

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

RONALD K. JOHNSON,

Appellant,

-against-

NO. 74

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
October 20, 2022

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:

TIMOTHY S. DAVIS, ESQ.
MONROE COUNTY PUBLIC DEFENDERS OFFICE
Attorney for Appellant
10 Fitzhugh Street North
Rochester, NY 14614

KAYLAN C. PORTER, ESQ.
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
47 Fitzhugh Street South
Rochester, NY 14614

Ellen S. Kolman
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 74, People v. Ronald K. Johnson.

3 MR. DAVIS: May it please the court, counsel,
4 Timothy Davis on behalf of Mr. Johnson. If I could please
5 reserve two minutes for rebuttal?

6 ACTING CHIEF JUDGE CANNATARO: You have two
7 minutes.

8 MR. DAVIS: Thank you.

9 Mr. Johnson was denied his right to due process
10 as the entirety of the seven years and eight months of pre-
11 indictment delay was marked by negligence on the part of
12 both the police and the district attorney's office at every
13 step of the way.

14 This court has held that negligent actions on the
15 part of police and prosecutors that causes a lengthy period
16 of pre-indictment delay may not be excused by simply
17 negligent conduct.

18 JUDGE GARCIA: Counsel - - -

19 MR. DAVIS: Just one or two - - - I'm sorry.

20 JUDGE GARCIA: In these types of cases, I always
21 struggle a bit with our role in reviewing the balancing of
22 the factors. So how do you see that? I mean, we may think
23 they balance out differently than the Appellate Division,
24 is - - - is that what we're doing here? Are we doing a
25 rebalancing based on our own perception of the factors, or



1 if they've applied the factors correctly, then is our role
2 just to say it's clear error somehow based on the record
3 how they interpreted the weight to give those factors? And
4 I just - - - I just - - - I would like to get your view of
5 that, because it's something in other cases I think I've
6 struggled with.

7 MR. DAVIS: Well, I think, Judge Fahey in Wiggins
8 made clear, I think that this court looks at it fresh and
9 weighs the factors as it sees fit.

10 JUDGE GARCIA: Like a de novo?

11 MR. DAVIS: Yes.

12 JUDGE GARCIA: Type of review?

13 MR. DAVIS: Yes.

14 JUDGE GARCIA: Okay. And - - - but your view, as
15 I understand it here, your argument is that you have your
16 arguments on that, that the weighing was done incorrectly,
17 but also that the way they actually looked at the factors
18 themselves was incorrect, particularly at the time of the
19 motion versus at the time of the later Appellate Division
20 decision?

21 MR. DAVIS: Yes, there is a Concepcion and
22 LaFontaine problem here in that the Appellate Division
23 looked at this case and analyzed it in rather a bizarre
24 fashion that as far as I know has not been repeated, and
25 there was no precedent for that.



1 The trial court looked at the factors before - -
2 - before trial, and - - - all five, and denied the
3 defendant's application based on the courts' application of
4 the five Taranovich factors.

5 When it got to the Appellate Division, the
6 Appellate Division looked sort of from the back end of this
7 to determine whether there was any prejudice by looking at
8 what the defendant actually pled guilty to.

9 The indictment had - - -

10 JUDGE TROUTMAN: Was - - - was it proper to limit
11 it to looking at it from what he pled guilty to?

12 MR. DAVIS: No. No. I don't believe so.

13 JUDGE WILSON: So is that a legal error?

14 MR. DAVIS: Yes.

15 JUDGE WILSON: So it should be reversed on that
16 basis and remit?

17 MR. DAVIS: Yes. But I also believe that based
18 upon the fact that the - - - there is no issue with regard
19 to fact, that I would ask this court to rule on it rather
20 than remanding it to the Appellate Division.

21 ACTING CHIEF JUDGE CANNATARO: When you say
22 there's no issue with regard to fact, you mean we do that
23 fresh Taranovich weighing on our own and we come to the
24 conclusion that it should be dismissed? Is that what
25 you're saying?



