11 JUDGE FEINMAN: So - - -

12 JUDGE STEIN: And may - - - and may I follow up
13 with that a little bit? I'm sorry; go ahead.

14 JUDGE RIVERA: I think Judge - - - I think Judge
15 Feinman had - - -

16 JUDGE FEINMAN: Why don't you ask your follow-up,
17 because mine actually goes back to the cross-designation
18 issue, but - - -

19 JUDGE STEIN: Oh, okay. Yeah, no, my question is
20 simply, do we need to - - - it's not clear to me what
21 retention of ultimate responsibility exactly means, you
22 know. Are - - - are we saying that the - - - that - - -
23 would you have us say that the DA, you know, would have - -
24 - would - - - would have to dictate or have - - - you know,
25 give consent to specific decisions taken during the course

1 of a prosecution, like what witnesses to call, which
2 evidence to use, or what sentence rec - - - recommendations
3 to make? How - - - how - - - what is the - - - how - - -
4 how granular do you think the court would need to get if we
5 agreed with your position?

6 MS. UNDERWOOD: I - - - the DA need not monitor
7 every decision made in the case, any more than the DA is
8 required to monitor every decision made by his or her own
9 staff in a case. The DA can supervise as they see fit, can
10 defer to discretion as they see fit, but they have to have
11 the ability to overrule when they feel moved to do so.

12 And somebody said they couldn't fire - - - they
13 could fire. They can't fire a special prosecutor - - - an
14 assistant special prosecutor from employment, but they
15 could, for instance, withdraw their consent in an ex - - -
16 in a case of disagreement to the continued representation
17 by an assistant special prosecutor.

18 Now, I will say that the Special Prosecutor has
19 said, that there's already a great deal of consultation and
20 collaboration, that they rarely - - - they've said at
21 various times in the course of the years we've been
22 litigating this issue, that they rarely, if ever, proceed
23 if the DA objects. That there have been few, if any,
24 disagreements between the DA and the Special Prosecutor.

25 This case, though, is about what happens if and



1 when they arise for this Special Prosecutor and for any
2 other that is similarly constructed. It's about what the
3 rules are in the event of - - - of disagreement. And if
4 they don't disagree, then imposing a requirement of con - -
5 - of approval and - - - and retention of authority
6 shouldn't be very burdensome, but it will provide some
7 guardrails in the event of - - - of a disagreement. It - -
8 -

9 JUDGE RIVERA: Judge Feinman?

10 JUDGE FEINMAN: So yeah. I just - - - going back
11 to the issue of cross-designation. Is there anything to be
12 learned from how the Special Narcotics Prosecutor operates,
13 which obviously there is a Special Nar - - - narcotics
14 prosecutor appointed with the consent of the five city
15 district attorneys, and it's staffed by all these ADAs from
16 across the five counties. And I believe they use a cross-
17 designation, you know, between you're on the ADA, and - - -
18 DA Vance's office, and you are a, you know, cross-
19 designated as an ADA in Bridget Brennan's office, you know,
20 the office of the Special Narcotics Prosecutor. Is there
21 anything to be learned from that in response to Judge
22 Rivera's questions about cross-designation?

23 MS. UNDERWOOD: Well, you know, I'm not sure
24 about the mechanics of - - - of all of that. I do know
25 that Bridget Brennan, herself, the Special Narcotics



1 Prosecutor, is an assistant district attorney. And the
2 independence and the respect that she has is simply what
3 she has earned. There is - - - there is authority in the
4 district attorneys to fire her. There is authority to - -
5 - to overrule her.

6 It works, as most - - - as - - - as one would
7 expect the Special - - - any spe - - - any expertise - - -
8 any person to - - - who - - - who is in charge of an
9 important area of - - - of work, to have considerable
10 respect from the head of the office. But - - - but there
11 are ultimately differences of opinion, and somebody has to
12 be in charge. And the Special Prosecutor has insisted,
13 consistently, that they - - - in the event of disagreement,
14 they are in charge, and we are saying that that is what
15 violates the Constitution, because they are not one of the
16 constitutional prosecutors.

