

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	ID#: 1202022354
)	
ELI RODRIGUEZ,)	
Defendant.)	

ORDER

**Upon Defendant’s Request for Certification
Under Supreme Court Rule 41 – DENIED.**

1. On September 7, 2012, the court denied Defendant’s motion to dismiss the pending indictment for rape in the second degree.¹ The motion relied on an overlap between second and fourth degree rape,² and the charging discretion implicitly left by the overlap.³

2. On September 12, 2012, in a letter, Defendant asked the court to certify the question under Delaware Supreme Court Rule 41.

¹ 11 *Del. C.* § 772(a)(1).

² 11 *Del. C.* § 770(a).

³ *State v. Rodriguez*, ID No. 1202022354 (Del. Super. Sept. 7, 2012) (Silverman, J.).

3. As the September 7, 2012 letter/order reflects, the legal issue presented has been previously decided by this court, and it has been touched-on by the Supreme Court. Presently, there are no conflicting decisions of the trial courts on the question.

4. The question is important because it turns on statutory interpretation and recurs in rape cases. Moreover, there is precedent for certifying a question under Supreme Court Rule 41 in a criminal case.⁴ Here, the State's last plea offer involves a significant prison sentence. Defendant's dilemma is he must decide whether to risk trial and a potentially harsher sentence. Nevertheless, this court routinely decides important, recurring legal issues in serious situations, and Supreme Court Rule 41 does not contemplate automatic certification, nor does Delaware's Constitution allow it.

5. The ban on interlocutory appeals is constitutional.⁵ Presumably, the framers generally anticipated Defendant's dilemma. Nevertheless, the framers probably also saw the greater problems engendered by allowing interruptions in criminal prosecutions. Regardless of the reasoning, a court rule is not a way around

⁴ See *State v. Demby*, 672 A.2d 59 (Del. 1995) (Certification accepted without comment in death penalty case).

⁵ Del. C. Ann. Const. Art. 4, § 11.

a constitutional prohibition. There is no carve-out in article IV,⁶ even for purely legal questions. So, albeit by another name – “certification” – Defendant’s request amounts to an interlocutory appeal in a criminal case.⁷ Supreme Court Rule 41 notwithstanding, this court has no discretion to medially certify a question of law in a criminal prosecution.

7. If the court could certify, it is hard to see how certification would help. Certification will not end this case or solve Defendant’s dilemma. No matter what the Supreme Court might decide, this Defendant will still face trial on twenty-one, felony sex offenses: thirteen rape counts and eight counts of child pornography possession, or accept the next plea offer. What this boils down to is Defendant’s hope that if an interlocutory appeal works, the State will sweeten its plea offer on remand.

8. In summary, the court holds that certification to the Supreme Court regarding a question of law, in an on-going criminal prosecution, is constitutionally prohibited. Alternatively, if it had discretion to certify, the court would not do so because that would not accomplish much.

⁶ Compare Del. C. Ann. Const. Art. 4, § 11 (1) (a).

⁷ *Rash v. State*, 318 A.2d 603 (Del. 1974).

For the foregoing reasons, Defendant's informal request for certification is **DENIED**. Trial remains on for September 18, 2012.

IT IS SO ORDERED.

Date: September 13, 2012 _____ /s/ Fred S. Silverman
Judge

oc: Prothonotary (Criminal)
Annemarie Hayes, Deputy Attorney General
Thomas A. Foley, Esquire