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People v Sinagra
2007 NY Slip Op 51180(U) [15 Misc 3d 1146(A)]
Decided on June 11, 2007
Supreme Court, Kings County
Reichbach, J.
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Decided on June 11, 2007

Supreme Court, Kings County

The People of the State of New York,
against
John Sinagra, Defendant

825/05

Appearing for the defendant was:

Joseph Giarimita, Esq.

Appearing for the People:

Kevin Richardson, Esq.

Monique Ferrell, Esq.

Bryan Wallace, Esq.

Justin L. Reichbach, J.

Background

On May 27, 1990, the bullet-ridden body of 18-year-old Patrick Porco was found dumped on the streets of Brooklyn. During the months of June and July, the New York City police conducted an investigation including interviewing numerous persons close to the deceased. By August, it appears from the police file that the investigation into Porco's murder had stalled and while the case remained "active," no further investigation was undertaken. *People's Ex. 3.*

On May 7, 1996, the Patrick Porco homicide file was closed by "Exceptional Clearance." The "Clearance" report stated that based on information from the Kings County District Attorney's office, Joey Scarpa, the son of a notorious organized crime figure, Greg Scarpa Sr., had been

Porco's executioner. Because of Scarpa's own murder on March 20, 1995, the case was being closed. *Defendant's Ex. E*.

At the end of 2005, in connection with a parallel investigation, three witnesses informed the District Attorney that John Sinagra had told each of them on separate occasions that he had been the shooter in the Porco homicide. These witnesses were presented to a Brooklyn Grand Jury who, on March 23, 2006, returned the instant murder indictment against Sinagra for the 1990 execution of Patrick Porco. ^[FN1] [*2]

The defendant moved to dismiss the instant indictment claiming that the 16-year delay between the killing of Porco and the indictment violated his right to speedy trial and due process. Because of the limited pre-trial discovery afforded criminal defendants in New York, CPL § 240.20, *et. seq.*, the defendant, in his motion to dismiss, relied primarily on the passage of time; to wit, the 16 years between the murder and indictment. The defendant, while unable to supply specifics, did suggest that the information against him had to be available to the police and the District Attorney much earlier than 2005. The defense claimed that Jay Novoa, an important prosecution witness, had been cooperating with law enforcement authorities since 1995 and opined that the information regarding the Porco shooting was available back then. In their opposition to the defendant's motion, the People submitted an affirmation from Bryan C. Wallace, an Assistant District Attorney, and an affidavit from Thomas Dades, identified as a former police detective, "presently employed by the Kings County District Attorney's office." People's Ex. 5 and People's Ex.6. In his affirmation in opposition, ADA Wallace stated, in response to the defense claims about Novoa, that "although Jay Novoa in 1995 named Joseph Scarpa as the killer of Patrick Porco, Novoa did so based on information given to him by Joseph Scarpa and Novoa made no mention of any role of defendant Sinagra in the commission of that crime." Wallace's affirmation also asserted that, "the only relevant fact is that the one surviving witness with material knowledge of the crime did not disclose that knowledge until late 2005." In his affidavit, Dades swore that in 1995 he debriefed Novoa and asserted that Novoa told him then that in 1994 Joseph Scarpa told Novoa that he (Scarpa) had murdered Porco and that to Dades' knowledge, "Novoa did not mention the defendant to any other law enforcement official." Dades' affidavit concluded with the assertion that, "The information made available in 2005 about the defendant was not available to law enforcement previously."

On the basis of these categorical denials by the District Attorney and the inability of the defense to challenge these specific factual assertions by someone with personal knowledge, the Court summarily denied the defense motion without ordering a hearing pursuant to *People v. Singer*, 44 NY2d 241 (1978). It would soon be revealed that these denials were misleading, inaccurate and incorrect.

