



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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November 25, 2016

Hon. P. David Soares
Albany County Judicial Center
6 Lodge Street
Albany, NY 12207

Re: *People v. Viviani*,
Indictment No. 6-6976

Dear District Attorney Soares:

I am writing to inform you that a question has arisen in the above-referenced proceeding concerning your communications with the Justice Center for the Protection of People with Special Needs, which is conducting the prosecution. Copies of the parties' filings are enclosed to provide background on the issue, which arises against the backdrop of a Court of Appeals decision from earlier this year, *People v. Davidson*, 27 N.Y.3d 1083 (2016), a copy of which is also enclosed.

The question at issue is whether the Justice Center's Special Prosecutor may constitutionally conduct this felony prosecution. Defendant asserts that the legislation creating the Special Prosecutor, codified in relevant part at Executive Law § 552, is an unconstitutional delegation of prosecutorial power to an officer other than a County District Attorney or the Attorney General.

The Attorney General has noticed an appearance as intervenor under Executive Law § 71 to address defendant's constitutional challenge, and is scheduled to file a brief as intervenor on or before December 15, 2016. The Attorney General has maintained in other cases raising the same challenge presented here that the Special Prosecutor may constitutionally proceed if the County District Attorney with geographical jurisdiction over the case has authorized the Special Prosecutor to conduct it on the District Attorney's behalf, subject to the District Attorney's retention of ultimate responsibility for the prosecution and of authority

over it.¹ See generally *People v. Soddano*, 86 N.Y.2d 727, 728 (1995); *People v. Van Sickle*, 13 N.Y.2d 61, 62-63 (1963).

Similar arguments were put to the Court of Appeals in *Davidson*, which likewise concerned the Special Prosecutor's authority to conduct a prosecution. The Special Prosecutor argued in that case that no authorization from a County District Attorney was required because the Legislature had constitutionally vested the Special Prosecutor with independent prosecutorial authority to prosecute covered abuse and neglect cases. A majority of the *Davidson* Court held that the constitutional issue was not preserved, and therefore did not address it. See 27 N.Y.3d at 1086 n.*. Two Judges, however, concluded that the issue was properly before the Court and agreed with the Attorney General that "as a constitutional matter," the Special Prosecutor "may proceed with defendant's prosecution only with the local District Attorney's consent," and only "so long as the District Attorney retains ultimate responsibility to prosecute." *Id.* at 1090-91, 1095 (Rivera, J., dissenting).²

In the present matter, the Attorney General has concluded that the record does not make clear whether your Office retained ultimate prosecutorial responsibility and authority when authorizing this prosecution, as required by the analysis of the Court of Appeals judges who reached the constitutional issue in *Davidson*.

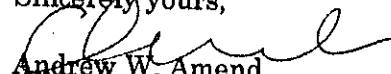
Under these circumstances, we anticipate that the Court may seek further information about your Office's communications with the Special Prosecutor, and would find such information useful in any event. We therefore wanted to make you aware of this dispute and the issues involved. We are available to discuss any questions you may have between now and our December 15, 2016 briefing deadline, and can set up a conference call with the Special Prosecutor and defense counsel when mutually convenient.

¹ Enclosed is a copy of the Attorney General's brief as intervenor in one such case, *People v. Gesin*, No. CR-00881-16 (Cortland City Ct.).

² See also William C. Donnino, *Supplementary Practice Commentaries* [2012-2016], *McKinney's Cons. Laws of N.Y.*, to C.P.L. § 1.20 (Westlaw 2016).

Thank you very much for your attention to these matters.

Sincerely yours,


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Enclosures

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