1 MR. DAVIS: Yes. I believe based upon what Judge
2 Fahey wrote in Wiggins, I believe that is what this court
3 can do and what I would be asking this court to do.

4 JUDGE GARCIA: Counsel, to go back to your point
5 on, which I take that we look at the factors at the time
6 the motion's made. So here, there's - - - there's these
7 two charges. I think then to be consistent; you would also
8 look at the nature of the underlying charge at that time.
9 So at the time the motion is made, it's - - - it's two
10 counts. It's rape in the first degree and second degree.
11 So if we're looking at all of the factors at the time the
12 motion was made, as we weigh that factor, which I think is
13 3, we're looking at both charges as well, right?

14 MR. DAVIS: Yes. Yes, Judge.

15 JUDGE GARCIA: And it seems also to get to how
16 they interpreted the factors, the Appellate Division seemed
17 to say, "assuming arguendo that the People failed to
18 establish good cause for the protracted delay such that the
19 second and third factors favor defendant", and I'm having
20 some trouble understanding why it would be also the third
21 factor would also favor defendant just based on your
22 inclusion as to the second factor which is what they seem
23 to be doing there.

24 MR. DAVIS: I believe what the court did was look
25 at the case law which indicates that in looking at the



1 serious nature of the offense, we look at what serious
2 means with regard to the amount of work that has to go into
3 this case. So here, with regard to the both rapes, you
4 have - - - or both allegations, excuse me - - - both
5 counts, you have DNA, you have no issue as to the age of
6 the complainant when this occurred, and you have no issue
7 with regard to the age of the perpetrator.

8 So at least with regard to the second count,
9 there is - - - this is - - - even though this is a very,
10 very serious - - -

11 JUDGE GARCIA: Well, we look at both counts,
12 right, because of the timing of the motion, we're not only
13 going to look for purposes of the one factor at the time
14 the motion is made - - - and later, oh, no, it's only one
15 count. So it's first and second. And first degree is
16 incapacitated victim, right?

17 MR. DAVIS: Right.

18 JUDGE GARCIA: And then you have a minor victim.
19 So wouldn't that affect the complexity of the
20 investigation, because yes, you could have DNA evidence,
21 which eventually they had here, but you also have a minor
22 victim who is incapacitated, and don't you have to look at
23 all those factors?

24 MR. DAVIS: You do, but the court is looking at
25 this eight years after an incident was alleged to have



1 occurred.

2 So we know based upon the investigation by the
3 police in the first four years, that there were no other
4 witnesses to this incident. This is not a case where there
5 may be, if we just delay for another year, somebody's going
6 to come forward - - -

7 JUDGE WILSON: Do we know when the - - - when the
8 defendant's - - -

9 MR. DAVIS: Excuse me?

10 JUDGE WILSON: Do we know when the defendant's
11 DNA was entered into CODIS?

12 MR. DAVIS: Yes. It was four years - - -

13 JUDGE WILSON: I don't mean when it was - - -
14 when the match was made, when it was actually entered into
15 the system?

16 MR. DAVIS: Oh. I'm sorry. Yes, it was entered
17 in the system four years before the incident's alleged to
18 have occurred.

19 JUDGE WILSON: And that's in the record
20 somewhere?

21 MR. DAVIS: That is in the record, yes.

22 JUDGE TROUTMAN: So should the delay that the
23 time it took for the lab to finally analyze it weigh
24 against the People?

25 MR. DAVIS: Yes. Yes and no. If at some - - -



1 at some point when there is a delay that is so extensive
2 with regard to a lab, their build up, whatever else,
3 there's going to come a point in time when there has to be
4 a due process violation simply based upon the fact that
5 it's the People's responsibility.

6 JUDGE TROUTMAN: Right. But here it was
7 compounded by the fact that she was unconscious, so she
8 wasn't able to say X person did it by identifying them.

