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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 18

ANDREW REGAN,

Appellant.

20 Eagle Street
Albany, New York
February 9, 2023

Before:

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

Appearances:

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1 ACTING CHIEF JUDGE CANNATARO: Next up is number
2 18. People v. Regan.

3 MR. HUG: Good afternoon, Your Honors. My name
4 is Matthew Hug. I represent the Appellant, Andrew Regan.
5 I request two minutes for rebuttal.

6 ACTING CHIEF JUDGE CANNATARO: Okay, Mr. Hug.
7 Thank you.

8 MR. HUG: Your Honors, this case provides an
9 opportunity to restructure the Taranovich factors with
10 respect to Singer. I think very clearly, there is a Singer
11 violation in this case. I think it's unavoidable. I think
12 that the dissenting opinion of the appellant division, as
13 well of most of the decision by Judge Richards in the
14 court - - - in the trial court amply demonstrates that if
15 this doesn't constitute a Singer violation, then we're
16 operating under a new standard.

17 There is a four-year delay. The People
18 acknowledge that this delay is excessive. That leads us to
19 the excuse for the delay, to which they - - -

20 JUDGE TROUTMAN: How does the impact of the
21 Defendant - - - it's preindictment delay.

22 MR. HUG: Yes.

23 JUDGE TROUTMAN: And he's free at the time.

24 MR. HUG: Right.

25 JUDGE TROUTMAN: How does all of that come into



1 play?

2 MR. HUG: Well, that's the fifth factor under
3 Taranovich, which is prejudice, which I think you got to
4 keep in mind, Your Honor, that prejudice, when there is an
5 unexcused prolonged delay, as this Court has stated, and
6 the Third Department has, is the element of least
7 significance. It's presumed.

8 JUDGE TROUTMAN: So during the time that this
9 four-year delay was going on, were they able to document
10 what they were doing during that time? And I'll ask a
11 double question. Were they doing something throughout that
12 time, or were there periods where nothing was occurring?

13 MR. HUG: To say that there were gaps between
14 when things happened is to really stretch the definition of
15 things happened.

16 So the complaint was made on August 9th, 2009. I
17 would add just to jump off, that this case has spanned
18 three decades. All right? We are here in the normal
19 course of a criminal case, conviction appeal, appeal. That
20 is part of the reason for Singer. This person has - - -
21 has been in prison and has been under the cloud of this
22 thing for going on - - - for a third decade.

23 To answer what was happening, well, nothing was
24 happening. From August of 2009, they interviewed the
25 Complainant, they interviewed the Defendant, and they



1 obtained the results from the - - -

2 JUDGE TROUTMAN: When they interviewed her, she
3 immediately said what had happened, she was cooperative,
4 she submitted to an exam, and her boyfriend offered DNA,
5 correct?

6 MR. HUG: Yes. I'll do you one better, Judge.
7 On that date, they had all the evidence, and only evidence
8 that they presented at trial. So four and a half, five
9 years later, they're only using that which they obtained on
10 August 9th, 2009.

11 JUDGE WILSON: Well, plus the DNA of the
12 Defendant they obtained later.

13 MR. HUG: Well, right. So they established that
14 the Defendant, the Complainant's boyfriend, and a third
15 John Doe's DNA was present on the sample. So I take your
16 point. There was one other piece of evidence that they
17 could have gotten, way earlier, and so that's what they
18 tied - - - they hung their hat on, like, well, we didn't
19 really know how to do it, and you can't blame them.

20 JUDGE TROUTMAN: But unlike in some cases, they
21 had identity. They knew who the Defendant was at that
22 point, also.

23 MR. HUG: Right. Exactly. There was really - -
24 - the DNA piece did not establish much of anything, other
25 than to establish that the Defendant wasn't truthful in his



1 initial statement to the police. So - - -

2 JUDGE RIVERA: I thought they asserted that part
3 of the delay is due to the Defendant's unwillingness to
4 provide a sample.

5 MR. HUG: No. No. That - - - to the extent that
6 that makes its way to the record, it is untrue. So to jump
7 off Judge Troutman's point, which is what activity was
8 taking place, I'll lay that out for you.