At a subsequent court appearance to set a trial date, the Assistant District Attorney presented the Court and defense for the first time with a document in the form of a memorandum, dated March 21, 1995 from Senior Investigator Joseph Mallewich of the District Attorney's office to his supervisor, then Deputy Chief, now Chief Inspector Ponzi concerning his debriefing of Jay Novoa. That [*3] memorandum directly and unambiguously contradicted the factual claims made in Wallace's affirmation and Dades' affidavit. That memorandum, based on notes taken during the March 21, 1995 debriefing of Novoa, indicated that Novoa told the two DA investigators with whom he spoke that both Sinagra and Scarpa, at different times, had each told Novoa that Sinagra had shot and killed Porco and that Porco had been killed because they suspected that he was or might become an informant in the 1989 homicide of Dominic Masseria.

As a consequence of this belated revelation, this Court vacated its previous denial and set defendant's motion to dismiss on for a *Singer* hearing, which was held on May 16 and May 29, 2007.

New York Law on Speedy Trial/Due Process Claims

Long before the United States Supreme Court made speedy trial rights applicable to the states in *Klopfer v. North Carolina*, 386 US 213 (1967), and before *Barker v. Wingo*, 407 US 514 (1972) enumerated the standards to consider in regards to Sixth Amendment speedy trial claims, New York had recognized that the deprivation of the right to a speedy trial may affect fundamental fairness because "the means of proving...innocence may not be within...reach" *People v. Prosser*, 309 NY 353 (1955); and, that an unreasonable delay in prosecuting a defendant constitutes a denial of due process of law. *People v. Winfrey*, 20 NY2d 138 (1967). Indeed this right has been considered of such fundamental importance that New York has held that the right to a speedy trial cannot be made an item of barter in plea bargaining and that any purported waiver of a speedy trial claim under the old Code of Criminal Procedure §668 was ineffectual. *People v. Blakely*, 34 NY2d 311 (1974).

Generally, speedy trial rights are discussed in the context of post-charging delays and due process rights are implicated in pre-charging delays. *People v. Singer, supra, People v. Staley*, 41 NY2d 789 (1977). The distinction however is not a rigid one. *People v. Vernace*, 96 NY2d 886, 887 (2001).

The Court of Appeals in *People v. Staley, supra*, found that failure to conduct a prompt prosecution implicates both speedy trial and "more encompassing due process rights," *Staley* at 790, "and that an unexplained or inexcusable pre-indictment delay can be a deprivation of due process." *Id.* at 791. The *Staley* court held that such a delay may require dismissal of an indictment even in the absence of prejudice, (*see also, People v. Taranovich*, 37 NY2d 42 (1975)), and that "sheer neglect or trifling is not permissible." *Staley, supra* at 792.

*4] *People v. Taranovich, supra* addressed a defendant's right to a speedy trial under both the federal constitutional guarantees of the 6th and 14th Amendments and New York statutes, CPL §30.20; Civil Rights Law §12. The Court stated unequivocally that "the only available remedy to a speedy trial violation is to preclude prosecution." *Id.* at 444. *Taranovich* further makes clear that there is no bright line or precise time frame which automatically requires dismissal. It states that the trial court must examine the claim in light of the particular factors in the specific case before it. *See also People v. Prosser, supra*. The *Taranovich* Court instructs that the Court must engage in a sensitive weighing process of the "diversified factors present in the particular case," and that no one factor is *necessarily* decisive. *Id.* at 445. (emphasis added).

The factors that *Taranovich* directed be examined in determining the merits of a claim of denial of a defendant's rights to a speedy trial were: 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 pre-trial incarceration; and 5) whether or not there has been any indication that the defense has been impaired by reason of the delay. *Id.* at 445. While recognizing that the greater the delay, the more probable that the accused will be harmed, the Court in *Taranovich* refused to set a *per se* period beyond which a criminal prosecution may not be pursued. *See also, People v. Prosser, supra* at 360. The Court in *Taranovich* found that the delay in indicting the defendant in the case before it did not appear to be a deliberate attempt by the prosecution to hamper the defense and no claim of prejudice was made. Notwithstanding that, the Court in *Taranovich* noted that, "it is not incumbent upon a defendant to show that he has been prejudiced by the delay in the commencement of his trial." *Id.* at 447. The Court in *Taranovich* made it clear that, "we do not depart from the now traditional view...that where in the circumstances delay is great enough there need be neither proof nor fact of prejudice to the defendant." *Id.* at 447. That Court also found that the delay of one year between the crime and the indictment, as a consequence of prosecutorial inattention, did not require dismissal where there was no lengthy pre-trial incarceration and no apparent impairment of the defense. Judge Wachtler dissented, noting that in New York, the Court of Appeals had previously held that only two factors were determinative; the length of the delay and the reason for it. And when the delay is attributed to the prosecutor's negligence this "affords neither explanation nor excuse." *Id.* at 448. Wachtler, J. (dissenting). While agreeing that the nature of the charge is a consideration in determining the significance of the delay, nevertheless Judge Wachtler also noted that, "where the delay is lengthy, the burden is upon the prosecution to justify it." [*5]