9 MR. DAVIS: Well, two things.

10 One is the police had the ability to ask for the
11 testing to be expedited. And they did not do so at the
12 beginning even though - - -

13 JUDGE TROUTMAN: There was a backlog generally.

14 MR. DAVIS: Yes. But what the - - - what the
15 scientist testified to was that based upon the allegations
16 here, a minor alleged to have been raped, that if there had
17 been a request for the testing to be expedited, this would
18 actually have gone to the top of the line and been tested
19 right away.

20 JUDGE RIVERA: But is there - - - is there
21 anything in the record that the police made some analysis
22 and came to a conclusion not to request an expedited
23 treatment? I mean, did they think about it at all?

24 MR. DAVIS: If they thought about it, it's not -
25 - - it's not in the record.



1 JUDGE RIVERA: Not in the record.

2 MR. DAVIS: There's certainly nothing in the
3 record that that was - - -

4 JUDGE RIVERA: They never argued that.

5 MR. DAVIS: They never argued that.

6 JUDGE RIVERA: They made some calculations,
7 discretionary determination that under the circumstances
8 they were not going to seek that, given the backlog, or
9 whatever else - - -

10 MR. DAVIS: Yes.

11 JUDGE RIVERA: Okay.

12 MR. DAVIS: Yes. And - - -

13 JUDGE SINGAS: I think one of the biggest delays
14 was also the victim survivor didn't want to cooperate with
15 law enforcement. Do you think that that's unreasonable,
16 that you wait until someone is ready to testify in a case
17 like this?

18 MR. DAVIS: Well, I don't - - - I don't think the
19 record - - - I'm not quite sure based upon the record where
20 this notion that she was an uncooperative witness actually
21 comes from. She - - - when she first went to the hospital,
22 she had said a number of things including that she had
23 actually been sexually assaulted. Based upon the record,
24 it appears that she then saw a rape counselor who told her
25 that she should be in touch - - - keep in touch with the



1 police while - - -

2 JUDGE TROUTMAN: Was it - - - but then they went
3 and spoke to her biological mother who told the police
4 she's in contact with me. Maybe that wasn't exactly
5 accurate. So not that she wouldn't cooperate, but was it
6 more of an instance of them not being able to contact her
7 directly for her input as to how she wished to proceed?

8 MR. DAVIS: Well, this actually comes - - - is an
9 issue where the police really did nothing.

10 After the CODIS match, the investigator made two
11 calls to the mother, and it actually isn't clear because at
12 some point later, I believe, on cross examination the
13 investigator indicates that maybe he was not the person who
14 actually made the calls, and it may - - - this may actually
15 have been one message after the other.

16 He then says that he checked city records, I'm
17 not sure exactly what that is, but did nothing else.

18 JUDGE TROUTMAN: But isn't it complicated by the
19 fact that she was a foster child? So he's contacting the
20 mother who's not a custodial parent and may, in fact, have
21 a complicated relationship with the alleged victim?

22 MR. DAVIS: It does make it more difficult, but
23 here the child was of school age and there was no attempt
24 to actually check the school district - - - well, I should
25 say the school district records to see if there was an



1 address or a forwarding address or the actual name or
2 address of the foster parent.

3 There is also, if you look at Investigator
4 Seierzma (ph.) when he then is requested by the eventual
5 prosecuting attorney to try to contact her, it takes him,
6 like, you know, eighteen hours, or two days, and he's
7 actually contacted her and meeting with her. To look at
8 then what Judge - - - what - - - or excuse me, what
9 Investigator Connor (ph.) did versus that, Investigator
10 Connor simply waited and other than those two calls did
11 nothing.

12 JUDGE TROUTMAN: So your - - - your argument is
13 they simply didn't diligently investigate the case?

14 MR. DAVIS: It was negligent, yes, Your Honor.
15 In People v. Staley in this court just two years after
16 Taranovich, the court wrote that, "Sheer neglect or
17 trifling" is not acceptable.