9 In January - - - In April of 2010, all right,
10 this is almost a year after the complaint, Investigator
11 Duffy of the New York State Police asked Mr. Regan's then
12 attorney, will Mr. Regan consent to a buccal swab? There's
13 no response. They wait for fourteen months and do nothing.
14 They can't point to a single thing that was done.

15 Fourteen months go by, and they ask a different
16 investigator - - - I'm sorry, the prosecutor, ADA Nissen,
17 on June 26th, 2011, says to the same attorney, hey, will
18 your guy submit to a buccal swab? The case is so old by
19 then - - - and the emails are in the record, the case is so
20 old by then the attorney says what year was this from? I
21 don't really remember. I'm certainly not representing him
22 anymore.

23 JUDGE SINGAS: Well, Mr. Hug, the legislature had
24 decided that there is no statute of limitations on a rape
25 case. They're saying for public policy, it could be ten



1 years, it could be twenty years that a woman could come in
2 and make a report.

3 MR. HUG: Yes.

4 JUDGE SINGAS: So are you saying that the four-
5 year delay here - - - like, are we, in essence, putting on
6 a statute of limitations by declaring preindictment - - -
7 not even preindictment, pre-accusatory instrument, right?

8 MR. HUG: Well, that is - - - I'm glad you asked
9 that question because that is a fallacy raised by the
10 prosecution. Singer is a check on the statute of
11 limitations.

12 JUDGE SINGAS: Okay. But Singer also implied
13 some kind of misconduct, right? Singer, the People there
14 were looking for an advantage. And they said, we're not
15 going to do anything because we'll wait so we can get the
16 statements we need. There was some misfeasance there.
17 There was something going on which they were doing to gain
18 a benefit that's not going on here. Maybe here it was
19 ineptness, incompetence; I don't know what it was. But it
20 wasn't to gain a strategic trial advantage, like Singer.
21 You disagree with that?

22 MR. HUG: Well, I guess I do. I do disagree. I
23 don't think that we need to demonstrate bad faith.

24 JUDGE SINGAS: I'm not suggesting that you do.
25 I'm just trying to distinguish Singer.



1 MR. HUG: Did the People obtain a benefit by
2 delay? Yes. Look at Mr. Plumadore's testimony, riddled
3 with I don't remember; I can't recall; I don't know; I
4 don't remember.

5 So Singer is a check on the statute of
6 limitations because we do not want to do one of two things.
7 We do not want to encourage police departments to sit on
8 their hands for a prosecutorial advantage. We also want to
9 move cases along so that the public can be sure that if the
10 police have enough to charge or do something, they'll do
11 something. They won't just sit there and say, oh, you know
12 what, there's no statute of limitations, we'll get to that,
13 we'll get to that, we'll get to that, while the public is
14 exposed to a potentially dangerous person.

15 ACTING CHIEF JUDGE CANNATARO: So then in this
16 case, would the rule of Regan be that in these types of
17 felonies that don't have statutes of limitations attached
18 to them, forty seven months is the outer limit for
19 preindictment, or pre-accusatory delay?

20 MR. HUG: Thirty months?

21 ACTING CHIEF JUDGE CANNATARO: Forty-seven. I
22 assume - - - I think that's the total number of months.

23 MR. HUG: That's the total here, but the cases
24 that are cited in my brief show that far less time is
25 required.



1 ACTING CHIEF JUDGE CANNATARO: So there's nothing
2 new here? This - - -

3 MR. HUG: Nothing new at all. And to suggest
4 that the statute of limitations should be somehow a bar to
5 the use of Singer would - - - would unravel decades of
6 precedent, would expose Defendants and the public to
7 endless cases.

8 JUDGE WILSON: You're not saying a Complainant
9 couldn't come forward ten years later and that's when the
10 DA learns about it for the first time, and - - -

11 MR. HUG: Right.

12 JUDGE WILSON: Right. And you're not - - -

13 MR. HUG: That's why we have a statute of
14 limitations. So in that situation that could happen.

15 JUDGE WILSON: So you're not - - - and I guess -
16 - - I'm not - - - I count there as being something pretty
17 close to two years where the People haven't offered - - -
18 not a word about what was going on. You're not saying that
19 if they had a colorable explanation for that time this case
20 wouldn't come out differently?

