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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 15

REGINALD WIGGINS,

Appellant.

20 Eagle Street
Albany, New York
January 9, 2018

Before:

CHIEF JUDGE JANET DIFIORE
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

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 15, the People of the State of
3 New York v. Reginald Wiggins.

4 MR. SCHATZ: Good afternoon. May it please the
5 court, Ben Schatz for Mr. Wiggins. Your Honor, may I
6 please have two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may.

8 MR. SCHATZ: Thank you. The People of the State
9 of New York deprived Reginald Wiggins his constitutional
10 right to a speedy trial when they detained him at Riker's
11 Island for over six years - - -

12 CHIEF JUDGE DIFIORE: Counsel, what is the period
13 of delay that we review here? Is it the period between the
14 time when Mr. Wiggins was arrested and the time the first
15 speedy trial motion was denied?

16 MR. SCHATZ: We would say at a minimum it's the
17 period - - - the period you just described, the period from
18 the arrest to the - - - the point when the first - - - it's
19 December 5th, 2013, the first speedy trial motion is
20 denied. And we say that only because we don't think it
21 really makes a difference whether it's five-and-a-half
22 years or six-years-and-three-months. Both periods are
23 extraordinarily long. Probably the better rule in terms of
24 preservation on these types of issues is not to require
25 counsel to repeatedly continue to make speedy trial motions



1 once there's been a significant period of time.

2 JUDGE FAHEY: Well, what about the effect of the
3 arrest and conviction I believe on one of two assault
4 charges?

5 MR. SCHATZ: It's totally irrelevant here. It's
6 irrelevant as a matter of law. There is a U.S. Supreme
7 Court case called Betterman that comes down last year and
8 says that even if a defendant is convicted on one count he
9 still retains his right to be speedily brought to trial on
10 an unrelated count.

11 JUDGE GARCIA: But does it affect a prong of the
12 extended period of pretrial incarceration? I mean it
13 wouldn't affect your speedy trial rights, I could see that.
14 But if you're factoring a period of pretrial incarceration,
15 why wouldn't it go to that factor?

16 MR. SCHATZ: I think it's - - - I think it's
17 irrelevant to the totality of the Taranovich analysis, but
18 as - - - as sort of a factual matter, to look at - - -

19 JUDGE FAHEY: Well, the argument would be that
20 you'd be in jail for - - - for - - - on these charges
21 anyway. So that instead of having five-and-a-half years it
22 may be two-and-a-half years.

23 MR. SCHATZ: Well, as to the pretrial
24 incarceration prong alone, I - - - I think - - -
25 respectfully, Your Honor, I think that switches cause and



1 effect. The reason he is at Riker's Island in the first
2 place is because he's being detained for so long. There is
3 an assault committed at year three of his incarceration.

4 JUDGE FAHEY: Clearly, then, the first three
5 years would be free of that.

6 MR. SCHATZ: At a minimum, I - - - I think our
7 position is that the entire period of detention counts
8 because he wouldn't have been - - - he wouldn't have been
9 at Riker's Island had it not been for the case that he was
10 - - -

11 JUDGE STEIN: In other words, even if he didn't
12 commit those assaults he still would have been there on - -
13 - on these charges?

14 MR. SCHATZ: Our - - -

15 JUDGE STEIN: Isn't that your argument?

16 MR. SCHATZ: Exactly.

17 JUDGE STEIN: Okay.

18 MR. SCHATZ: He would have been - - - he would
19 have - - - the - - - the entirety of this period goes to
20 one overarching point which is that the prosecution made a
21 strategic decision to effectively ignore Mr. Wiggins' case,
22 to focus on his co-defendant.

23 JUDGE GARCIA: That seems to me to not look at
24 the factors, and one factor is the length of time. And
25 granted, the four-and-a-half years I think it is here



1 wouldn't go to the length of time. But in terms of
2 pretrial incarceration, what if he had been convicted for
3 fraud he had committed when he was outside but he happens
4 to be sentenced to that fraud while he's in Riker's? Would
5 that count?

