# NYS Court of Appeals Criminal Decisions for February 8, 2018

## People v. O'Kane

This is a unanimous and successful People's appeal, authored by Judge Wilson. The County Court's reversal of the judgment is reversed in this local appeal. It was not ineffective assistance of counsel for the trial attorney to consent to the verdict sheet including annotations to help the jury distinguish the charges. CPL 310.20 is analyzed here. Appellant failed to establish that there was no legitimate explanation or strategy for counsel's decision. At issue was a four-page verdict sheet with 14 counts,12 distinct time periods and over 300 different acts of harassment, stalking and contempt. The jury convicted on 12 of the 14 charges. CPL 310.20 permits delineating different counts with dates, names of complainants or statutory language. An expanded or supplemental verdict sheet may be furnished to the jury with the consent of the parties. The matter was remitted to County Court for consideration of issues raised on appeal.

## People v. Sposito

This is a unanimous memorandum, affirming the AD. The defendant failed to establish ineffective assistance of counsel based on the record below. A CPL 440 motion was recommended; as counsel's alleged out of court statements were outside of the record and beyond review by this Court on direct review. Defendant's C.P.L. 440.30(1-a) motion for DNA was properly denied, as he failed to establish a reasonable probability that the verdict would have been more favorable if the requested testing had been carried out and the results admitted into evidence at trial.

# NYS Court of Appeals Criminal Decisions for February 13, 2018

## People v. McCain
## People v. Edward

This is a combined memorandum decision, affirming the appellate terms in both 4th degree CPW cases. Judge Stein concurred on both results. Judge Wilson concurred in McCain and dissented in Edwards. The misdemeanor complaints in both cases were facially sufficient under CPL 100.40(4)(b). Both accusatory instruments established reasonable cause that defendant possessed a "dangerous knife" under P.L. §260.01(2), triggering the presumption of possession under P.L. §265.15(4).

## People v. Francis

This is a unanimous decision authored by Judge Rivera, affirming the AD. A prior YO adjudication may be properly considered in determining a SORA risk assessment. A full discussion of the principles behind both the SORA and YO statutes (CPL art. 710 and Corr. Law art. 6-c respectively) is found here. Allowing the prior YO adjudication to be considered in the limited public safety context of having to accurately assess an offender's risk level does not conflict with the goal of avoiding stigmatizing a youthful indiscretion, as the information regarding the prior YO matter is not revealed to the public, but only to the Board of Examiners of Sex Offenders ("Board"), which has a statutory right to have such access under CPL 720.35(2). Also, it is the offender's present sex offense, not his prior YO matter, that he is being potentially stigmatized for. The Guidelines support the rationale that a prior YO is a reliable indicator and should be considered in assessing an offender's likelihood of reoffending. Though a YO adjudication is not a judgment of conviction or any other offense (CPL 720.35[1]), it is still premised on the commission of a crime.

The Court unfortunately pays just lip service to the important reasons for the "raise the age" movement and the recognition in the scientific community that the development of a child's brain is incomplete until he or she reaches adulthood - - and therefore any use of a prior YO adjudication would not in fact be a reliable indicator of whether a defendant would reoffend. The heedless and impulsive risk-taking of a child who has an underdeveloped sense of responsibility seems to fly in the face of the Board's important duty in accurately assessing one's risk of reoffending. The Court, however, falls back on a separation of powers angle here, as policy making belongs to the legislature, which has spoken through CPL 720.35(2).

Here, the 25 points under the criminal history category of defendant's risk assessment instrument were properly assessed; he was correctly adjudicated as a level three offender.

