
State of New York
Court of Appeals

The People of the State of New York,

Respondent,

-against-

Israel Romero,

Defendant-Appellant.

Brief of the
New York State Defenders Association

Amicus Curiae

Jonathan E. Gradess
New York State Defenders Association
11 North Pearl Street, 18th Floor
Albany, New York 12207
(518) 465-3524

Of Counsel:
Alfred O'Connor

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i, ii, iii

PRELIMINARY STATEMENT.....1

INTEREST OF AMICUS.....1

STATEMENT OF FACTS.....3

ARGUMENT.....6

The Attorney General lacked authority to criminally prosecute Israel Romero for the unauthorized practice of law under Judiciary Law § 476-a because the section applies to civil actions only. Executive Law § 63 (3), which requires a threshold request of the Attorney General by a state officer or agency head with regulatory authority over the subject matter in question, also failed to confer criminal jurisdiction on the Attorney General because no such request was made in Romero’s case. The Attorney General’s self-professed authority to “request himself” to prosecute criminal matters under Executive Law § 63 (3) is belied by a plain reading of the statute, the legislative intent of the law, and twenty-five years of interpretation of the section by the courts and the office of the Attorney General itself.

Judiciary Law §476-a applies to civil actions only.....7

Executive Law §63 (3) requires a request from a state official or agency head
other than the Attorney General himself 7

Policy Considerations underlying Executive Law §63 (3)9

Textual Analysis of Executive Law §63 (3)11

Legislative history and administrative interpretation of Executive Law §63 (3).....12

More recent legislation concerning the Attorney General’s criminal jurisdiction
supports Appellant’s position14

In the alternative, the Attorney General’s authority to “request himself” to prosecute
under Executive Law §63 (3) should be limited to matters within the regulatory
ambit of the Department of Law15

CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

Chapis v. State Liquor Authority, 44 N.Y.2d 57 (1978).....11

Della Pietra v. State of New York, 71 N.Y.2d 792 (1988).....8

El Gamayel v. Seman, 72 N.Y.2d 701 (1988).....7

Lawrence v. Houston, 172 A.D.2d 923 (3d Dept. 1991)7

Matter of Emmi v. Burke, 236 A.D.2d 854 (4th Dept. 1997).....9

Matter of Haggerty v. Himelein, 89 N.Y.2d 431 (1997).....8

Matter of Johnson v. Pataki, 91 N.Y.2d 214 (1997)..... 9

Matter of Landau v. Hynes, 49 N.Y.2d 128 (1978).....9, 10, 16

Matter of NYPIRG v. Town of Islip, 71 N.Y.2d 292 (1988).....13

New York Bar Assoc. v. Jacoby, 61 N.Y.2d 130 (1984).....7

People v. Enfield, 136 Misc.2d 52 (Sup. Ct. New York County 1987).....7

People v. Tru-Sport Pub. Co., 160 Misc. 628.....10

People v. Zara, 44 Misc.2d 698 (Sup. Ct. Suffolk County 1964)..... 9, 10

Statutory Provisions

Arts and Cultural Affairs Law Art. 23.....15

Arts and Cultural Affairs Law §23.11.....14

Arts and Cultural Affairs Law §23.17.....8, 14

Business Corporations Law §109.....14

Business Corporations Law §1607.....8, 14

Civil Practice Act §1221 (former).....7

| | |
|------------------------------------------------|-------------|
| Civil Practice Law and Rules §103..... | 7 |
| Civil Practice Law and Rules §105..... | 7 |
| Correction Law §168-p..... | 14 |
| County Law §700..... | 9 |
| Education Law §213-b (6) (7)..... | 14 |
| Environmental Conservation Law §71-2305..... | 11 |
| Estate Powers and Trusts Law §8-1.4..... | 15 |
| Executive Law §60..... | 5 |
| Executive Law §63 (1)..... | 5 |
| Executive Law §63 (2)..... | 9 |
| Executive Law §63 (3)..... | passim |
| Executive Law §70-a..... | 8 |
| General Business Law §347..... | 8 |
| General Business Law §352 <i>et seq.</i> | 15 |
| Judiciary Law §476-a..... | 6, 7, 8, 15 |
| Judiciary Law §478..... | 6 |
| Labor Law §214..... | 8 |
| Public Health Law §3455 (3)..... | 11 |
| Public Officers Law §73 (1) (3)..... | 15 |
| Statutes §94..... | 7 |
| Statutes §129..... | 13 |
| Worker’s Compensation Law §132..... | 8 |