6 MR. SCHATZ: I'm not sure - - - I'm sorry. I'm
7 not sure I understand the hypo - - -

8 JUDGE GARCIA: But for the fact that he was at
9 Riker's he wouldn't have committed the gang assault. So
10 let's say it's a crime unrelated to his time at Riker's.
11 He had been committing some type of fraud while he was out,
12 and he gets convicted of that fraud while he's in Riker's
13 and sentenced to four-and-a-half years.

14 MR. SCHATZ: I - - -

15 JUDGE GARCIA: Would that time count?

16 MR. SCHATZ: I think it's - - - I think it's
17 tough to parse. It's a - - - it's a different scenario.
18 In this case, had he - - - he had committed an assault and
19 the instant case didn't exist I think we'd - - -

20 JUDGE GARCIA: No, let's say the instant case
21 existed but he committed the assault before he went to
22 prison but they try him while he's in there.

23 MR. SCHATZ: Yeah, I think - - - I think you'd
24 have to look at whether or not he could make bail on the
25 other - - - on the other count.



1 JUDGE GARCIA: What about the sentence wouldn't
2 matter if he made bail or not, right? That's pretrial
3 time.

4 MR. SCHATZ: Yeah, and so - - -

5 JUDGE GARCIA: So he's sentenced to four-and-a-
6 half years, he's sentenced to four-and-a-half years. He
7 wouldn't make bail.

8 MR. SCHATZ: Right, and - - - and the four-and-a-
9 half years comes after a three-year period - - -

10 JUDGE GARCIA: Right.

11 MR. SCHATZ: - - - where he's incarcerated on
12 this case.

13 JUDGE GARCIA: Then to count the three years, I
14 think as Judge Fahey was saying, but to issue his in terms
15 of incarceration why would you count the four-and-a-half
16 years.

17 MR. SCHATZ: Well, so I guess another way to look
18 at it is just to - - - to distinguish your fraud
19 hypothetical, in this case, the assault on which he was
20 convicted requires as an element that he is confined in a
21 correctional institution - - -

22 JUDGE GARCIA: What about escape? What if he
23 escaped and he gets - - - well, obviously, he wouldn't get
24 the - - - every time he was out but let's say he escapes
25 and he gets convicted for escape. Would the same theory



1 hold that but for the fact that was in prison he wouldn't
2 have escaped?

3 MR. SCHATZ: I think there are scenarios you can
4 come up with where the - - - where the fact - - - where the
5 pretrial detention shrinks depending on the circumstances
6 of the crime. I don't think that's the case here.

7 JUDGE RIVERA: But - - - well, you're not trying
8 to incentivize escapes. Let me ask you this question, got
9 a little confused from the briefing on this. What - - -
10 how do the Taranovich factors differ from the Barker
11 balancing test, if at all in your view?

12 MR. SCHATZ: They - - - they differ in one way,
13 in - in this court's jurisprudence is broader than the
14 federal examination in one which way is that this court or
15 New York does not consider the - - - whether or not the
16 defendant pipes up about the delay. So in this case, he
17 did make two constitutional speedy trial motions, but in
18 the federal context that is actually something that is
19 looked at the demand for - - -

20 JUDGE FAHEY: You mean the assertion of the
21 right?

22 MR. SCHATZ: Right.

23 JUDGE RIVERA: So you're saying otherwise the
24 factors overlap?

25 MR. SCHATZ: Right. And so for - - - for the



1 factors that count I think we look - - - we can look to
2 cases like Barker v. Wingo, and the factor that's really
3 important here because it's one of the two factors that the
4 lower court - - - the Appellate Division majority and
5 dissent disagreed on is prejudice and the other factor is
6 the nature of the cause asserted.

7 JUDGE FAHEY: Well, we - - -

8 JUDGE STEIN: Does it matter whether we consider
9 the - - - the lost opportunity for rehabilitation and all
10 that under Factor Four or under Factor Five? Does that
11 make a difference?

12 MR. SCHATZ: No, it doesn't. And it's extremely,
13 extremely important. The - - - the fact that the Appellate
14 Division majority, no disrespect to the Appellate Division
15 majority, did not consider the fact that Mr. Wiggins was a
16 sixteen-year-old kid at - - - at Riker's Island for over
17 six years is astonishing. It is wrong as a matter of law.
18 It's crucial because not only does Mr. Wiggins have an
19 interest in this speedy trial right, society has an
20 interest in general in making sure the juveniles aren't put
21 in those types of situations.