21 MR. HUG: Well that's part two of the Taranovich
22 factors. What is the People's excuse for - - - for not
23 proceeding more promptly? They have a fourteen-month gap
24 and a sixteen-and-a-half-month gap, and a four-month gap
25 where - - -



1 JUDGE WILSON: Well, let me put it a different
2 way. You're not saying categorically that a four-year
3 delay means speedy trial violation no matter what the
4 circumstances?

5 MR. HUG: Correct. I am not saying that. I am
6 saying that there are cases that are legion that say that
7 if the People are trying to investigate a thorny matter,
8 which is what - - - what category three provides, which I
9 would ask the Court to eliminate. Because it just - - - it
10 creates confusion. There's no need for category three of
11 the Taranovich factors because it's necessarily assumed to
12 be as part of category two, which is the reason or the
13 excuse for the People's delay. A complicated case merits
14 and should be afforded wider latitude for an investigation.

15 JUDGE GARCIA: What's your view of the rape in
16 the first degree, with respect to it being a complicated
17 case?

18 MR. HUG: I mean any case could be complicated,
19 Your Honor. In this case, the case isn't complicated.

20 JUDGE GARCIA: But it's a first-degree rape case.
21 Unfortunately, we all know there's been a terrible history
22 of malprosecutions and victims in these cases coming
23 forward and being subject to mistreatment in the system, so
24 doesn't that complicate a complainant case like this?
25 Where you have somebody coming forward and saying they were

1 assaulted in this way, and now we have to get DNA because
2 we have a witness coming forward in this type of way. And
3 that DNA for whatever reason here is delayed. But it
4 doesn't go to the nature of the crime. I mean, it seems to
5 me like you're saying this is a very simple and
6 uncomplicated investigation.

7 MR. HUG: Yes. I do. I am saying that. If you
8 look at the trial evidence, Judge, it's basically,
9 Defendant says this, the Complainant says this, and the DNA
10 says that. There is nothing - - -

11 JUDGE TROUTMAN: It's a serious crime,
12 nonetheless.

13 MR. HUG: Right. Right. It is a serious crime.
14 But in Taranovich, this Court specifically said that
15 category three is not a check the box type of category
16 where you say, oh, serious offense, we're going to forgive
17 a lot of delay.

18 What it says is, and it really - - - I think it
19 was just an attempt to make this a more complicated
20 analysis than it had to be, the prosecution can show that
21 they engaged in reasonable due diligence over the course
22 of, say, four years because this was a complicated case.

23 They have not said that. In fact, there's been
24 three judges that have dispensed with their excuse all
25 together. But yet those same three judges have all said

1 because of the seriousness of the offense, that cuts in
2 favor of the People. And that there is a contradiction
3 there.

4 That if they can't raise an excuse as to why it
5 took them so long, which they can't, try as they might.
6 And they've changed their argument since they were
7 initially in front of Judge Richards, after the appellate
8 division majority invented, oh, the - - - the case was
9 ongoing and it was open. Those are not excuses.

10 The permitted excuses, according to this Court in
11 Lesiuk, L-E-S-I-U-K, are need to investigate to discover
12 the offender, elimination of unfounded charges, and to
13 gather sufficient evidence to charge. Those are not
14 excuses raised by the People, nor could they because they
15 don't exist in this case.

16 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
17 Hug.

18 MR. PEABODY: May it please the Court, Matthew L.
19 Peabody, assistant district attorney, St. Lawrence County
20 on behalf of the Respondent.