Three years later, Justice Wachtler was now writing for the majority in the seminal case, *People v. Singer, supra*. Unlike the factual circumstances in *Blakely, Staley* and *Taranovich*, where all the defendants had been arrested but formal proceedings had not commenced, in *Singer supra*, the defendant had neither been arrested nor charged for a period of three years after the police had already collected all the evidence in the murder case against him. In *Singer*, the crime, a brutal rape and murder of a 17-year-old girl, occurred in October of 1970. The police had determined the defendant was the killer within two weeks and had all the evidence in their possession by February 1971. The defendant, who was in prison serving time on a separate manslaughter charge, was not arrested until his release from prison in May of 1974. Judge Wachtler noted that the federal courts draw a distinction between pre-indictment and post-indictment delays and that in regards to pre-indictment delays, governed by the due process clause, the federal courts have generally required a showing of actual prejudice before a dismissal would be warranted. *US v. Marion*, 404 US 307 (1971); *US v. Lovasco*, 431 US 783 (1977). The federal courts, he wrote, have generally assumed that the statute of limitations is the primary safeguard against potential prejudice where there has been a delay in arresting or charging the defendant. By contrast, the Court in *Singer* found that it cannot be assumed that the statute of limitations will always adequately protect the defendant against the potential prejudice inherent in delay, particularly as New York has no statute of limitations for murder. *Singer* at 253. The Court in *Singer* noted that, "there is more at stake...than actual prejudice to the defendant's ability to defend himself," and that the law of New York is that, "unreasonable delay in prosecuting a defendant

constitutes a denial of due process of law." *Id.* at 253; *see also People v. Staley, supra* at 791. The Court declared that the due process requirement in New York mandating prompt prosecution "is broader than the right to a speedy trial guaranteed by statute (see CPL §30.20; CPL §30.30) and the 6th Amendment." New York law is "less rigid in its application" than the right to due process recognized under the Federal Constitution because, "in a proper case, a lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown." *Id.* at 253-254. This is so, "even though, in the interim, the defendant was not formally accused, estrained or incarcerated for the offense." *Id.* at 253. *See also, People v. Winfrey*, 20 NY2d 138 (1967); *People v. Wilson*, 8 NY2d 391 (1960); *People v. Staley, supra*. As the Court in *Singer* recognized, when there has been "a protracted delay, certainly over a period of years, the burden is on the People to establish good cause." *Singer* at 254. Of course, a "good faith determination to defer commencement of the prosecution for further investigation...will not deprive [*6] a defendant of due process even though the delay may cause some prejudice...but if the commencement of the prosecution will be delayed for a lengthy period, without good cause, the defendant may be entitled to a dismissal although there may be no showing of special prejudice." *Id.* at 254.

Since *Singer*, the courts have continued to analyze this issue in the context of the five factors set forth in *Taranovich, supra*. *See, People v. Walden*, 10 NY3d 463 (2006), *People v. Jones*, 267 AD2d 250 (2nd Dept., 1999), *People v. Vernace*, 96 NY2d 886 (2001). All of these cases recognize that the greater the delay, the more probable it is that the accused will be harmed and the burden is on the prosecution to establish good cause for the delay.