22 CHIEF JUDGE DIFIORE: Mr. Schatz, what is the
23 standard by which we review the prosecutor's conduct in - -
24 - in the way that - - -

25 MR. SCHATZ: The - - - the legal standard. This



1 is a - - -

2 CHIEF JUDGE DIFIORE: Is it a deferential
3 standard of good faith in - - -

4 MR. SCHATZ: No, not at all. You have to look to
5 - - - I think good faith comes into play only to the extent
6 that they're arguing that they didn't act in bad faith, but
7 you still have to look to the objective justification for
8 their action.

9 JUDGE FAHEY: Well, take - - - take a step back
10 for a second. Let's assume that there was good faith. You
11 know, I - - - let's assume that the people legitimately
12 wanted to use Armstead's testimony in a trial against him.
13 I think we can all assume that. That - - - and there's
14 certainly nothing wrong with that. That doesn't - - -
15 they're doing their job, and I don't think any of us would
16 characterize it as bad faith for them to attempt to do
17 this. The question is when - - - isn't it really that even
18 if they aren't wrong, if they are acting with good faith,
19 when does it become a constitutional violation.

20 MR. SCHATZ: That's - - -

21 JUDGE FAHEY: Isn't that the question you want to
22 ask?

23 MR. SCHATZ: That's the exact question you want
24 to ask, and the answer is it's answered by Barker v. Wingo.
25 Barker says four years is too long to do the exact thing



1 the prosecution is saying that they're doing in this case
2 which is trying to get the cooperation of a co-defendant to
3 better prosecute a defendant.

4 CHIEF JUDGE DIFIORE: So with all that was going
5 on in this prosecution, mistrials, motions, are we - - - if
6 we were to agree with you are we getting close to make a
7 per se time rule here?

8 MR. SCHATZ: No. No, you're not. All - - - you
9 don't have to say anything more than Barker says because
10 Barker says four years is too long. This is at least two
11 years longer than what Barker says. I think it can be
12 decided as a matter of law on all fours with Barker. This
13 is - - -

14 JUDGE FAHEY: Well, it - - - it really - - - I
15 think the court should be concerned about that and wouldn't
16 we have to say in the context of the Taranovich factors
17 that it was too long and then do an analysis on a Factor
18 Five factor basis? I don't think we'd ever want to say
19 that there's some time limit.

20 MR. SCHATZ: That's completely right, and I was
21 just making reference to the - - - the second cause factor
22 in relation to the first cause factor. But the other
23 factors, aside from seriousness which no one disputes, cut
24 in our favor because he was incarcerated for a very long
25 time. He was incarcerated under these very sorts of



1 inhumane conditions.

2 JUDGE FAHEY: What about a requirement for
3 specific prejudice in the last factor? You - - - you say
4 he's been impaired by the delay. Do - - - do you need to
5 show specific impairment?

6 MR. SCHATZ: That - - - that's the other sort of
7 legal error made below. There's no requirement of a
8 demonstration of specific prejudice. It's presumed when
9 you're - - - when you're talking about a delay so
10 extraordinary. Thank you.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 Counsel.

13 MS. BIERER: May it please the court, Sabrina
14 Bierer on behalf of the People. The determination that
15 there was good cause justifying the delay presents a mixed
16 question of law and fact.

17 JUDGE STEIN: Well, but is that - - - is that
18 even the determinative issue? It seems to me that the
19 court below conflated CPL 30.20 and CPL 30.30. It seems to
20 me those are two different things and - - - and the
21 Appellate Division seemed to use this - - - the standards
22 that we use for - - - for - - - you know, one inquiry into
23 another, and - - - and they don't seem to fit that well to
24 me.

