

## NEW YORK COURT OF APPEALS ROUNDUP

### CONVICTION OF CRIMINAL DEFENDANT REVERSED DESPITE UNEXPLAINED DELAY IN FILING INDICTMENT

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The Commission on Judicial Nomination submitted another slate of seven candidates to Gov. Kathy Hochul to consider for appointment as Chief Judge of the Court of Appeals after the Senate declined to approve the governor's appointment of Second Department Presiding Justice Hector LaSalle earlier this year. From that slate, Gov. Hochul nominated current Court of Appeals Associate Judge Rowan D. Wilson and announced her intention to nominate Caitlin Halligan of Selendy Gay Elsberg to fill the associate judge vacancy that will be created by Judge Wilson's elevation to chief judge. Wilson has served as an associate judge of the Court of Appeals since 2017 and, if he is confirmed by the Senate, he will be the first Black chief judge in the history of New York state. Before joining Selendy Gay as a partner, Halligan served as, inter alia, Solicitor General for the state of New York and general counsel to the New York County District Attorney's Office. The Senate now has 30 days in which to confirm or reject the governor's nomination of Judge Wilson as chief judge.

In the meantime, the six-member Court of Appeals continues to hear argument and issue decisions, including a recent 4-2 decision written by Judge Wilson and joined by Acting Chief Judge Cannataro and Judges Rivera and Troutman, in which the court reversed the conviction of a criminal defendant in light of the People's largely unexplained four-year delay in filing an indictment.

The defendant in *People v. Regan* was convicted of first-degree rape and sentenced to a 12-year prison term followed by 15 years of post-release supervision. The victim and her boyfriend and the defendant and his girlfriend attended a wedding together on Aug. 8, 2009. The four of them then patronized several bars together and returned to the home of the victim and her boyfriend where the defendant and his girlfriend were invited to sleep on a couch. According to the victim, she awoke during the night to find the defendant on top of her engaging in sexual intercourse without her consent. The victim went to the hospital where a sexual assault nurse administered a sexual assault examination and rape kit. The crime, including the identity of the defendant, was immediately reported to the police who then interviewed the defendant that day. The defendant denied having sexual intercourse with the victim and he refused to voluntarily provide the police with a DNA sample. The police interviewed several other witnesses and collected a DNA sample from the victim's boyfriend.

Five months later, a lab report indicated that samples obtained with the rape kit contained semen. Three months after that, on April 5, 2010, the lab reported that male DNA from someone other than the victim's boyfriend was present in the samples. The police asked the defendant again to provide a DNA sample, but did not hear back from him and the police did not follow up. Approximately seven months later, the assistant district attorney assigned to the case contacted the New York Prosecutor's Training Institute to obtain information on how to obtain a warrant to collect the defendant's DNA, but then failed to apply for a warrant. Two months later, the assistant district attorney met several times with the investigatory team about obtaining the defendant's DNA. Four months later, in June 2011, the assistant district attorney spoke with the investigators again and the investigators said that they would obtain the DNA evidence.

But nothing further happened for more than a year until June 26, 2012, when the assistant district attorney emailed the defendant's counsel to ask, again, if the defendant would provide a voluntary DNA sample. Defense counsel responded that he needed to speak with the defendant and noted that the People may have a due process issue at that point because of the length of time that had passed. Nevertheless, the People waited another five months before requesting a warrant. That process proved to be relatively easy. When a new investigator was assigned to the case, he called the New York State Police Counsel's office, completed the search warrant application and supporting affidavit and sent it to the District Attorney's Office for review. The application sat there for three weeks before being submitted to the court on Nov. 9, 2012. It was approved that day, and the defendant's DNA sample was obtained three days later and immediately sent to the state police lab. On Feb. 4, 2013, the investigator received a report back indicating that the defendant's DNA matched the samples obtained during the sexual assault examination of the victim. A felony complaint was filed on Feb. 12, 2013, the case was presented to the grand jury on Aug. 15, 2013, and the indictment was filed on Aug. 29, 2013— more than four years after the victim reported the incident to the police.

The defendant's motion to dismiss the indictment on pre-indictment delay grounds was denied and the case proceeded to trial where the defendant no longer denied having sex with the victim but claimed that it was consensual. The jury found the defendant guilty of first degree rape. The Appellate Division, Third Department affirmed the conviction in a split decision and one of the two dissenting justices granted permission to appeal to the Court of Appeals. 196 A.D. 3d 735, 739 (3d Dep't 2021).

The court, in a majority decision written by Judge Wilson, reversed the Third Department and dismissed the indictment on the grounds that the People's delay in indicting the defendant violated his due process rights. The court noted that the inquiry into whether a defendant's rights have been violated for post-indictment speedy trial reasons or for pre-indictment delay are both subject to the same five factors first articulated in *People v. Taranovich*, 37 NY2d 442, 445 (1975), namely: 1) the extent of the delay; 2) the reason for the delay; 3) the nature of the underlying charge; 4) whether or not there has been an extended period of pretrial incarceration; and 5) whether or not there is any indication that the defense has been impaired by the delay.

While the majority noted that no one factor or combination of factors is necessarily determinative, the majority placed the most emphasis on the first two factors—the extent of and reason for the delay. The majority acknowledged that pre-indictment delays far longer than the multi-year delay here have been excused where the People were able to establish good cause for the delay, but pointed out that there was no satisfactory explanation for at least 31 months of the four year delay here. The People were aware no later than April 2010 that they would need a sample of the defendant's DNA but delayed seeking a warrant until November 2012 and offered no good faith, strategic rationale for doing so. The remaining three *Taranovich* factors do not weigh in the defendant's favor, but in the view of the majority they cannot overcome the People's lengthy and unexplained delay.

Judge Singas dissented and would find that there was no due process violation despite the extent of the delay and the People's lack of justification for that delay. She expressed concern that the majority decision would undermine recent progress in ensuring fair treatment for sexual assault victims in New York's criminal justice system. Not surprisingly, given this conclusion, Judge Singas focused on the last three *Taranovich* factors—the nature of the crime charged, whether the defendant was incarcerated and prejudice to the defendant. Her dissent includes a detailed description of the largely misogynistic history of rape jurisprudence, including the burdens placed on victims and the roadblocks to effective and fair prosecution that were inherent in the criminal justice system. Judge Singas also described the effort since the 1970s to effect significant, albeit incremental, improvement in this anti-victim bias as evidenced, for example, by the passage of a "rape shield" statute in 1975 and the elimination of the statute of limitations for first degree rape in 2006. In her view, the seriousness of the crime for which the defendant was convicted, the fact that he was not incarcerated before the indictment was filed, and the lack of demonstrable prejudice require affirmance of the conviction.

Judge Garcia did not join in Judge Singas' dissent, but rather dissented without writing a separate opinion for the reasons set forth in that portion of the Third Department's majority opinion that addressed the pre-indictment delay issues.

The *Regan* decision does not just present two extremely well-written opinions; it also demonstrates the difficulties imposed by the lack of a full, seven-judge Court of Appeals in that the court would have been unable to issue a decision here if one of the judges joining the majority opinion had instead joined in the dissents.

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