17 JUDGE GARCIA: Judge Rivera, if I might just - -
18 -

19 JUDGE RIVERA: Of course.

20 JUDGE GARCIA: - - - ask a question?

21 Counsel, are you - - - you know, I - - - I'm just
22 having trouble finding - - - you know, the Third
23 Department, for example, said you didn't have written
24 consent here - - - finding these terms in the statute
25 anywhere. And my understanding of the avoidance doctrine



1 was, you could look at a statute, and if there were two
2 ways to interpret that statute that were reasonable, we
3 would go towards the one - - - gravitate towards the one
4 that would save the provision from a finding that it was
5 unconstitutional.

6 But we've always made clear in those cases that
7 we wouldn't rewrite a statute. And I don't see how, for
8 example, we can put in a requirement of written consent
9 based on that amorphous provision, which actually goes
10 against some of the other provisions in that statute, and
11 say, well, if you have a written consent here, it's
12 required, or if you retain ultimate authority, then that's
13 okay.

14 And I don't know of an example of any case where
15 we've done that. In fact, the only one I found that was
16 somewhat analogous was in *People v. Smith*, where the court
17 was considering the constitutionality of the death penalty
18 in New York. The Attorney General's Office came in and
19 made the argument that we could read in a mitigation
20 consideration of mitigating factors into that statute and
21 save it. And Judge Kaye said, that's not our job. We
22 would be rewriting the statute.

23 And when I look at this statute and I hear
24 written consent and retention of ultimate authority, I
25 think of that same response, which is, they may be very



1 good provisions to have in here, but the pen is with the
2 legislature.

3 MS. UNDERWOOD: Well, this - - - this is my
4 response to that complex of questions, which is, I - - - I
5 think the specific requirement of written consent would be
6 impossible to find in the statute. But I also think that
7 that is an evidentiary point. What is required is consent,
8 and it is a matter of prudence and courts sometimes explain
9 - - - some - - - sometimes impose evidentiary or procedural
10 rules to implement the rules.

11 The rule would be that the district attorney has
12 to have approved it. And I think you can fairly read that
13 into the sentence that says, "Nothing herein shall
14 interfere" and so forth and so on. So I would treat the
15 rule - - - the - - - the Third Department's rule of written
16 consent just as a rule of administration, a rule that makes
17 it easy to document that there actually was consent.

18 And - - - and, you know, as I say, the - - - a
19 letter, a simple - - - probably, they would develop a form,
20 you know, a simple letter would ordinarily do that. Ms.
21 Halligan has said that in our - - - in our papers, we said,
22 "in the mind run of cases." That's meant just to reserve
23 the possibility that there might be blatant extrin - - -
24 extrinsic evidence that there wasn't, in fact, consent.
25 You know, there might be - - - as - - - as for instance,



1 the Chief ADA Rossi's affidavit in these cases, in which he
2 said he didn't think he had authority; he wasn't making any
3 judgment, and so you can't read his letter as expressing
4 consent.

5 But ordinarily, you could read a letter,
6 particularly if this court says that the statute requires -
7 - - in order to save its constitutionality, the statute
8 requires DA approval and ultimate authority. We're talking
9 about law enforcement officials here. Presumably, they
10 will do what they are told the law requires.

11 JUDGE RIVERA: Certainly, we would think they
12 would do something to avoid the prosecution going nowhere
13 and being overturned.

14 MS. UNDERWOOD: Exactly right. Exactly right.

15 JUDGE RIVERA: Unless there's another question,
16 thank you so much.

17 MS. UNDERWOOD: I - - - I - - - I'd like to say -
18 - -

19 JUDGE RIVERA: Go ahead.

20 MS. UNDERWOOD: - - - just one thing, if I might
21 just - - - just in closing. I want to make it very clear
22 that the AG is here and in these cases, not to protect
23 anybody's turf, and certainly not to undermine the mission
24 of the Justice Center. We're here to fulfill our
25 responsibility to the rule of law, to defend and enforce



1 the Constitution, to defend the law of the State of New
2 York, and to reconcile them, if possible.