25 MS. BIERER: Well, Your Honor, the - - - the



1 Appellate Division's reference to 30.30 wasn't to suggest
2 that 30.30 was dispositive of this issue. It was simply to
3 suggest that 30.30 was drafted in order to protect the
4 right to a speedy trial not to curtail that right, and
5 therefore the exclusions under 30.30 are certainly
6 indicative of time periods that are reasonable delay. Like
7 here the Appellate Division found that the reasons
8 justifying the delay were reasonable. And to - - - to go
9 back to the - - -

10 JUDGE STEIN: So but that doesn't end the inquiry
11 whereas in - - - under 30.30 it's an additional protection
12 or right that you're giving the defendant and - - - and
13 there are specific time periods. It's - - - it's about,
14 you know, the People not doing certain things to delay.

15 JUDGE STEIN: Well, of course, Your Honor, but
16 here the - - - the good cause analysis isn't just the
17 second factor or the reasons for the delay. The good cause
18 actually is the Taranovich balancing test. As this court
19 found in Vernace, that balancing test - - -

20 JUDGE STEIN: So - - - so are you saying then
21 that whenever there's an absence of bad faith or there's a
22 - - - there's a legitimate reason no matter how long the
23 delay is it can't possibly be a constitutional speedy trial
24 violation?

25 MS. BIERER: Absolutely not.



1 JUDGE FAHEY: So - - - so what's the question
2 then? Is it if - - - if - - - I'm operating under the
3 notion that the People had good faith. There's no mixed
4 question here. I'm assuming you're acting under good
5 faith. You want to get somebody to testify against someone
6 accused of murder. There's no bad faith in that. You
7 think that's dispositive then?

8 MS. BIERER: It - - -

9 JUDGE FAHEY: You could hold - - - how long could
10 you hold someone for even if you have good faith?

11 MS. BIERER: Well, Your Honor, the People's good
12 faith is not dispositive.

13 JUDGE FAHEY: But, no, answer my question. How
14 long could you hold - - - assuming the People have good
15 faith, how long can you hold someone before you bring them
16 to trial?

17 MS. BIERER: Well, there is no bright-line rule
18 but - - -

19 JUDGE FAHEY: Give me your estimate. What - - -
20 is there a limit? Is there any limit?

21 MS. BIERER: It - - - it depends on the balancing
22 of all the factors.

23 JUDGE FAHEY: Could you hold them for twenty
24 years?

25 MS. BIERER: It depends on the balancing of all



1 the factors. If the twenty-year delay were solely caused
2 by the defendant - - -

3 JUDGE FAHEY: Could you see the - - - let me
4 finish. Let me finish.

5 MS. BIERER: Oh.

6 JUDGE FAHEY: I - - - I'll - - - then I'll let
7 you respond too. You see the absurdity of the position is
8 that by assuming good faith, which - - - which I think we
9 can do here, it can't be a limitless good faith. There has
10 to be time period beyond which you're - - - no matter what
11 the person's been charged with you've got to bring them to
12 trial no matter whether you're going to be successful or
13 not. You - - - you can't look for the perfect case. You
14 have to go with the case you've got. And - - - and so you
15 can't argue the absurd position for that we get to decide
16 how long we can hold someone before we bring them to trial.

17 MS. BIERER: Of course not, Your Honor. And that
18 is not at all our position. Our position is that in
19 evaluating the second factor, the Appellate Division had
20 reason to find that there was good faith. And that balanced
21 with the other factors, including the fact the defendant
22 was charged with murdering fifteen-year-old Maurice McIver
23 and the other factors such as the fact the defendant, while
24 he was incarcerated for the pendency of this case was
25 indicted on two other violent felonies.



1 JUDGE STEIN: So how many - - - so how many
2 mistrials - - - how many times could the - - - the
3 prosecutor have continued to - - - to try to convict the
4 co-defendant in order to get him to - - - to testify
5 against this defendant? Is - - - is there no end to that?

6 MS. BIERER: There is, of course, an outer
7 boundary to that. It just wasn't reached.

8 JUDGE STEIN: Well, okay, so why - - - why wasn't
9 it reached here?

10 MS. BIERER: Well, it wasn't reached here because
11 of the balancing factors in this case. Again, defendant
12 was indicted for murder in the second degree.

