

STATE OF NEW YORK  
ERIE COUNTY COURT

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THE PEOPLE OF THE STATE  
OF NEW YORK

v.

**NOTICE OF MOTION TO DISMISS**

IND: [REDACTED] [REDACTED] 1

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YOUR HONOR:

Please take notice that upon the attached affirmation of [REDACTED], ESQ., the defendant will move, at a term of Erie County Court, Part 17, at 9:30 a.m. on [REDACTED] 2023, to dismiss the indictment on the ground that the pre-indictment delay deprived him of his rights to a speedy trial and due process of law (US Const Amend VI; NY Const art I, § 6).

DATED: [REDACTED], 2023  
Buffalo, New York

Respectfully submitted,

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

TO:

Hon. Sheila DiTullio

Erie County District Attorney  
25 Delaware Ave.  
Buffalo, New York 14202

THE PEOPLE OF THE STATE  
OF NEW YORK

v.

**SUPPORTING AFFIRMATION**

IND-7-██████████

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STATE OF NEW YORK            )  
COUNTY OF ERIE            )        ss.  
CITY OF BUFFALO            )

██████████, ESQ., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel to the defendant, ██████████, who is charged in this indictment with course of sexual conduct against a child in the second degree (Penal Law § 130.80[1][a]) and sexual abuse in the second degree (Penal Law § 130.60[2]).
2. I make this affirmation in support of my motion to dismiss the indictment on the ground that the pre-indictment delay violated his rights to a speedy trial and due process of law (US Const Amend VI; NY Const art I, § 6).
3. Unless otherwise stated, this affirmation is made upon information and belief, the source of which is my review of the indictment, case file, and discovery provided by the prosecution.
4. The indictment alleges that Mr. ██████████ committed two acts of sexual abuse against the complainant in 2006. The complainant first reported the alleged abuse to a law enforcement agency, the Orchard Park Police Department, in 2018.
5. On ██████████ 2018, Det. ██████████ Payne interviewed Mr. ██████████ and confronted him with the accusation. Mr. ██████████ signed a now-suppressed statement that the accusation was true.
6. Within a month, a target letter was sent to Mr. ██████████, and counsel was assigned. But the indictment was not filed until ██████████ 2020, twenty months after he signed the incriminating statement.

7. “The constitutional right to prompt prosecution ... [is] embodied in the due process clause of our state constitution” (*People v. Regan*, 39 NY3d 459, 462 [2023], Wilson, J.).
8. Thus, an unreasonable delay in bringing a prosecution is grounds for dismissal even if the defendant “was not formally accused, restrained[,] or incarcerated for the offense” (*id.* at 464-465, quoting *People v. Singer*, 44 NY2d 241, 253 [1978]).
9. The rule is rooted in “basic fairness to the defendant[,] which requires the State to minimize delay and, hence, anxiety attending a pending charge” (*Singer*, 44 NY2d at 253, n 2). “The public also has a need for prompt prosecution of criminal offenders ... seek or obtaining convictions long after the offense was committed disrupts the rehabilitation process[,] and penal sanctions lose much of their deterrent value when justice is delayed” (*id.* at 254).
10. There is, of course, a need to investigate in order to “discover the offender; to eliminate unfounded charges and to gather sufficient evidence to bring the case, or related cases, to court” (*Singer*, 44 NY2d at 251). But this need was satisfied on June 18, 2018, when Mr. ██████ signed the incriminating statement.
11. The factors to consider are “(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 reason of the delay” (*Regan*, 39 NY3d at 465, quoting *People v. Taranovich*, 37 NY2d 442, 445 [1975]).
12. In *Regan*, the Court of Appeals dismissed the indictment, finding that the pre-indictment delay violated the defendant’s right to a prompt prosecution. The court emphasized that the most important *Taranovich* factors were the first two: the extent of, and reason for, the delay.
13. The overall delay in this case was nearly 14 years, far longer than the delay in *Regan*, which was just over four years.
14. With respect to the reason for the delay, when it has been protracted, the burden is on the prosecution to establish good cause (*Regan*, 39 NY3d at 467). While the first 12 years

appear to be justified by the complainant's delay in reporting the alleged abuse, the prosecution must justify the last twenty months.

15. Importantly, the entire delay occurred before the COVID-19 pandemic disrupted the criminal justice system.
16. In *Regan*, the Court of Appeals found that 24 months of delay were unjustified, only slightly longer than the delay in this case. The delay was even more consequential because the case was already 12 years old. The prosecution had a duty to promptly charge ██████████ or not charge him at all.
17. With respect to the nature of the charge, the highest charge in this case is a D violent felony. In *Regan*, the charge was rape in the first degree, a B violent felony. Although the allegations are serious, the law deems the allegations in *Regan* even more serious, and that was not enough to save the prosecution.
18. Mr ██████████ was not subject to any pre-trial incarceration, and while he is not able to show any specific prejudice, neither was the defendant in *Regan*, and “the impairment of one’s defense is the most difficult form of prompt prosecution prejudice to prove because time’s erosion of exculpatory evidence and testimony can rarely be shown” (*id.*, 39 NY3d at 471).
19. For the same reasons, the pre-indictment delay deprived Mr ██████████ of his right to a speedy trial under the Sixth Amendment to the United States Constitution (*Barker v. Wingo*, 407 US 514 [1972]).
20. If the prosecution disputes any of the factual allegations, a hearing is requested.

For the reasons stated, the motion should be granted.

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██████████ ESQ.