3 And that's why we have urged this court to
4 enforce the Constitution's limitation on who can exercise
5 prosecutorial authority, and also to save the statute, and
6 the valuable contribution of the Justice Center to these
7 cases, by interpreting it to provide this Special
8 Prosecutor with a path for obtaining constitutional
9 authority to prosecute.

10 JUDGE RIVERA: Thank you so much.

11 Ms. Halligan?

12 You have to unmute.

13 MS. HALLIGAN: Sorry.

14 JUDGE RIVERA: It's all right. We hear you.

15 MS. HALLIGAN: Okay. Thank you.

16 My adversaries have made quite a few points. Let
17 me try to respond to a few of them.

18 First of all, there is nothing definitive in the
19 Constitution that precludes the independent exercise of
20 power by the special prosecutor, and I would ask this court
21 to read the cases on which the Attorney General relied,
22 Wogan, Schumer, and Haggerty. They are all about not
23 transgressing statutory lines, not constitutional
24 restrictions. As you suggested, Judge Garcia, the Office
25 of the District Attorney was created by the legislature.



1 The powers are set by the legislature. That's true for the
2 Attorney General as well, and Article 5 of the Constitution
3 says so.

4 As to whether there was some ulterior motive in
5 the unanimous passage of this statute, there's certainly no
6 basis for that. And it would be speculation in any event.

7 I would also like to - - -

8 JUDGE RIVERA: Counsel, if I may interrupt you.
9 My apologies.

10 How - - - how would the legislative purpose not
11 be furthered? That is to say, how is it undermined - - -

12 MS. HALLIGAN: Yes.

13 JUDGE RIVERA: - - - by the kind of cabining or
14 reading of the statute that the Attorney General advocates?

15 MS. HALLIGAN: I'm really glad you asked that
16 question, Your Honor, because I think that this is
17 essential to further the purposes of the statute.

18 First of all, what the Attorney General is saying
19 is that there should not just be consent by the district
20 attorney, but there also must be some mechanism by which
21 ultimate authority is retained. And as I think some of
22 these exchanges demonstrated, there's no way to know what
23 that means. The result of that is uncertainty and delay.

24 And I can tell you, although it's not in the
25 record, that as a result, the number of cases that the



1 Special Prosecutor has been able to handle has really
2 dropped off because this really makes it very difficult to
3 negotiate with each district attorney, what an arrangement
4 like that might look like. And it also creates tremendous
5 - - -

6 JUDGE RIVERA: But why - - - why - - - why isn't
7 Ms. Underwood correct when she says, well, look, that's - -
8 - that's for the district attorney to decide within their
9 office, and the same they decide what the appropriate
10 oversight and supervise - - - supervision is going to be of
11 an ADA that's working up a prosecution; it's sort of in the
12 same nature. Why isn't that the appropriate response?

13 MS. HALLIGAN: I think these cases show why. If
14 you look at the appendix for each of these cases, it is
15 clear that the district attorney "agrees" that the Special
16 Prosecutor will proceed with the criminal prosecution. And
17 for the Attorney General, and also for Mr. Pollok and Mr.
18 Bartosik, that is not enough.

19 And so the - - - the questions that that creates,
20 both in terms of future litigation, along the lines of what
21 Mr. Pollok is suggesting, as well as the need to sort that
22 out with each of the sixty-two district attorneys, means
23 that the resources that could be used to make these cases
24 and to handle these very difficult, challenging cir - - -
25 circumstances, is - - - is being eroded.



1 JUDGE RIVERA: Counsel - - -

2 JUDGE STEIN: Judge Rivera, could - - -

3 JUDGE RIVERA: If I could just follow up on this?

4 Counsel, you would agree, though, that if the
5 legislature had actually put into the statute that the
6 special prosecutor, and whoever the special prosecutor
7 appoints within their own office, would - - - the
8 legislature could have written that that person is
9 subordinate to the district attorney, correct?

10 MS. HALLIGAN: Well, the legislature can allocate
11 those - - - those - - -

12 JUDGE RIVERA: Well, all I'm saying - - - all I'm
13 saying is that the uncertainty that you're talking about is
14 - - - is not really an uncertainty; it's inherent in the
15 nature of having hierarchical assignments, and the
16 legislature could have decided the same.