13 JUDGE GARCIA: Just I guess to go to Judge
14 Stein's point, and - - - and I think what Judge Fahey is
15 saying, is at some point retrying this other person becomes
16 bad faith in a way because it seems to me you go forward
17 with this charge and you should be prepared to try the
18 case. I mean it may get better. That'd be great for you.
19 But as a prosecutor, you bring this charge, you're prepared
20 to prove it. Otherwise, you wouldn't indict this case I
21 assume.

22 MS. BIERER: Of course.

23 JUDGE GARCIA: So at some point the need to add
24 to that mix of proof you have when by filing an indictment
25 you've represented you're prepared to try it on what you

1 had in a grand jury or what was available, when does that
2 become bad faith?

3 MS. BIERER: Well, there certainly is a period in
4 which that does become bad faith, but again, in the context
5 of this case that period just wasn't reached. Now - - -

6 JUDGE WILSON: Because what?

7 MS. BIERER: I'm sorry?

8 JUDGE WILSON: Why?

9 MS. BIERER: Well, again, this is a delicate
10 balancing of all the Taranovich factors. And - - -

11 JUDGE GARCIA: Right, but just looking at that
12 one factor of good faith, why haven't you reached the point
13 where - - - the tipping point where this is bad faith now?
14 You've tried this guy, this potential witness, a number of
15 times. You haven't been able to convict him. You've
16 indicted someone on the theory that you can go forward and
17 prove a case beyond a reasonable doubt. When does that
18 become bad faith?

19 MS. BIERER: Well, again, Your Honor, there is a
20 point in which it would. And actually, if I could direct
21 this court to Barker, it appears that in Barker that court
22 found that the pursuit of the co-defendant's testimony over
23 four years, while they didn't use the phrase bad faith they
24 said that that was unjustifiable. But in light of the
25 counterbalancing factors in that case, there was no speedy



1 trial deprivation.

2 JUDGE FEINMAN: So bottom line you just want us
3 to look at the Gestalt of all the factors and, you know,
4 let - - - let that go.

5 MS. BIERER: Well, again, I would assert that the
6 People did act in good faith and throughout the pendency -
7 - -

8 JUDGE FAHEY: The thing is - - - the thing is the
9 - - - the fact - - - the reason that he wasn't trialed was
10 - - - tried in this case wasn't because of - - - of the two
11 assaults, one he was acquitted on and one he wasn't. It
12 wasn't because of those at all, so that factor - - - I
13 think it enters into the mix but it's - - - it's far from
14 dispositive. The dispositive factor is the testimony of
15 Armstead, right?

16 MS. BIERER: I - - -

17 JUDGE FAHEY: That's the key element. That's the
18 - - -

19 MS. BIERER: I - - -

20 JUDGE FAHEY: - - - reason that - - - that he was
21 there for that period of time.

22 MS. BIERER: I would say that there is no factor
23 that is dispositive, but it's certainly relevant.

24 JUDGE FAHEY: Is there anything other than
25 Armstead that - - - that held you up in bringing the case



1 to trial all those periods of time?

2 MS. BIERER: Well - - -

3 JUDGE FAHEY: That entire six years, three
4 months, and twenty-five days?

5 MS. BIERER: As a matter of fact, the defendant
6 himself requested several adjournments.

7 JUDGE FAHEY: Seven months of adjournments.

8 JUDGE FEINMAN: And you had how many different
9 DAs on this case?

10 MS. BIERER: The - - - the assistant district
11 attorney did change twice during the course of the
12 litigation, but the People were pushing defendant's case
13 forward. Discovery practice went until March of 2009.

14 JUDGE RIVERA: So - - - so let me try - - - let
15 me try this question for you because I think this is where
16 I'm stuck. What under your rule, your approach, your
17 reading of the law, the People's position on this, what - -
18 - what do you see as the factors - - - and I know we're
19 talking about a lot of factors, but for this particular
20 issue, what - - - what is it that the court should use as a
21 guide to determine the reasonableness of the People's
22 choice to continue to try and get Armstead to flip and turn
23 and testify against this defendant?