# NYS Court of Appeals Criminal Decisions for February 15, 2018

## People v. Reyes

This is a 5-2 memorandum, with Judge Garcia authoring the dissent and Judge Feinman joining in. This is an unsuccessful prosecution appeal. The AD is affirmed. There was insufficient evidence of the "agreement" element in this second degree conspiracy prosecution (PL §105.15). Every conspiracy requires an intent that a crime be committed and an agreement to engage in (or cause that) a crime be performed. Defendant was a gang member who was present at meetings where a former gang member became the object of a fire bomb plot on his home. The defendant was not present for the actual arson that occurred. There is no presumption of an agreement based merely on a defendant being present for a meeting regarding the planning of a crime. Knowledge of the existence or goals of a conspiracy is insufficient to establish a conspiracy. *See* US v. Ceballos, 340 F3d 115, 124 (2d Cir. 2003). Of course, there is not a great deal of transparency in the making of an illegal agreement, unlike a public contract, where there is often correspondence and conspicuous dialogue. Because in the planning of a crime, there is usually clandestine and ambiguous activity, the court declined to define exact parameters for conspiracies in general.

The dissent believed that there was a concrete and unambiguous expression here of an intent to violate the law. The evidence at bar showed the structure of the gang, an earlier attack on the victim, that defendant was a member of the gang and that defendant was present at meetings where the attack was planned. Defendant's gang activity was insufficient alone to establish the conspiracy; but it was a relevant factor.

## People v. Wiggins

This is a great decision authored by Judge Fahey, reversing the judgment and dismissing this murder indictment based on a constitutional speedy trial claim. The Chief authored the dissent, with Judges Garcia and Feinman joining in. Defendant spent six years and almost four months in the cesspool that is Rikers Island before taking a plea on a homicide alleged to have been committed when he was 16 years old. During this time, the People attempted to get the co-defendant to cooperate and eventually tried him, resulting in several mistrials and a plea to attempted murder. Defendant was convicted of an assault during this time period (committed while incarcerated), and was also charged with a gang assault, which was ultimately dismissed. Defendant resolved the primary homicide case against him by pleading guilty to first degree manslaughter. He remained in custody the entire time.

The court analyzed the five factors set out in People v. Taranovich, 37 NY2d 442, 445 (1975), that is, the extent of the delay, the reason for the delay, the nature of the

underlying charge, whether there was extended incarceration and whether the defense was impaired by the delay. *See also* Barker v. Wingo, 407 US 514, 530 (1972) (setting out the federal standard, considering the length of the delay, the reason for it, the defendant's assertion of his/her speedy trial right and any prejudice to the defendant). No one factor is considered to be determinative.

The Court considered all five factors under the assumption that the People were acting in good faith throughout these proceedings. The entire court, including the dissent, agrees that a delay of five years between the crime and the plea is extraordinary. *(The majority's calculation was that the delay was over six years; the dissent opined [in footnote 2] that it was only five years because of procedural issues involving defendant's motion to dismiss.)* As for the reason for the delay, the AD erroneously applied CPL 30.30(3)(a) to this homicide prosecution and erroneously concluded that the People's purported good faith could not be second guessed. The latter issue is important, as the People must gather enough evidence to establish one's guilt beyond a reasonable doubt *before* filing charges, but are to be afforded less latitude once charges are filed. "[T]he People cannot justify this extraordinary delay through their good faith alone. The People do not have unfettered discretion to indefinitely pursue evidence that would strengthen their case while the defendant's trial is postponed." The majority concluded that only factor number three, addressing the serious nature of the underlying charge, favored the People. The defendant having been incarcerated on other charges during this time period does not preclude the fourth factor from still favoring him in this analysis.

The fifth factor requires special attention here. The majority opines, in great contrast to the dissent, that determining whether prejudice has been caused to defendant is broader than merely whether the defendant's case *in court* has been negatively impacted. As specific impairment in presenting a defense is very difficult to prove in a speedy trial context, there is a presumption under these circumstances that prejudice occurred. Moreover, prejudice here by being under indictment also includes loss of employment, financial losses, curtailment of associations, public obloquy, anxiety and loss of liberty. This is a welcomed analysis by the Court of what it means to merely stand *accused* of a crime.

It may come as a bit of a surprise to some *amici curiae* on this case that the Court elected not to comment *at all* on the conditions of Rikers Island, as a significant amount of time was spent in the litigation of this claim pointing out that this was a teenager spending the prime of his youth in that infamously oppressive facility.

The dissent believed there was record support for there being good cause for the delay, though it was a close call. Also, as mentioned above, it opined that the impairment of the defense in the fifth factor is restricted to specifically defending the case in court.