21 With respect to the four year-delay here, I think
22 that what's important is to analyze it looking at some of
23 the cases that have been sighted with respect to, you know,
24 these time frames less than ours, People v. Staley, People
25 v. White, People v. Winfrey, I think those are all



1 situations - - -

2 JUDGE TROUTMAN: What was going on?

3 MR. PEABODY: Well, there's nothing - - - in
4 those cases, nothing. No activity whatsoever.

5 JUDGE TROUTMAN: In this case, the problem here,
6 in this case, that is of concern is that there was a
7 victim, she was fully cooperative, she came forward, she
8 submitted to an intrusive exam, and her boyfriend consented
9 to buccal swabbing and giving his DNA. A name was given.
10 Why no prosecution?

11 MR. PEABODY: Well, you have to counter that with
12 the other available evidence at that time, too, which is
13 that suspect consented to an interview with law
14 enforcement, and adamantly denied having any sexual contact
15 at all. So at that point - - -

16 JUDGE TROUTMAN: So the prosecution didn't go
17 forward because he denied it?

18 MR. PEABODY: Well, at that point in the
19 investigation, you're weighing the balancing of the
20 evidence you have, which is you have a Complainant's
21 statement about what happened on this night, and you have
22 the suspect completely saying not at all. And so - - -

23 JUDGE TROUTMAN: There are a number of rape cases
24 tried throughout this country where there is no DNA. There
25 is exactly what you just said.



1 MR. PEABODY: No, that - - - correct. But in
2 this situation, we balance the fact that we have two
3 completely conflicting events. Not a, I had contact with
4 her and it was consensually. There was no contact at all.

5 JUDGE WILSON: So the record - - -

6 MR. PEABODY: We now have a - - - we're awaiting
7 the results of the same kit.

8 JUDGE WILSON: The record reflects that on
9 November 10th, 2010 the assistant district attorney spoke
10 with the New York Prosecutor's Training Institute about how
11 to get the Defendant's DNA. And it's two years later, on
12 November 9th, 2012, when they actually apply for a warrant.

13 MR. PEABODY: That's correct.

14 JUDGE WILSON: That seems really hard to explain,
15 or even believe.

16 MR. PEABODY: That I - - - judge, I don't believe
17 that there's anything in the record to support an excuse as
18 to why it took so long for the People to make that
19 application, but - - -

20 JUDGE WILSON: Well - - -

21 MR. PEABODY: - - - there's nothing to show it
22 was done in bad faith.

23 JUDGE WILSON: Well presumably, it's not - - -
24 well, do we need bad faith?

25 MR. PEABODY: I think so, when we're analyzing



1 this.

2 JUDGE WILSON: Does the constitutional speedy
3 trial right depend on bad faith?

4 MR. PEABODY: No, I think when we're analyzing
5 factor number two, I think one of the things that Singer
6 and Lesiuk make clear is that you need to look at whether
7 the decision to defer was in good faith or in bad faith. I
8 think that Barker v. - - -

9 JUDGE WILSON: Well, but that presumes that it's
10 a decision.

11 MR. PEABODY: Well - - -

12 JUDGE WILSON: I mean, this doesn't even look
13 like a decision, it looks like - - - I mean, I assume. I
14 don't know, but I assume that when the ADA called the
15 training institute and said how do I do this, they weren't
16 told, we don't know. They were told here's how you do it.
17 And there's a form for it, right?

18 MR. PEABODY: Right. But - - -

19 JUDGE WILSON: So - - -

20 MR. PEABODY: But following that, there's
21 attempts to obtain the sample voluntarily. And I would
22 interpret those as that's products of negotiation and
23 leveraging.

24 ACTING CHIEF JUDGE CANNATARO: And when the
25 attempt was made to obtain the sample voluntarily, the



1 response from counsel was hasn't Singer already killed
2 this? Wasn't it something like that?

3 MR. PEABODY: Well, that's the - - - that's the
4 second attempt. The first attempts are made in April of
5 2010, I believe.

6 ACTING CHIEF JUDGE CANNATARO: That's a pretty
7 provocative statement. I'm just thinking, that would have
8 sped you up a lot, I would think. But it doesn't seem to
9 have done so here.