17 MS. HALLIGAN: Well, no, Your Honor. I'm saying
18 that - - - that by suggesting that there is this
19 requirement, which is not imposed on OCTF or the Special
20 Narcotics Prosecutor, once those cases are charged, then
21 that officer proceeds to handle them independently. So
22 there's not an analog here, and certainly not in County Law
23 701. So of course, there's uncertainty about what that
24 might be.

25 JUDGE STEIN: Well, let me - - - let me ask you



1 this, Ms. Halligan. As I see it, we have three options
2 here. We can either - - - we can either read the statute
3 as constitutional, as written. We can read it as not being
4 constitutional, unless we - - - unless we find within it
5 certain limitations, if you will, such as consent and/or
6 ultimate - - - retaining ultimate responsibility. Or we
7 can just say, this is for the legislature. We find that
8 this statute is not constitutional as written, end - - -
9 end of story.

10 Where does that leave the Justice Center, if we
11 do that?

12 MS. HALLIGAN: There's hopefully an additional
13 alternative, Your Honor. I think that if you were to apply
14 the canon of constitutional avoidance, you don't need to
15 hold that the statute is unconstitutional, if it allows the
16 Justice Center to exercise independent authority. What you
17 can hold is that that's a question that would raise serious
18 constitutional concerns. You don't need to dispose of the
19 constitutional question per se.

20 If that's the route that you take, and - - - and
21 as I have, I think, laid out, we don't think there's
22 anything in the Constitution that gives any basis for
23 restricting the legislature and the Governor in that way.
24 But if that's the route that you take, I - - - I think that
25 you can read it to require consent.



1 I don't think there's any basis as a
2 constitutional matter, to require the retention of ultimate
3 authority. And what the Attorney General is relying on is
4 Van Sickle. I would ask the court to look at that case, as
5 well. What the court is saying in Van Sickle is - - -
6 first of all, it says expressly that it's not resolving any
7 question about the DA's rights or duty. And then it says,
8 if that question were before us, the DA would have to obey
9 Section 700. So the only point in Van Sickle is that where
10 the legislature has made a decision, then that's what the
11 district attorney has to abide by. Here - - -

12 JUDGE RIVERA: But Counsel, let me - - - correct
13 me if I'm wrong, obviously, former prosecutor that you
14 were. Somebody's got to make the final call on a
15 prosecution. I mean, it literally cannot be concurrent.
16 That's what's, in my view, sort of the core problem with
17 the statute. It cannot be concurrent because if one's - -
18 - if the DA or - - - doesn't want to prosecute, and the
19 special prosecutor does, you don't have concurrent.

20 MS. HALLIGAN: So - - -

21 JUDGE RIVERA: Right? Somebody is making a
22 decision, and somebody's got to decide how that prosecution
23 is going to proceed. So at - - - at some point, whether we
24 see it your way or another way, someone's running the
25 prosecution.



1 MS. HALLIGAN: That's - - - that's right, Your
 2 Honor. I will say, as a - - - as a factual matter, there
 3 are no circumstances in which there's been a disagreement.
 4 And the statute provides that as soon as an allegation
 5 comes in, the special prosecutor has to notify the DA. But
 6 I think to go to Your Honor's core concern here, I take it
 7 to be one of who's accountable. And what this court has
 8 said in the 1979 Grand Jury case, is that where there is a
 9 superseder, for example, the Governor is publicly
 10 accountable for those decisions.

11 It is also not the case, as the Attorney General
 12 suggests, getting to the same concern, that only an elected
 13 official can wield prosecutorial authority. The 1846
 14 convention, which is what she points to, made a slew of
 15 offices elected. For example, the canal commissioner, the
 16 state engineer, for reasons having to do with the crackdown
 17 on patronage. There's no evidence it had anything to do
 18 with prosecutorial authority. And while that exercise is
 19 certainly very serious, because of the consequences it can
 20 have for any defendant, this court has been clear that the
 21 Governor and the legislature, at the end of the day, are
 22 accountable for choices made by prosecutors whom they
 23 appoint. And that should suffice to address any concerns
 24 about some hypothetical disagreement that might arise down
 25 the road.