18 This court also wrote in Vernaise (ph.) or
19 Vernace, I'm not sure, that "a determination made in good
20 faith to delay prosecution for sufficient reasons" may
21 eliminate or answer the question whether the defendant was
22 denied due process.

23 And Judge Wilson, and this goes to your point,
24 which is there has to actually be a determination. This
25 simply cannot be wandering along, against a serpentine wall



1 hoping that you come out at the end some place that may
2 lead to an indictment or not.

3 ACTING CHIEF JUDGE CANNATARO: Thank you,
4 Counsel.

5 MR. DAVIS: Thank you.

6 MS. PORTER: Good afternoon, Your Honors. Kaylan
7 Porter on behalf of the People.

8 I'll start with a point that was brought up by
9 Judge Garcia in terms of this court's review powers, and
10 while it's not necessarily borne out in my brief, I do
11 believe that this court's analysis as to most of the
12 factors constitutes a mixed question.

13 The line that's in Wiggins is attempting to
14 distinguish itself from most of the cases that have come
15 before this court in which this court has found that there
16 is record support for good cause, there's record support
17 for the fact that there's no due process violation, and
18 this court's then accepted the facts as they are in the
19 record.

20 ACTING CHIEF JUDGE CANNATARO: That might solve
21 the problem of our review on the second charge, which was
22 the one that was pleaded to, but it doesn't help us with
23 the first charge, which was never, at least, reviewed at
24 the Appellate Division. So - - - so what do we do there?

25 MS. PORTER: Your Honors, you're referencing



1 prejudice. And so the prejudice prong is different, and I
2 do believe that that would be the only real question of law
3 before this court is the analysis that was used by the
4 Appellate Division in terms of the relevance of a satisfied
5 count in terms of prejudice.

6 And as Justice Garcia noted, the time that the
7 motion is decided, prejudice should not be looked at as it
8 exists only at the time the motion is decided. In fact,
9 that's never been the case before this court.

10 Most of those five factors, at the time the
11 motion is decided are immutable. The length of the delay,
12 the time it takes between defendant's crime and when
13 defendant is indicted, that's not changing by anything - -
14 -

15 JUDGE RIVERA: What is - - - what is the nisi
16 prius court deciding then? I mean, they're deciding
17 something based on the factors before them and the record
18 before them. Right, and that's what gets appealed, no?

19 MS. PORTER: Correct, Judge Rivera. So the court
20 is looking at all five factors, but the relevance of
21 prejudice - - -

22 JUDGE RIVERA: Aren't we analyzing whether or not
23 these decisions are correct? Isn't that what we're
24 deciding? At that time, with what you knew at that time
25 you were making a decision.



1 MS. PORTER: The - - - as to what the trial court
2 decided, a reviewing court has always looked to prejudice
3 that existed after the fact. It's not simply locked into
4 what was alleged at the time that the motion was decided.

5 And like I said, those other factors are
6 immutable at the time. However, prejudice where - - - for
7 example, where defendant proceeds to trial. The court has
8 looked to how prejudice has played out at the trial. This
9 court has that in People v. Decker where the court looked
10 at how the witnesses testified as to whether a defendant's
11 claims of prejudice which may have - - -

12 JUDGE RIVERA: This is a plea.

13 MS. PORTER: This is a plea, Your Honor.

14 JUDGE RIVERA: Does that matter?

15 MS. PORTER: Correct. So the - - - but the
16 court, though, has always looked to prejudice as it could
17 develop even after the time of the motion. And this is
18 consistent with any other prejudice analysis that comes
19 before the court, because a reviewing court has the benefit
20 - - -

21 JUDGE RIVERA: I'm confused. Are you arguing
22 that then the court should have considered what the
23 prejudice would be if he went to trial on - - - on both
24 counts?

25 MS. PORTER: No, Your Honor, because defendant



1 was not convicted of the rape one. So he's never going to
2 be convicted of the rape one - - -

3 JUDGE WILSON: Well, don't you think his position
4 in plea bargaining might be somewhat weaker because of the
5 delay on the first count - - - as to the first count?
6 There's a second one, right, is just based on the age,
7 right. But the first count, there's other information the
8 defendant might try to collect to disprove the first count,
9 right?