Other Provisions

Exhibit A: Letter from Attorney General Louis Lefkowitz to
Governor Rockefeller (May 9, 1969)..... 12

Exhibit B: Division of Budget Memorandum (S.5185)..... 12

New York State Department of Law Annual Report 1973.....13

New York State Department of Law Annual Report 1974..... 13

New York State Department of Law Annual Report 1975..... 13

New York State Department of Law Annual Report 1980..... 13

“Vacco Retracts Claim to Broad Authority - Faced Storm of Protest by District
Attorneys,” NYLJ, April 9, 1998 at p. 1..... 10

Preliminary Statement

By permission of the Honorable Joseph W. Bellacosa, appellant, Israel Romero, appeals from an order of the Appellate Division, Third Department, dated November 13, 1997, which affirmed judgments of the Schenectady County Court (Tomlinson, J.), dated July 24, 1996, convicting him of unauthorized practice of law and petit larceny.

The New York State Defenders Association has moved for permission to submit a brief as *amicus curiae* by motion returnable before this Court on May 11, 1998.

Interest of Amicus

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1300 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems.

New York State contractually obligates NYSDA, through its Public Defense Backup Center, "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." In this capacity, the Association has issued numerous reports identifying problems in the state's public defense system.

The Court of Appeals has granted NYSDA *amicus curiae* status in a number of important cases dealing with the rights of criminal defendants. Some of the cases in which NYSDA has filed *amicus* briefs include: People v. Burdo, 91 N.Y.2d 146 (1997); People v. Knowles, 88 N.Y.2d 763 (1996); People v. Ford, 86 N.Y.2d 397 (1995); People v. McKiernan, 84 N.Y.2d 397 (1994); Matter of King v. N.Y.S. Div. of Parole, 83 N.Y.2d 788 (1994); People v. Van Pelt, 76 N.Y.2d 156 (1990); People v. Seaberg, 74 N.Y.2d 1 (1989); People v. Pollenz, 67 N.Y.2d 264 (1986) and People v. Bigelow, 66 N.Y.2d 417 (1985).

The instant case raises an important issue about the criminal jurisdiction of the office of the Attorney General. The Appellate Division, Third Department, unanimously interpreted Executive Law § 63 (3), which authorizes the Attorney General to bring a criminal action whenever requested to do so by a state officer or agency head with jurisdiction over the subject matter of the prosecution, to permit the Attorney General, in his capacity as the head of the Department of Law, to “request himself” to criminally prosecute any matter related to his civil jurisdiction. That is, the Appellate Division held the statute allows the Attorney General, on his own initiative, to assume criminal jurisdiction over any matter for which he possesses civil jurisdiction.

The Appellate Division’s unprecedented decision vastly expands the criminal jurisdiction of the office of the Attorney General in contravention of the legislative intent of Executive Law § 63 (3). The Attorney General’s self-professed authority to “request himself” to prosecute criminal matters under Executive Law § 63 (3) is belied by a plain reading of the section, the legislative intent of the law, and twenty-five years of interpretation of the section by the courts and the office of the Attorney General itself. If left undisturbed, the Appellate Division’s decision threatens to promote jurisdictional conflict between local district attorneys and the Attorney General, conflict that will destabilize the criminal justice system, and prejudice the rights of criminal defendants. Therefore, NYSDA has an important interest in the instant appeal. From

its position at the center of New York’s public defense community, it also has information that may be helpful to the Court in the resolution of the appeal.