1 JUDGE GARCIA: Counsel - - -

2 If I might just ask a question, Judge Rivera?

3 I'll ask the same question. Do you know of any
4 case from our court where we have read in these types of
5 requirements into a statute under the theory of avoidance
6 of unconstitutionality?

7 MS. HALLIGAN: Well, Your Honor, I - - - I think
8 that you can fairly - - - on this point specifically, I
9 agree with General Underwood. I think that you can read
10 the requirements to not interfere, as well as the
11 requirements for consultation and notification with respect
12 to a search warrant, as embodying a requirement of
13 agreement or consent on the front end. And - - -

14 JUDGE GARCIA: Well, let's look at the - - -
15 let's take the search warrant one. As - - - as I
16 understand the search warrant provision, you have to give
17 notice to the DA where the search warrant is executed,
18 right?

19 MS. HALLIGAN: Correct.

20 JUDGE GARCIA: That may not be the same DA that
21 has the ultimate prosecution, right?

22 MS. HALLIGAN: Well, I'm not sure why it wouldn't
23 be. I - - - I - - -

24 JUDGE GARCIA: Let's say the perpetrator lives -
25 - -



1 MS. HALLIGAN: Exactly, right.

2 JUDGE GARCIA: - - - in a different county,
3 right?

4 MS. HALLIGAN: Yes.

5 JUDGE GARCIA: You search the house.

6 MS. HALLIGAN: Hypothetically.

7 JUDGE GARCIA: Right. So how could that be
8 further implying that you have - - -

9 MS. HALLIGAN: Well - - -

10 JUDGE GARCIA: - - - and be - - -

11 MS. HALLIGAN: - - - that requirement, along with
12 the grand jury requirement, right, that the - - - that the
13 special prosecutor notify the - - - the DA before - - -
14 before she goes into the grand jury, confirms that the
15 legislature expects them to cooperate - - -

16 JUDGE GARCIA: Coordinate.

17 MS. HALLIGAN: - - - and - - - and for the
18 special prosecutor to not trespass on the interests of the
19 DA. I think that specific - - -

20 JUDGE GARCIA: But I think that - - - the grand
21 jury one seems to me very much a time-and-place
22 consultation, right. I think it's the language that we
23 use. So I - - - I think it's difficult to read a
24 consultation on time and place, and a requirement that you
25 give the DA a location of the search warrant, as a - - - as

1 a consent requirement.

2 MS. HALLIGAN: Well - - - well, to be clear, Your
3 Honor, I don't think you need a consent requirement.

4 JUDGE GARCIA: I understand.

5 MS. HALLIGAN: So - - - but on this specific
6 point, I do agree with General Underwood that the statement
7 in the statute that the special prosecutor may not
8 interfere with the district attorney can fairly be read
9 that way, to the extent the court thinks that there are
10 serious constitutional concerns about reading it - - -
11 about reading it otherwise. And - - - and that is
12 something that, I think, would at least provide some
13 measure of efficacy for the Special Prosecutor going
14 forward.

15 I would ask this court, especially given the
16 difficulty of these cases, that if the court disagrees with
17 us and finds some basis in the Constitution to prohibit the
18 legislature and the Governor from allowing - - - appointing
19 the Special Prosecutor, that it provide some clarity. It
20 is the uncertainty which I think this argument has made
21 plain about what some requirement for retention of some
22 authority might mean, that is very paralyzing.

23 So should the court disagree, we would urge you
24 to - - - to provide clarity on that point. The best way to
25 do that, and the way that is most consistent with the case



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law and the statute, if that's the route that you believe you need to go, I think it's to simply say, consent is sufficient. And there is consent here; it's set forth in the appendix and the letters of agreement.

I'd be happy to answer any other questions, if the court has any.

JUDGE RIVERA: Thank you. Thank you, Counsel. Have a very good afternoon.

(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 v. Marina Viviani, No. 15, People v. Justin Hope, No. 16, People v. Nicole Hodgdon, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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