24 MS. BIERER: Well, that's just it. It is a
25 reasonableness test, and - - -



1 JUDGE RIVERA: Yes, and what - - - what are you
2 saying under the law the court should look at?

3 MS. BIERER: Well, the court should look at, for
4 instance, the fact that the defendant never alerted the
5 People that he was suffering any harm beyond that what
6 could be - - -

7 JUDGE RIVERA: No, no, no. That - - - but that
8 has nothing to do with whether or not you're taking more or
9 less time to pursue Armstead for purposes of getting him to
10 testify against the defendant.

11 MS. BIERER: Well, it does go to reasonableness
12 of the People's approach. As the Supreme Court said in
13 Barker v. Wingo the more - - - and of course this court
14 doesn't consider his demand as a factor, but - - -

15 JUDGE RIVERA: How - - - how is it the - - - the
16 defendant's counsel telling you what's obvious, that he
17 spent years in Riker's is detrimental to him, affect your
18 deciding whether or not I'm going to stop waiting for
19 Armstead who says I'm never going to testify against this
20 defendant to actually testify against this defendant?

21 CHIEF JUDGE DIFIORE: Is it the nature and
22 gravity of the offense?

23 MS. BIERER: The nature and the gravity of
24 offense certainly attributes to the reasonableness of that.
25 And the fact that - - -



1 JUDGE STEIN: But that factor's never going to
2 change here. So it - - - it never - - - I mean we know
3 that that goes against the defendant and we know it's a
4 very serious crime. And - - - and certainly we all agree
5 that to a point it's - - - it's - it's not a constitutional
6 violation to have the People pursue this attempt to - - -
7 to make sure he's convicted. But - - - but what we're - -
8 - you are saying that it's all the - - - it's the other
9 factors that tell us really when we reach the point of no
10 return so-to-speak, right? So - - -

11 MS. BIERER: Of course.

12 JUDGE STEIN: Okay. So - - - so presumably if it
13 had been, you know, a low-level misdemeanor, you know, we
14 wouldn't be here having this conversation. But - - -

15 MS. BIERER: Exactly. And - - - and the
16 reasonableness of the People's actions has to be viewed in
17 light of all the circumstances of this case.

18 JUDGE RIVERA: Yes, but the seriousness of the
19 crime, it's on the People's side but it's also the
20 complexity if the case, is it not? And what made this case
21 so complex? You've got all those eyewitnesses. What - - -
22 what - - -

23 MS. BIERER: Well, I - - -

24 JUDGE RIVERA: Isn't it again, as Judge Fahey has
25 asked you several times, that you're - - - you're trying to



1 get this one individual to somehow strengthen your case?

2 MS. BIERER: Respectfully, Taranovich - - -

3 JUDGE RIVERA: While someone is rotting in
4 Riker's.

5 MS. BIERER: Respectfully, Taranovich said that
6 the complexity of the - - - or, I'm sorry, the seriousness
7 of the charge matters. Not necessarily because it would
8 take more time to figure out the defense but because the
9 People have a responsibility in cases like this where
10 someone is charged with murdering a fifteen-year-old that
11 they have to take deliberation and consideration.

12 JUDGE RIVERA: But by its very nature the point
13 of that is that deliberative process, that process to act
14 cautiously and carefully, yes, you are correct, of course,
15 to try and secure a conviction. But it has to be in the
16 context of the nature of your prosecution.

17 MS. BIERER: Yes, absolutely. And sometimes - -
18 -

19 JUDGE FEINMAN: Let - - - let me try it this way.
20 If - - - if the witness that you're trying to get to
21 cooperate says to you day one no way, I'm never going to
22 flip because snitches get stitches, I'm not doing this, and
23 - - - and, you know, at that point is it still reasonable
24 for the People to pursue?

25 MS. BIERER: That would certainly make it much



1 less reasonable but that's not what happened here.

2 JUDGE FEINMAN: Okay. So exactly. So what did
3 happen?

4 MS. BIERER: What happened here was that the
5 People were pursuing good faith efforts with the co-
6 defendant, and he continued to meet with them. And they
7 pursued those efforts until they presented him with a
8 cooperation agreement which he rejected. And they
9 immediately announced their readiness to go to hearings and
10 trial so that they could have the Huntley hearing and
11 determine whether the cases needed to be severed. Because
12 at this point the cases were still joined, and the People
13 had every duty to bring the best case possible against both
14 defendants. And strong public policy suggests that co-
15 defendants should be tried together. And I see that my
16 time is up. I would ask this court in light of the
17 seriousness of the offense and the defense's failure to
18 allege any harm to the defense case whatsoever balanced
19 with the other Taranovich factors please affirm.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel.