Statement of Facts

Appellant, Israel Romero, a Honduran lawyer studying for admission to the New York State bar, was admitted in December of 1991 to practice *pro hac vice* by the Appellate Division, Third Department. The eighteen-month practice order permitted Romero to represent indigent clients of the Immigration, Employment and Charitable Community Services Project of the State Street Presbyterian Church in Schenectady, New York (A. 33).¹

In August of 1993, Angel Jiminez met with Romero at the State Street Presbyterian Church and sought his assistance to obtain an uncontested divorce (A. 9). According to Jiminez, Romero represented himself as a “lawyer who specialized in divorce and immigration cases,” and told her he would charge \$750 to represent her. *Id.* Thereafter, Romero prepared and filed the necessary legal papers, Jiminez paid him \$750, and the judgment of divorce was granted in Supreme Court, Schenectady County. Once final judgment had been entered, Jiminez was surprised to learn that the divorce action had been signed and filed as a *pro se* pleading (A. 9-10).

As a result of this incident, Romero was charged in July of 1995 upon the felony complaint of a Department of Law investigator with offering a false instrument for filing, unauthorized practice of law, and petit larceny (A. 5-8). He was later indicted upon the same charges by a Schenectady County grand jury after a presentation by an assistant attorney general (A. 37-39).

¹ Page numbers refer to the Appellant’s appendix.

Representing himself in the Schenectady County Court, Romero moved, *inter alia*, to dismiss the charges on the ground that the Attorney General did not have jurisdiction to criminally prosecute him for the crimes included in the indictment. Specifically, Romero argued that while Judiciary Law § 476-a authorizes the Attorney General to enjoin the unauthorized practice of law in a civil proceeding, it does not authorize the Attorney General to criminally prosecute a person for the misdemeanor offense of unauthorized practice of law (A. 40-45). An assistant attorney general opposed Romero's motion, and the trial court denied it, ruling that Judiciary Law § 476-a authorizes the Attorney General to prosecute both civil and criminal actions. The court did, however, dismiss the felony charge of offering a false instrument for filing as legally insufficient (A. 46-52).

An assistant attorney general prosecuted Romero at a jury trial in the Schenectady County Court. Romero was convicted of unauthorized practice of law and petit larceny. On July 24, 1996, he was sentenced to three years probation with a special condition of thirty days incarceration, a sentence that has been stayed pending determination of the instant appeal.

Represented by appellate counsel, Romero appealed the judgments of conviction to the Appellate Division, Third Department,² where he once again pressed his jurisdictional point about the authority of the Attorney General to prosecute the crime of unauthorized practice of law. Romero repeated his claim about the scope of Judiciary Law § 476-a, and also argued that Executive Law § 63 (3), which authorizes the Attorney General to criminally prosecute certain crimes upon request of a proper state official, was inapplicable because there had been no such request in his case. The Attorney General reiterated his claim that Judiciary Law § 476-a authorizes both civil

² Although Romero was charged solely with misdemeanor offenses, the lone felony having been dismissed for legal insufficiency, he was tried upon the indictment in the Schenectady County Court. Therefore, his appeal was properly to the Appellate Division, Third Department.

and criminal actions, and also argued that, as the head of the Department of Law, he could “request himself” to prosecute crimes pursuant to Executive Law § 63 (3).³

In a decision dated November 13, 1997, the Appellate Division unanimously affirmed the judgments of conviction. Addressing Romero’s jurisdictional arguments, the court wrote:

[W]e reject defendant’s argument that the Attorney General lacked authority to prosecute the criminal charges. Assuming, arguendo, that defendant is correct in maintaining that Judiciary Law § 476-a only authorizes the Attorney General to maintain a civil action against an individual accused of the unlawful practice of law and not a criminal actions [citations omitted], we nevertheless conclude that the Attorney General was authorized to prosecute the subject charges under Executive Law § 63 (3). Pursuant to that statute, the Attorney General has the authority to investigate persons believed to have committed indictable offenses and to criminally prosecute them. This authority can be exercised “upon request” of the Governor or the head of any department of the State. Inasmuch as the Attorney General is the head of the Department of Law (see, Executive Law § 60), he would have the authority, inter alia, under this statute to initiate an investigation and prosecute the matter.

By permission, Romero now appeals the Appellate Division’s order affirming the judgments of conviction.