10 MS. PORTER: That was what he alleged.

11 JUDGE WILSON: Right. And if the delay had only
12 been six months instead of eight years, that might affect
13 the defendant's ability - - - the strength of how - - - how
14 his - - - how he might perceive his defense on the first
15 count.

16 MS. PORTER: And I would say, Judge Wilson, the -
17 - - a defendant's decision whether or not to plead guilty,
18 whether or not to go to trial, whether to have a bench
19 trial, a jury trial has never been part of a Taranovich
20 analysis.

21 The five factors that this court has continuously
22 looked at as to the prejudice analysis, there's no room in
23 the prejudice analysis for a defendant's decision as to
24 whether or not to go to trial, whether or not to plead
25 guilty. It's simply whether defendant has demonstrated



1 actual prejudice.

2 JUDGE WILSON: Really? So if - - - if - - -
3 imagine a different first count, right, or could be the
4 same first count where there was evidence that would have
5 clearly exculpated the defendant of the first count, but
6 it's now disappeared because of the length of the delay,
7 and the defendant now is in a different position in plea
8 bargaining, right. Can't - - - can't say look, you can't
9 prosecute him for the first count because I've got an iron
10 clad defense. That defense is lost, and is now facing two
11 different counts. Don't you think there's some prejudice
12 there?

13 MS. PORTER: No, Your Honor, because I don't - -
14 - because there's no remedy, really, that would exist. So
15 if we're saying that there was such a severe level of
16 prejudice to a top count the defendant was not convicted
17 of. If we're saying then the trial court erred in not
18 dismissing that one count - - -

19 JUDGE WILSON: Well, the defendant took the plea
20 to the second count because of the threat of conviction
21 under the first count that wouldn't have existed but for
22 the delay.

23 MS. PORTER: I understand the argument the
24 defendant has made in that respect, but I would simply ask
25 this court to not - - - not include a defendant's plea



1 bargaining calculus as part of the Taranovich analysis.
2 The Taranovich analysis is whether the prosecution should
3 be able to bring these charges against defendant in spite
4 of the passage of time.

5 Here - - -

6 JUDGE RIVERA: So then on that first count, you
7 will correct me if I misread the record - - - as I
8 understand it, defendant did make an argument about
9 prejudice. Am I - - - am I wrong on that?

10 MS. PORTER: It did - - -

11 JUDGE RIVERA: And did you all object? Did you
12 present any counterargument?

13 MS. PORTER: It would be the defendant's burden
14 to establish a - - -

15 JUDGE RIVERA: I'm asking you did you? I mean,
16 you objected generally. Did you object on the prejudice
17 issue specifically?

18 MS. PORTER: It would be the defendant's burden
19 to show prejudice. The People did not - - -

20 JUDGE RIVERA: Is that a no then?

21 MS. PORTER: The prejudice was simply mentioned
22 in defendant's motion papers. I do believe that the People
23 then countered with the fact that defendant has not shown
24 actual prejudice of which it would be his actual burden.

25 The prejudice that was alleged here pertains only



1 to the rape in the first-degree charge. He acknowledges
2 that there would be no prejudice to the rape second,
3 because it's a strict liability crime. However, the
4 prejudice that he alleged has been routinely dismissed by
5 this court as being general routine-like claims of
6 prejudice, and those types of prejudice are inherent in any
7 delay.

8 Of course, you're not going to be able to
9 contemporaneously investigate, because the charges are
10 brought later. That is inherent in any delay, and that has
11 never constituted - - -

12 JUDGE RIVERA: Well, because they're inherent
13 doesn't mean that under the particular facts of the case,
14 they don't matter, right?

15 MS. PORTER: It - - - that is - - - it's always
16 been dismissed as a routine general allegation. That has
17 never been sufficient as an actual showing of prejudice.
18 And the defendant does have to show actual prejudice to his
19 claim.