22 MR. SCHATZ: Very briefly, the - - - page 184 of
23 the record, the People specifically noted the effect of the
24 - - - of all of the repeated adjournment requests on Mr.
25 Wiggins. So there is a concession by the People that their



1 conduct by focusing solely on Armstead's case is impacting
2 Mr. Wiggins, and this was in - - - this was in 2012. It
3 was two years before his plea, so there were still two
4 years after that. And the only thing that had happened to
5 Mr. Wiggins' case during that entire six-year period,
6 essentially, was that they litigated a constitutional
7 speedy trial motion.

8 JUDGE STEIN: What - - - what about the fact that
9 - that, you know, you had young witnesses, a lot of time
10 was going by, memories fade? I mean I don't think - - - I
11 think that's just common sense. But does that work for or
12 against either the People or the defendant because it
13 doesn't work - - -

14 MR. SCHATZ: It works for us.

15 JUDGE STEIN: - - - against both?

16 MR. SCHATZ: No, it works for us absolutely
17 because the - - - what you have to do is get these guys in
18 the courtroom and have them testify. If you don't try Mr.
19 Armstead for four years it's no surprise that - - -

20 JUDGE STEIN: Okay.

21 MR. SCHATZ: - - - none of these witnesses are
22 going to remember anything.

23 JUDGE STEIN: So that's not part of your - - -
24 that's not part of your prejudice argument then.

25 MR. SCHATZ: No. I mean I think there's nothing



1 in the record that says I've lost a witness, that sort of
2 thing. Our prejudice argument is about what happened to
3 Reggie Wiggins.

4 JUDGE FEINMAN: What - - - what about the - - -
5 the - - - your adversary just said at the very end about,
6 you know, Armstead doesn't really unequivocally say I'm not
7 going to cooperate until well into this and at that point
8 they immediately announce ready once the judge grants the
9 severance? And - - - and how much of this is really on the
10 trial court for sort of just not ruling on the severance
11 motion?

12 MR. SCHATZ: So, two points. The first is that
13 there's no support for that - - - the narrative you've just
14 described what happened essentially is he said I will never
15 - - - he - - - the only facts we have are that Armstead
16 said I will never cooperate and he repeatedly said that.
17 And then there is a line in the trial ADA's affirmation
18 that says although he waived on that. We don't know when
19 he waived. We don't know how much he waived, the fact
20 that - - -

21 JUDGE FEINMAN: Should there have been a hearing
22 maybe to figure that out?

23 MR. SCHATZ: I - - - I mean it's not necessary.
24 This is the prosecution making an affirmation that says
25 that their - - - their potential cooperator is not going to



1 cooperate and repeatedly saying that. I don't know that
2 there needs to be a hearing. But ultimately, the burden is
3 on the prosecution the whole time, so regardless of whether
4 he's waivering or not, to spend two years trying to get him
5 to cooperate, it's all - - - it all goes to the - - - that
6 delay is all attributable to the prosecution.

7 JUDGE RIVERA: So under your approach what - - -
8 what is it the court has to focus on to determine the
9 reasonableness of the People's continuing to try and get
10 Armstead to testify against the defendant?

11 MR. SCHATZ: Well, I think this is - - - this is
12 a strange circumstance because Barker has already told you
13 basically there's a period of time that is unacceptable and
14 that is four years, and we have much longer here. So it
15 might - - - it might vary depending on the reason
16 proffered, but the reason proffered here happens to be the
17 exact reason that was offered up in Barker. And the delay
18 is much longer here, and in that case, it was for an
19 essential co-defendant. And here it is a co-defendant that
20 they can at best say would make their case better. So I
21 think Barker is on all fours, and - - - and with that we'll
22 rest on our briefs. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (Court is adjourned)

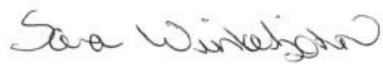
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Reginald Wiggins, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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