³ In his Appellate Division brief, the Attorney General also advanced the remarkable argument that Executive Law § 63 (1) permits him to criminally prosecute all crime in New York on the same terms as local district attorneys. By letter dated March 20, 1998 to the Clerk of the Court of Appeals, assistant attorney general Edward Saslaw withdrew this claim, citing concern that “this position will upset what has been a strong and productive working relationship between our office and the State’s 62 District Attorneys.”

ARGUMENT

The Attorney General lacked authority to criminally prosecute Israel Romero for the unauthorized practice of law under Judiciary Law § 476-a because the section applies to civil actions only. Executive Law § 63 (3), which requires a threshold request of the Attorney General by a state officer or agency head with regulatory authority over the subject matter in question, also failed to confer criminal jurisdiction on the Attorney General because no such request was made in Romero’s case. The Attorney General’s self-professed authority to “request himself” to prosecute criminal matters under Executive Law § 63 (3) is belied by a plain reading of the statute, the legislative intent of the law, and twenty-five years of interpretation of the section by the courts and the office of the Attorney General itself.

Although the Schenectady County District Attorney obviously had jurisdiction to prosecute Israel Romero for the crime of unauthorized practice of law (Judiciary Law § 478), the matter was handled exclusively by the New York State Attorney General. In the trial court, Romero moved to dismiss the indictment, claiming that Judiciary Law § 476-a does not confer power on the Attorney General to prosecute the crime of unauthorized practice of law, but merely authorizes the Attorney General to bring a civil action to enjoin it. The court denied the motion, holding that Judiciary Law § 476-a authorizes both civil and criminal proceedings. Romero was convicted of unauthorized practice of law and petit larceny and, on appeal, he renewed the jurisdictional claim. The Appellate Division upheld the authority of the Attorney General to prosecute Romero, but grounded its decision on Executive Law § 63 (3). The court acknowledged the statutory prerequisite of a request of the Attorney General to bring a criminal action from a state officer or agency head, but the Appellate Division reasoned the Attorney General, as the head of the Department of Law, can “request himself” to investigate and prosecute criminal matters. As explained below, neither Judiciary Law § 476-a, nor Executive Law § 63 (3) authorized the Attorney General, on his own initiative, to prosecute Israel Romero for the unauthorized practice of law.

Judiciary Law § 476-a applies to civil actions only.

Judiciary Law § 476-a authorizes the Attorney General to bring a civil action to enjoin the unauthorized practice of law, not a criminal action against a person for the crime of unauthorized practice of law. This conclusion is apparent from a plain reading of the section, which provides that the Attorney General may “maintain an action” for injunctive relief against “any person, partnership, corporation or association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unauthorized practice of law.” Indeed, the statute also permits a bar association to maintain such an action, a provision which clearly forecloses any possibility that it authorizes a criminal prosecution.

Derived from the former Civil Practice Act § 1221, Judiciary Law § 476-a was signed into law in 1962 (L. 1962, chap. 310, sec. 232) as a conforming amendment to the newly-enacted Civil Practice Law and Rules (CPLR). The CPLR defines an “action,” *inter alia*, as an “independent application to a court for relief,” “other than a criminal action.” CPLR §§ 103, 105. Therefore, a plain reading of the section reveals that the “action” referred to in Judiciary Law § 476-a is a civil one (*see* Statutes § 94), and no court has ever held otherwise. *See El Gamayel v. Seman*, 72 N.Y.2d 701 (1988); *New York Bar Assoc. v. Jacoby*, 61 N.Y.2d 130 (1984); *Lawrence v. Houston*, 172 A.D.2d 923 (3d Dept. 1991); *People v. Enfield*, 136 Misc.2d 52 (Sup. Ct. New York County 1987) (Local district attorney has authority to criminally prosecute defendant for unauthorized practice of law - Judiciary Law § 476-a is limited to civil actions only).

Executive Law § 63 (3) requires a request from a state official or agency head other than the Attorney General himself.