10 MR. PEABODY: Well, actually I think it does,
11 Judge. I think that conversation takes place in June of
12 2012. The DAs and state police apply for their search
13 warrant five - - -

14 JUDGE WILSON: Four months - - - four months
15 later.

16 MR. PEABODY: - - - months later.

17 JUDGE WILSON: That's a long wait, isn't it?
18 Especially when defense counsel has told you there's a
19 Singer problem here and by the way, I don't even remember
20 this guy, it's been so long.

21 MR. PEABODY: Right. No, I - - - the additional
22 five months certainly doesn't help our arguments, but I
23 think again, when you're looking at the excuse for the
24 delay, you've contrasted with cases where there's no excuse
25 at all, basically we put the file in a box and forgot about



1 it for years, versus - - -

2 JUDGE WILSON: But isn't that what it looks like
3 here?

4 MR. PEABODY: No. I think the record is complete
5 with a lot of examples of activity that take place on this
6 case. Now, the main example has been this - - - this need
7 to obtain the Defendant's sample, as a comparison. And
8 they focused on, well, that shouldn't have taken three
9 years to do.

10 But there's other things that are taking place on
11 the case while those time frames are ongoing. State police
12 are investigating and interviewing - - -

13 JUDGE WILSON: I'm looking for example at, I
14 think it's ADA Botts' affidavit, which is what submitted in
15 opposition to the speedy trial motion. And I see
16 absolutely nothing to explain the sixteen months from June
17 10th, 2011 to October 18th, 2012. Not a peep about what
18 happened there. I mean, that to me looks like sitting in a
19 box.

20 MR. PEABODY: For those four months - - -

21 JUDGE WILSON: Sixteen months.

22 MR. PEABODY: June 2012 - - -

23 JUDGE WILSON: No. June 10th, 2011.

24 MR. PEABODY: Oh. If you refer to the record,
25 Judge, at, I believe, it's Respondent's appendix 9 and 10,



1 in January 2011, in February 2011, June 1st, 2011 - - -

2 JUDGE WILSON: Yeah. No. I'm asking about from
3 June 10th, 2011 to October 18th, 2012.

4 MR. PEABODY: I apologize, Judge. In between
5 those two times frames, following the interview of Mr.
6 Woodward, there's the June 26th correspondence between our
7 office and Attorney Pilatzke regarding a voluntary DNA
8 sample, on October 11th, then the investigation gets
9 reassigned to a new investigator who then meets with the
10 DAs office subsequently after that.

11 So between June 10th, 2011, and October 18th,
12 2012, those are really the only two activities supportable
13 by the record in terms of what was happening on the case.
14 But I think still, you need to look at that excuse for the
15 delay, consider - - - I think one of the things that this
16 Court referenced, Barker v. Wingo before, and I think the
17 Defendant has cited in his papers.

18 JUDGE TROUTMAN: So can I ask you again, what is
19 the excuse for the delay?

20 MR. PEABODY: I think the excuse for the delay
21 was the need to obtain the Defendant's DNA sample as a
22 whole.

23 JUDGE TROUTMAN: At four years, that's what the
24 problem was?

25 MR. PEABODY: Well, three years to obtain the



1 sample. And then following that I think the People worked
2 very quickly to secure an indictment. The Defendant's - -
3 -

4 JUDGE TROUTMAN: Okay.

5 MR. PEABODY: - - - DNA sample was obtained in
6 November of 2012, so if we're looking at the time from
7 the - - -

8 JUDGE WILSON: Then you have - - -

9 MR. PEABODY: - - - time of the incident to
10 getting the DNA sample, it's three years, and then - - -

11 JUDGE WILSON: Then you have another quite long
12 period of time, maybe a year or so, waiting for the lab to
13 come back with a sample? With those results, I mean.

14 MR. PEABODY: I think it's - - - the record as I
15 know it, Judge, I believe it's at Respondent's Appendix 3
16 and 16. I believe the search warrant is applied for
17 November 9th, 2012. The Defendant consents and comes in to
18 give his sample November 12th in response to that order.
19 And then the results from the lab are received in February
20 2013. So approximately three months until February.