20 JUDGE SINGAS: Well, what about the DNA testing?
21 Did you have no control over that? Wasn't there a process
22 in the lab where you could have said, you know what, this
23 is a rape case, it's important, can you get us to the top
24 of the line?

25 MS. PORTER: The - - - the expert from the - - -



1 from the lab did testify that there was a priority request
2 form that could have been filled out. As the trial court
3 found, none of the reasons as to why a person would file
4 that priority request form were triggered or implemented in
5 this case.

6 JUDGE SINGAS: So how could that be though when
7 we are waiting - - - I think it was almost two years to get
8 a test? Why doesn't that trigger a priority list or some -
9 - - why does - - - why don't the people feel the pressure
10 to act when you have the evidence and your only delay is
11 coming from the lab when we're talking about someone's
12 liberty?

13 MS. PORTER: I do believe that the backlog here
14 was extraordinary. He - - - there was almost 1,000 cases
15 that were waiting analysis at the lab at the time that this
16 case was being investigated. And hundreds of those, in
17 fact the majority of those cases were sexual assault cases.

18 JUDGE RIVERA: But did law enforcement given - -
19 - given that backlog have some kind of internal protocol to
20 assess when they might take, perhaps, what you would argue
21 is an exceptional step of asking for a priority?

22 MS. PORTER: They - - -

23 JUDGE RIVERA: They obviously did ask for
24 priority somewhere along the line, not necessarily in this
25 case, because it was familiar to the lab.



1 MS. PORTER: There was nothing in the record here
2 that would suggest that the police made any sort of
3 decision that they would need to do that in this case, and
4 I would ask the court to adopt the - - - find that the
5 factual finding of the trial court - - -

6 JUDGE RIVERA: There's nothing in the record as
7 to whether or not there was any such internal process?

8 MS. PORTER: The only thing in the record was the
9 forensic biologist testimony that one existed. However,
10 her testimony was that there are certain types of cases
11 where it would be more appropriate for them to file a
12 priority request form such as where there's a trial
13 deadline or where there's a hearing deadline or where
14 there's an approaching statute of limitations, and they
15 need to get that particular DNA tested more expeditiously.

16 JUDGE TROUTMAN: So are you arguing that because
17 of the volume of the backlog there were a number of
18 competing cases to be expedited that unfortunately pushed
19 this one back further?

20 MS. PORTER: We don't know how many priority
21 request forms were outstanding. That was not part of the
22 record. But what was part of the record was the hundreds
23 of sexual assault cases that were waiting to be tested.
24 And I - - - I would ask this court to not put on the police
25 the priority request form needs to be sent in every sexual



1 assault case, every serious case, or else it's not
2 considered to be an important process to the People.

3 The People have a number of - - - hundreds of
4 sexual assault cases waiting to be tested, they're waiting
5 for those DNA results so that they can initiate
6 prosecution.

7 JUDGE RIVERA: Fair enough, if there was
8 something in the record that suggested that law enforcement
9 made - - - made a determination given its internal
10 protocols, that it just couldn't, in this case, no matter
11 how serious, no matter how consequential, there were other
12 cases that should be at the top of the list, and they just
13 couldn't see their way on this case. But you said there is
14 no such - - -

15 MS. PORTER: I don't believe there was - - -

16 JUDGE RIVERA: Nothing in the record that shows
17 that?

18 MS. PORTER: Well, there was based on the
19 forensic biologist testimony and the trial court - - -

20 JUDGE RIVERA: So that there exists a protocol.
21 And that's not my question. My question is - - - I'm
22 asking the general question. If it's in the record, fine.
23 But there's nothing in the record that law enforcement went
24 through the exercise of making a decision that they would
25 not pursue expeditious treatment in this case - - -



1 MS. PORTER: I don't - - -

2 JUDGE RIVERA: - - - even though they could have
3 done that.

4 MS. PORTER: I don't believe that there was any
5 specific note that an investigator made that determination.
6 But I would also highlight then for the court that what the
7 investigators were looking at at that time was a victim
8 that was deemed uncooperative, that had no way of
9 identifying her attacker. The case was for several years
10 closed as victim uncooperative. This was not necessarily a
11 case that they would be looking to get that priority on
12 because they didn't even have a cooperative victim at that
13 point. And I do see that my time is up, so unless the
14 court has any additional questions?