Contrary to the decision below, Executive Law § 63 (3) does not authorize the Attorney General to prosecute, on his own initiative, a criminal action for the unauthorized practice of law. Executive Law § 63 (3) directs the Attorney General, at

the request of a state officer or agency head, to prosecute violations of law which the officer or agency head is “especially required to execute or in relation to any matters connected with such department.” According to the Appellate Division, this section permitted the Attorney General, in his capacity as the head of the Department of Law, to “*request himself*” to criminally prosecute the crime of unauthorized practice of law, an offense the Attorney General is empowered to enjoin in a civil action pursuant to Judiciary Law § 476-a. In other words, the Appellate Division held that Executive Law § 63 (3) allows the Attorney General to “request himself” to assume *criminal* jurisdiction over any matter for which he possesses civil jurisdiction. The Appellate Division’s unprecedented interpretation of Executive Law § 63 (3) is inconsistent with the plain wording of the statute, the intent of the Legislature, and with twenty-five years of interpretation of the section by the courts of this state and by the office of the Attorney General itself.

By and large, the Legislature has “delegated the responsibility for prosecuting persons accused of crime solely to the District Attorney, the public officer entrusted with the general prosecutorial authority for all crimes occurring in the county where elected.” Della Pietra v. State of New York, 71 N.Y.2d 792, 796 (1988). By contrast, the Attorney General has “no general prosecutorial authority and, except where specifically permitted by statute . . . has no power to prosecute criminal actions.” Id. at 796-797; *see also* Matter of Haggerty v. Himelein, 89 N.Y.2d 431 (1997).

The Legislature has expressly granted the Attorney General prosecutorial authority over a wide range of “white collar” offenses⁴, as well as the power to investigate and prosecute persons engaged in organized crime. *See* Executive Law § 70-a. In addition, the Attorney General is cloaked with criminal jurisdiction when, by executive order, the Governor supercedes a local district attorney in a particular matter

⁴ *See e.g.* Arts and Cultural Affairs Law § 23.17, Business Corporations Law § 1607, General Business Law § 347, Labor Law § 214, Worker’s Compensation Law § 132.

and appoints the Attorney General as a special prosecutor. Executive Law § 63 (2). *See Matter of Johnson v. Pataki*, 91 N.Y.2d 214 (1997). Finally, the Attorney General may exercise criminal jurisdiction when requested to do so by a state officer or agency head in relation to a matter the officer or agency head is “especially required to execute or in relation to any matters connected with such department.” Executive Law § 63 (3).⁵ The jurisdiction conferred on the Attorney General by Executive Law § 63 (3) is concurrent to that of local district attorneys, who are empowered to investigate and criminally prosecute such matters on their own initiative. *See County Law § 700.*

When properly invoked, Executive Law § 63 (3) confers “broad investigative and prosecutorial powers” on the office of the Attorney General. *See Matter of Landau v. Hynes*, 49 N.Y.2d 128 (1978). But the Attorney General’s criminal jurisdiction under Executive Law 63 (3) is not self-executing; it must be “activated by the request of a proper State officer.” *Id.* at 136 (*quoting People v. Zara*, 44 Misc.2d at 701). The statute lists eight state-wide officers who may initiate such requests.⁶ In addition, a 1969 amendment to the statute empowered the “*head of any other department, authority, division or agency of the state*” to call upon the Attorney General to act in this capacity (L. 1969, chap. 814). According to the Appellate Division, it is this 1969 amendment that authorized the Attorney General to “request himself” to prosecute appellant, Israel Romero, for the crime of unauthorized practice of law.

Policy Considerations underlying Executive Law § 63 (3)

The Appellate Division’s interpretation of Executive Law § 63 (3) overlooks the significance of the statutory requirement that there be a request for the services of the

⁵ The Attorney General’s Medicaid Fraud Control Unit operates under both an executive order and long-standing requests from state agency heads under Executive Law § 63 (3). *See Matter of Emmi v. Burke*, 236 A.D.2d 854 (4th Dept. 1997).

⁶The governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of banks, commissioner of taxation and finance or commissioner of motor vehicles.