21 JUDGE WILSON: Okay.

22 MR. PEABODY: Following that, the delay from - -
23 - he's arrested subsequently very shortly after that,
24 approximately nine days later. The delay from there to
25 indictment is basically the negotiation between the parties

1 that kind of encapsulates one of the other issues.

2 JUDGE SINGAS: How do you balance that?

3 JUDGE RIVERA: Well, let's say that Court
4 determines that the excuse provided is simply not
5 acceptable. It's just - - - it's not an excuse, okay?
6 Does that mean then the Taranovich factors do weigh in
7 favor of the Defendant, or is there something else that
8 we're missing?

9 MR. PEABODY: No, Judge. I think that's - - - I
10 think what you need to focus on is - - - is that excuse.
11 And even if it's - - - even if it's not a valid excuse, I
12 think you can look at it three ways in the Court in Barker
13 v. Wingo did. They basically said you need to look at the
14 excuse for delay in three ways.

15 Was it done in a deliberate attempt to delay,
16 like bad faith like we had in Singer? Or was it done for a
17 completely good faith reason, like the need to do further
18 investigation. Or is it somewhere in the middle, a neutral
19 reason like - - -

20 ACTING CHIEF JUDGE CANNATARO: So is your answer
21 to Judge Rivera's question that the other four Taranovich
22 factors just don't factor in?

23 MR. PEABODY: No. No. I think they do factor
24 in, but I think you need to look at the delay first and
25 consider it like - - - it's basically a neutral like.



1 Like, we're not - - - if you're going to assume
2 hypothetically like we don't find good cause for your
3 delay, there's certainly nothing in the record to support
4 that it was done in bad faith either. So it's - - - it's
5 kind of neutral.

6 JUDGE RIVERA: Well, if you're dragging your
7 feet, why isn't that bad faith?

8 MR. PEABODY: I'm sorry?

9 JUDGE RIVERA: Let's say the record reveals that
10 it's not prioritized, there's - - - action is at a snail's
11 pace when it happens, why wouldn't that be bad faith? Is
12 this - - -

13 MR. PEABODY: Because there's nothing the
14 People - - -

15 JUDGE RIVERA: This is the work of law
16 enforcement - - -

17 MR. PEABODY: There's nothing - - -

18 JUDGE RIVERA: - - - dragging your feet, not
19 doing it, ending up as counsel has argued with a situation
20 where a witness, at least one witness, the memories fade
21 and makes it a difficult case, both for defense and the
22 prosecutor, but yes, certainly for the defense.

23 I mean, why - - - I understand the difference,
24 yes of course, between good and bad faith, but it does
25 really push the envelope about what - - - we're really



1 working to prosecute the case when this is the action, that
2 the record reveals it's not that I'm looking at the record
3 in any jaded way; it's just what the record shows.

4 MR. PEABODY: No, I completely agree, Judge, but
5 I think the reason you need to look at it that way is
6 because there's nothing the People gained advantage by
7 that. There wasn't like they were purposely seeking to
8 delay this Defendant's day in court or seeking to give this
9 victim justice.

10 JUDGE SINGAS: How does the delay balance against
11 the greater policy of prosecuting and holding people
12 accountable for rapes in the first degree?

13 MR. PEABODY: Well, I think there, Judge, that I
14 think we're back to that's where I think the analysis of
15 the fact that this is a crime, that the legislature has
16 given on limited statute of limitations on.

17 We're talking about four years, and we've
18 conceded that that is a substantial delay. There's no ifs
19 ands or buts about that. But taking into great context of
20 a rape first where you have two parties with completely
21 different testimony about what occurred on that event, and
22 the need to get more definitive evidence to move forward.
23 Not saying that we couldn't have moved forward, but to be
24 most successful to give that victim the best success for
25 justice, it was chosen to delay to get the Defendant's DNA.

1 And whether or not that delay was reasonable or
2 unreasonable I don't think is the analysis. I think we
3 need to focus on whether it was bad faith or good faith.