15 ACTING CHIEF JUDGE CANNATARO: Thank you.

16 MS. PORTER: Thank you.

17 MR. DAVIS: The People in the brief indicate that
18 this court has looked backwards to see whether or not
19 there's actual prejudice in these cases. The two cases the
20 People cite, the first one is People v. Decker. In that
21 case, the motion before the trial court had been denied
22 without a hearing. I'm not sure, based upon this court's
23 decision, what the actual pleading showed, but the court
24 indicated when stating that the hearing was not, in fact,
25 necessary based upon the pleadings, indicated there was no



1 indication of prejudice by the delay.

2 The other case that the People cite, U.S. v.
3 Marion. And that case was a federal case which requires a
4 showing of specific prejudice, and the district court
5 dismissed the case as premature, because there were the
6 allegations of prejudice until they were actually shown and
7 proven there could be no dismissal under the United States
8 Constitution.

9 With regard to whether this is a mixed question
10 of law and fact. Judge Fahey was quite clear that this
11 court has never looked at Taranovich issues as one of mixed
12 - - - a question of mixed law and fact.

13 With regard to prejudice, we do not concede that
14 there was no prejudice. It's quite clear under Taranovich
15 and this court's decision in Singer when the delay becomes
16 a certain length, there is no need - - - the defendant does
17 not need to show prejudice.

18 In this case, we do have prejudice, I believe,
19 under the fourth prong where Mr. Johnson was serving a
20 sentence on another crime. The police knew that he was in
21 custody. And by delaying, it deprived Mr. Johnson of the
22 possibility of a concurrent sentence.

23 JUDGE GARCIA: Counsel, I see your light's on and
24 before we finish here I wanted your thoughts - - - another
25 thing I struggle with in weighing these factors is where



1 does the victim fit in, right?

2 So we have a minor victim who's incapacitated.
3 That's the charge, right. So it affects, obviously, some
4 of the statute of limitations issues on certain crimes,
5 different issue, but it - - - that does get to the sense
6 that these are difficult victims. They present particular
7 challenges. And this one, I think there's some indication
8 in the record, at least that the trial court had other
9 issues as well, does that factor into the reason for the
10 delay, does it factor into the nature of the charges, does
11 it factor even into potentially reasons for the government
12 delay that we should look at differently because of the
13 nature of the victim that we have here in this special
14 challenges this victim faces?

15 MR. DAVIS: Yes. Under Decker, this court
16 excused the delay because the witnesses to the offense were
17 drug addicts and other - - - other things. And so at the
18 time of the offense, they would not have made good
19 witnesses. After a passage of time, they sobered up, and
20 then the people were able to then go forward with the
21 prosecution, and this court held that in Decker that was a
22 - - - that was reasonable.

23 Unfortunately, as Your Honor indicated, these are
24 difficult questions, and if the victim were truly
25 uncooperative, then that would excuse some of the time



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

here. I don't believe the record indicates that that is -
- - that is actually the case. And that also must then be
weighed against what the investigator does to actually
track her down.

What's clear is at this point, years before the
case goes to the - - - to the grand jury, this victim
contacted the police through a counselor she had who is
married to a police officer. Yet, still, it took the
police and the prosecutor more than eighteen months at that
point to put the case into the grand jury. So I would
argue that that is taking into account the victim's special
circumstances, but does not excuse what the police did and
the prosecutor in this case. Thank you.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Ronald K. Johnson v. People of the State of New York, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Ellen S. Kolman

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: November 1, 2022