Attorney General. The Attorney General's self-proclaimed authority to criminally prosecute crimes that have some relation to his civil authority essentially reads this requirement out of the statute. Instead, the Attorney General seeks a judicial revision of the section to permit him to conduct certain criminal investigations and prosecutions under Executive Law § 63 (3) on his own initiative. However, the "request" requirement cannot be so easily evaded because it serves the important function of demarcating the authority of the Attorney General vis-a-vis a local district attorneys, a matter of overriding concern to the orderly enforcement of the state's criminal laws. More than thirty years ago, one court observed that "for orderly process and for a proper accommodation between the offices of the District Attorney and the Attorney General the request [under § 63 (3)] should be in writing and should generally state the purpose and extent of the inquiry." People v. Zara, 44 Misc.2d 698 (Sup. Ct., Suffolk County 1964).⁷

Without the clear indication of authority provided by a written request from a state officer or agency head, other than the Attorney General himself, jurisdictional conflicts could easily arise between the Attorney General and local district attorneys in individual cases.⁸ Not only would Attorney General Vacco's interpretation of Executive Law § 63 (3) promote "turf wars" of this sort, it would also result in less coordinated and less effective law enforcement, as the absence of clearly demarcated lines of authority might tend to breed neglect of certain areas of law in one prosecutory agency or the other. By contrast, when the Attorney General's power to bring a criminal action under Executive Law § 63 (3) is "activated" (Matter of Landau at 136) by a written request from a state officer or agency head with regulatory authority over the law in question, the jurisdictional boundaries of the Attorney General and local district

⁷ The court in Zara stated in dicta that a written request under Executive Law § 63 (3) was not mandatory. *But see* People v. Tru-Sport Pub. Co., 160 Misc. 628. Apparently, no court has reconsidered the question because all such requests have routinely been made in writing.

⁸ Indeed, developments in this very case confirm that jurisdictional "turf wars" between the Attorney General and local district attorneys over the power to prosecute are not idle concerns. *See* "Vacco Retracts Claim to Broad Authority - Faced Storm of Protest by District Attorneys," NYLJ, April 9, 1998 at p. 1.

attorneys remain sharply defined. Political skirmishes over the power to prosecute are kept to a minimum, and the likelihood that criminal violations will escape detection through prosecutorial oversight is greatly diminished.

The rights of criminal defendants, who might otherwise be subjected to overzealous prosecution as a result of jurisdictional conflicts between the Attorney General and local district attorneys, are also safeguarded by the orderly delegation of authority contemplated by Executive Law § 63 (3). Moreover, the statute facilitates the negotiation of plea and cooperation agreements between the prosecution and defense, agreements that would otherwise be difficult to reach if the prosecutor's authority to hold the State to its end of the bargain were in doubt. *Cf. Chaipis v. State Liquor Authority*, 44 N.Y.2d 57 (1978).

Textual Analysis of Executive Law § 63 (3)

But putting these larger policy considerations aside, there is a more basic problem with the Attorney General's analysis of the statute. When the Legislature intends to grant the Attorney General authority to prosecute criminal actions upon referral from another source, or upon his own initiative, it usually does so in direct and unambiguous language. For example, Environmental Conservation Law § 71-2305 states in part:

The attorney general, upon his own initiative, or upon complaint of the commissioner or local government, shall prosecute persons alleged to have violated any such order . . .

Similarly, Public Health Law § 3455 (3) provides:

The attorney general . . . shall have the power to prosecute . . . any violation of this article; such prosecution may be instituted by him in his discretion or after complaint made to him by any person . . .

Given the clear language with which the Legislature usually confers such authority on the office of the Attorney General, it would not have done so in Executive Law § 63 (3) in the convoluted manner now suggested by Attorney General Vacco.