4 ACTING CHIEF JUDGE CANNATARO: Thank you.

5 MR. HUG: Good faith, bad faith isn't one of the
6 Taranovich factors. To the extent that it should be
7 considered, I will remind this Court about what it said
8 about good faith. This Court mentioned good faith in
9 association with the Taranovich factors, but it was, "good
10 faith to defer commencement of a prosecution for further
11 investigation or for other sufficient reasons."

12 It's not, oh, we're going to gather up in the
13 back room and grind our hands and say, oh, we'll wait until
14 this guy has no chance of winning.

15 JUDGE SINGAS: But regardless of whatever reason
16 is given, one of the factors is the seriousness of the
17 case.

18 MR. HUG: Right. But that must be read in
19 conjunction with the reason for the excuse. You're
20 giving - - -

21 JUDGE SINGAS: Must it?

22 MR. HUG: In other words, the way that you - - -
23 the way that you read factor three can only be, we will
24 give additional leeway in a serious case because it takes
25 longer to investigate, not - - - it isn't - - - that factor



1 doesn't exist as a check the box to say, oh, serious case,
2 let's let them sit on their hands for longer.

3 JUDGE WILSON: Well, couldn't - - - I'm sorry,
4 couldn't it have had two different purposes? One that you
5 just articulated, but also there's a greater societal
6 interest in prosecuting crimes that are more serious, and
7 so we're going to read the guarantee a little bit laxer in
8 those circumstances.

9 MR. HUG: Well, that suggests that when the
10 legislature passes a statute of limitations as it seems to
11 be - - -

12 JUDGE WILSON: No. It has nothing to do with the
13 statute of limitations.

14 MR. HUG: Right. But it's the same basic
15 argument that what are we saying? We want the police to be
16 lackadaisical in serious cases because they have unlimited
17 time? We're not going to hold their feet to the fire?

18 ACTING CHIEF JUDGE CANNATARO: It could be saying
19 we just want serious crimes to get prosecuted.

20 MR. HUG: No doubt. But that is covered in part
21 two, as to why is it taking so long? Well, Judge, it was a
22 serious case, we had complexity, so seriousness doesn't
23 only mean the Penal Law offense definition, but the
24 seriousness of the offense could be a forgery.

25 JUDGE GARCIA: But aren't - - - to Judge Wilson's



1 point, couldn't the test in that prong also be factoring in
2 the victim and the impact on society, this particular
3 victim, this is a first-degree rape case - - -

4 MR. HUG: Um-hum.

5 JUDGE GARCIA: - - - and we're going to balance
6 that, not only that it's complicated, it necessarily would
7 take you longer. To me, yes, that's somewhat subsumed in
8 your excuse. So on the theory that it isn't subsumed in
9 that, why isn't it that factor encompass that effect on the
10 victim - - -

11 MR. HUG: Because - - -

12 JUDGE GARCIA: - - - on society?

13 MR. HUG: Right.

14 JUDGE GARCIA: This crime going unpunished
15 because of delay by a prosecutor?

16 MR. HUG: Because I think - - - well, I think
17 that's the gray area, Judge, when you say, well, we're
18 going to ascribe a different set of rules to "go
19 unpunished." There's reasons why we have these rules.

20 JUDGE GARCIA: We do that. Like you said, the
21 statute of limitations does that.

22 MR. HUG: The statute of limitations does that so
23 that in Judge Wilson's example from earlier, that if the
24 victim comes forward after having not said anything, and
25 the police don't know anything about the case, that that



1 case could be prosecuted. In this case - - -

2 JUDGE GARCIA: That's not the only reason.

3 MR. HUG: What's that?

4 JUDGE GARCIA: That's not the only reason.

5 MR. HUG: That's the main reason, right? I mean
6 sometimes the police are aware of a crime but have no idea
7 who the identity is. If they come upon a body that's been
8 buried in a shallow grave, yes. But that's not the case of
9 what Singer's trying to do.

10 JUDGE GARCIA: It could be check hiding too. I
11 mean, it doesn't - - - the complicated nature of the case
12 doesn't always go to the seriousness of the case. And I
13 think the point here is that factor in terms of seriousness
14 goes to impact.