Legislative history and administrative interpretation of Executive Law § 63 (3)

Moreover, Attorney General Vacco's newly discovered authority to "request himself" to prosecute crimes under Executive Law § 63 (3) is inconsistent with the legislative history of the 1969 amendment which added state agency heads to the list of officers who may call upon the Attorney General to initiate a criminal prosecution (L. 1969, chap. 814). Although Attorney General Vacco now asks this Court rule that the 1969 amendment effectively bestowed on him the power to criminally prosecute any matter related to his civil jurisdiction, the history of the amendment fails to contain the slightest hint that the Legislature intended such a sweeping revision to the jurisdiction of the Attorney General's office. The uncontroversial amendment was sponsored by then-Attorney General Louis Lefkowitz, who explained the straightforward purpose of the bill (S.5185) in a memorandum to Governor Rockefeller on May 9, 1969:

. . . Whatever may have been the earlier reasons for limiting the Attorney General's authority in such matters to offenses reported by the officers now named in the statute,⁹ experience in recent years has demonstrated the wisdom of expanding the Attorney General's jurisdiction to include offenses called to his attention by the head of any State department or agency. And by including all departments and agencies there will no future need to amend the statute on a piecemeal basis to add other State agencies (emphasis added).¹⁰

⁹The governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of banks, commissioner of taxation and finance or commissioner of motor vehicles.

¹⁰ A Division of Budget memorandum on the bill noted that Executive Law § 63 (3) "has been amended a number of times in the last 15 years. These amendments, made on a piecemeal basis, added new department and agency heads with others who may request the Attorney General to investigate indictable offenses or offenses in violation of the law which such officer is required to execute. By including the heads of all departments and agencies with those who may request this service of the Attorney General, there will no future need to amend the statute on a piecemeal basis." A copy of Attorney General Lefkowitz's letter to Governor Rockefeller, and the Division of Budget memorandum are attached hereto as Exhibits A and B, respectively.

In the years immediately after the 1969 amendment, numerous criminal prosecutions were undertaken by the Attorney General's office as a result of requests from state agency heads covered by the 1969 amendment, including, among others, the Office of General Services, the Department of Health, the State University of New York, the Department of Mental Hygiene, the State Harness Racing Commission, the Department of Education, and the Department of Agriculture and Markets.¹¹ However, a review of every annual report filed by the Attorney General's office between 1969 and 1994 reveals that no prosecutions were ever commenced under Executive Law § 63 (3) on the Attorney General's own initiative. No doubt, this is because Attorney General Vacco's predecessors never laid claim to such authority under the statute. As former Attorney General Robert Abrams explained in 1980, requests under Executive Law § 63 (3) must originate with "other state officials." *See* New York State Department of Law Annual Report 1980 at 46.

For twenty-five years, the office of the Attorney General consistently interpreted its criminal jurisdiction under Executive Law § 63 (3) to require a threshold request from an officer or agency head from outside the Department of Law. While Attorney General Vacco is certainly not bound by his predecessors' understanding of the law, this long-standing construction of a statute, which is vital to the day-to-day operations of the office of the Attorney General, certainly weighs heavily against his present claim of authority to act on his own volition. "[J]udicial construction is often aided by the way a statute is interpreted or understood by those whose business it is to operate thereunder, that is, by the public officers charged with its administration or enforcement. Hence, it is well recognized that a long continued course of action by state or local administrative officers is entitled to great weight unless manifestly wrong." Statutes § 129; *see also* Matter of NYPIRG v. Town of Islip, 71 N.Y.2d 292 (1988).

¹¹ The Department of Law annual reports for the years 1973, 1974 and 1975 listed all state agencies that made requests for prosecution under Executive Law § 63 (3). *See* 1973 at p. 34; 1974 at p. 38; 1975 at p. 37.

More recent legislation concerning the Attorney General's criminal jurisdiction supports Appellant's position.

Furthermore, Attorney General Vacco's present contention is inconsistent with a number of post-1969 legislative enactments on the subject of the civil and criminal jurisdiction of the Attorney General's office. For example, a 1972 amendment to the Education Law concerning the unlawful sale of dissertations, theses and term papers included a provision which authorizes the Attorney General to bring a civil action to enjoin the unlawful sale of such material. Significantly, it also included a separate provision granting the Attorney General and local district attorneys concurrent jurisdiction to criminally prosecute violations of the law [Education Law § 213-b (6) (7)]. If Attorney General Vacco's present contention were correct, the Legislature's express grant of authority to the Attorney General to criminally prosecute these matters was a superfluous act, as criminal jurisdiction would have been implicit in the office's civil authority to seek an injunction. *See also* Arts & Cultural Affairs Law § 23.11 (civil injunction) and § 23.17 (criminal enforcement) (L. 1983, chap. 876); Business Corporations Law § 109 (Actions or special proceedings by attorney general) and § 1607 (criminal prosecution - L. 1976, chap. 894). In addition, although Attorney General Vacco now claims that his criminal jurisdiction is effectively coextensive with his civil jurisdiction, the Legislature continues to carefully distinguish when his office may exercise both civil and criminal jurisdiction, and when it may exercise civil jurisdiction alone. *See e.g.* Correction Law § 168-p (Sex Offender Registration Act).