15 MR. HUG: Well, I guess I will agree to disagree,
16 because when I read the factors that Taranovich as it laid
17 out in its explanation in it as to what that factor means
18 and it's quoted in my brief, it doesn't have anything to do
19 with a categorical Penal Law offense, and I would note that
20 with respect - - -

21 JUDGE TROUTMAN: But with respect to the
22 seriousness and the impact, you have a victim that's
23 completely cooperative. We don't want vigilante justice.

24 MR. HUG: Right.

25 JUDGE TROUTMAN: So we do want them to have the



1 opportunity to have their day in court, also.

2 MR. HUG: And from that point of view, Judge,
3 that is why the delay here is quite egregious. Because
4 what the People said in their position is the reason they
5 waited is because the victim said it happened and the
6 Defendant said it didn't happen. But that isn't a reason
7 to sit on your hands. In fact, it would have been a better
8 fact scenario for - - -

9 ACTING CHIEF JUDGE CANNATARO: The delay also
10 gave the victim the opportunity to have her day in court,
11 didn't it?

12 MR. HUG: Did it? I mean, eventually. I mean -
13 - - but that's the issue.

14 ACTING CHIEF JUDGE CANNATARO: If we did it your
15 way, that wouldn't have happened.

16 MR. HUG: Well, if the police had acted and done
17 anything over the course of four years, there would have
18 been swift justice and perhaps the Defendant would have had
19 a fair trial within an appropriate amount of time.

20 The point that I was trying to make with respect
21 to the dichotomy the People were raising, that their fact
22 pattern for the argument would be better if the Defendant
23 said yes, we had sex, it was consensual. And she said, no,
24 it was unconsensual, that that would create a situation
25 where you might want to sit and wait and think about it and



1 try to develop more evidence for your case.

2 But in a case where it happened or it didn't, and
3 there is an objective way to tell, any prosecutor worth
4 their weight in salt would be, I'm going to go get that
5 guy's DNA and I'm going to find out whether or not he's
6 lying about having had contact with that person.

7 JUDGE SINGAS: So because - - -

8 ACTING CHIEF JUDGE CANNATARO: Thank you. Oh,
9 I'm sorry. Go ahead.

10 JUDGE SINGAS: So because the prosecutor is not
11 on the ball, the victim doesn't have her day in court? I
12 mean, that's where I'm fundamentally having a hard time
13 wrapping my head around this. Taranovich says look at
14 seriousness of the crime. We have homicide cases that
15 we've upheld fourteen, fifteen years later, right?

16 MR. HUG: Under what? Under Singer?

17 JUDGE SINGAS: Under - - - yeah. Under Singer.
18 So I don't understand how a four-year period on a Rape 1,
19 where there is no prejudice to the Defendant, it's pre-
20 accusatory instrument, that you're so emphatically saying -
21 - -

22 MR. HUG: Well, Defendant has a due process
23 right, Judge. I mean - - -

24 JUDGE SINGAS: I understand that. I understand
25 that.



1 MR. HUG: So either you say that Singer is no
2 longer the law of the state, or you uphold it. I mean,
3 there is no middle ground here.

4 I mean, this is a perfect case of unexcused,
5 admittedly excessive delay that all of us agree, I believe,
6 was completely without excuse.

7 And so when you look at that Singer, Taranovich,
8 and the rest, they all say that prejudice becomes the least
9 important factor when there is unexcused prolonged display
10 for which that is conceded here. So I don't see the point
11 of engaging on whether or not this is serious.

12 I acknowledge rape in a vacuum is a serious
13 crime, but that is not going to rescue the People from
14 sitting on their hands and doing nothing for years while
15 everyone, including this Defendant, sits home - - - sits
16 now in a jail cell, fourteen years later. There has to be
17 an end to it.

18 And the People are completely in control as to
19 how this all functions, and it is the Court's obligation
20 under Singer to tell them we're not going to permit this
21 kind of foot dragging endlessly so that justice is forever
22 delayed.

23 ACTING CHIEF JUDGE CANNATARO: Thank you.

24 (Court is adjourned)

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

I, Nicole Oranges, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Andrew Regan, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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