In summary, Attorney General Vacco's revisionist analysis of Executive Law § 63 (3) is inconsistent with the plain language of the statute, the legislative history of the amendment, and with twenty-five years of official interpretation of the amendment by the courts and the office of the Attorney General itself. It is also completely at odds with numerous acts of the Legislature since 1969 which continue to draw a distinction between the civil and criminal jurisdiction of the Attorney General's office. Therefore,

in the absence of a valid request from an agency outside of the Department of Law, the Attorney General's office was without authority under Executive Law § 63 (3) to criminally prosecute Israel Romero for the crime of unauthorized practice of law.¹²

In the alternative, the Attorney General's authority to "request himself" to prosecute under Executive Law § 63 (3) should be limited to matters within the regulatory ambit of the Department of Law.

In the alternative, even if the Attorney General, as the head of the Department of Law, has the authority to "request himself" to criminally prosecute some cases, it does not follow that such unilateral authority can be exercised over the crime of unauthorized practice of law. Executive Law § 63 (3) specifies that the crime must be "in violation of the law which the officer making the request is *especially required to execute or in relation to any matters connected with such department.*" However, aside from the civil jurisdiction it shares with bar associations under Judiciary Law § 476-a, the Department of Law has no regulatory authority over the practice of law in New York State. It is the role of the judiciary to admit qualified persons to the bar, to administer the biannual registration of attorneys, and to enforce a code of conduct in disciplinary proceedings.

By contrast, the Department of Law does have front-line regulatory authority in such areas as the securities industry¹³, theatrical financing¹⁴, and charitable trusts.¹⁵ *See also* Public Officers Law § 73 (1) (3) (Ethics in Government Act - defining "regulatory agency" to include, *inter alia*, the department of law, except "when the attorney general or his agents or employees are performing duties specified in section sixty-three of the executive law.") Consequently, if the Attorney General can "request himself" to

¹² It follows that the Attorney General also did not have jurisdiction to prosecute Romero for petit larceny, a charge that arose in connection with the unauthorized practice of law investigation. See Executive Law § 63 (3).

¹³ General Business Law § 352 et seq. (Martin Act)

¹⁴ Arts and Cultural Affairs Law Art. 23

¹⁵ Estate Powers and Trusts Law § 8-1.4

criminally prosecute certain matters under Executive Law § 63 (3), logically, that authority should be limited to matters he is “especially required to *execute*,” in a regulatory sense, as the head of the Department of Law, or that are “connected” to the regulatory functions of the office. *See Matter of Landau v. Hynes*, 49 N.Y.2d at 128. Not coincidentally, the Legislature has expressly authorized the Attorney General to initiate criminal investigations and prosecutions in these regulatory areas on his own initiative. Therefore, the authority conferred by Executive Law § 63 (3) would merely supplement the Attorney General’s specific statutory jurisdiction to criminally prosecute violations of the laws he is “especially required to execute.”

Accordingly, as the Attorney General was without jurisdiction to prosecute Appellant, the judgments of conviction should be reversed and the indictment dismissed.

CONCLUSION

**FOR THE ABOVE-STATED REASONS, AND THE REASONS SET FORTH
IN APPELLANT'S MAIN BRIEF, THE JUDGMENTS OF CONVICTION
SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.**

Respectfully submitted,

Jonathan E. Gradess
Executive Director
New York State Defender Assoc.
11 North Pearl Street - 18th Floor
Albany, New York 12207
(518) 465-3524

Of Counsel:

Alfred O'Connor