In *People v. Allen*, 13 AD3d 639 (2nd Dept., 2004), the Court was confronted with a 57-month delay between the offense and indictment. Finding that the prosecution had failed to establish good cause for the delay, the Court found the delay unreasonable, and held that dismissal was required even in the absence of prejudice. *Id.* at 640. Where the delay is justifiable because further investigation is necessary to acquire more evidence or to locate witnesses, then such a delay, *if reasonable* and made in good faith, will not deprive a defendant of due process unless the defendant can demonstrate actual prejudice. *People v. Jones*, 267 AD2d 250 (2nd Dept., 1999). (emphasis added). Furthermore, the Court should not dismiss if the delay is reasonable and in good faith even if the defendant does suffer some prejudice. *People v. Lesiuk*, 81 NY2d 485 (1993).

[*7]*Singer Hearing Testimony*

The first witness called by the People at the *Singer* hearing, was **ALFONSE LOMBARDO**, Deputy Chief of the Special Investigations Unit at the Kings County DA's office. He has worked for the DA for over 20 years. In addition to his other duties, he is the office's certified polygraph examiner. In April of 1990, he interviewed Ray Aviles in connection with the murder of Dominic Masseria. The police had asked Lombardo to interview and polygraph Aviles. Aviles told Lombardo that he was in a limousine with Patty Porco, Joey Scarpa, and a guy named Craig when the shooting occurred. This information was given by phone to New York City Police detectives who were already investigating. Under these circumstances, Lombardo testified, the District Attorney would not open up a collateral investigation. After the April 1990 interview with Aviles, Lombardo met with Patrick Porco who would not cooperate. Shortly after Patrick Porco's homicide, Lombardo received a call from Ray Aviles who was in jail, telling him that word on the street was that "Fat Carmine and Johnny Loads killed Porco." This information, Lombardo testified, was also turned over to the police. Lombardo made no further investigation into the identity of the two named individuals.

After his release from prison in 1993, Aviles again repeated what he had told Lombardo earlier about the Porco killing regarding "Fat Carmine" and "Johnny Loads." This, Lombardo says, was again passed on to the New York Police Department. Lombardo sent a memorandum of this 1993 interview in which Aviles mentioned "Johnny Loads," to his supervisor, Joseph Ponzi. When originally called to testify, a copy of this 1993 memorandum was introduced as *People's Ex. 1*. When Lombardo was recalled as a witness and brought his entire case file on Aviles, attached to his memorandum was a handwritten list, containing a series of questions to be asked. The entire four pages, subsuming *People's Ex. 1* was then entered into evidence as *People's Ex. 4*. The first handwritten question asked, "Who is Joe Sinagra?" Nobody could identify the author of this document. Nobody knew who composed the questions or if they were ever asked. The questions were apparently to be posed to Jay Novoa not Aviles, and how they wound up in the Aviles file in the DA's office is another one of the many inexplicable and unanswered questions that plague his case. [FN2] [*8]

By 1995, Lombardo was in charge of the organized crime unit in the DA's office. In that capacity he met with John Novoa, also known as Jay, in a hotel at JFK airport after Joey Scarpa was killed. He attended this meeting with detective investigator Joe Mallewich of his office. Lombardo clearly recalled that Novoa told him that the two killers of Patrick Porco were John Sinagra, a/k/a "Johnny Loads" and Joey Scarpa. Novoa recounted that John Sinagra shot Patrick Porco through the teeth. Patrick Porco's body got tangled in the seatbelt when they were pushing him out of the car." He also testified that Novoa told him that Joey Scarpa had told him (Novoa) the same story, that Sinagra had done the shooting. Lombardo signed off on the report written by Mallewich detailing Novoa's debriefing. This information was turned over to the New York Police Department and passed

along to Supervising Investigator Ponzi, as well. Afterwards, Lombardo and Mallewich took Novoa out of state. Subsequent to that interview, Lombardo had no further involvement with the Patrick Porco homicide, he never reviewed the autopsy report, nor did anything else to independently corroborate Novoa's story.

Lombardo was unsure if there were any New York Police Department personnel present during this interview with Novoa. He did not re-interview Aviles after his meeting with Novoa. He testified that he made no connection between the reference to "Johnny Loads" previously given to him by Aviles in 1990 and 1993 and identified as Sinagra by Novoa in 1995. He stated pointedly, "I don't remember what I did 18 years ago."

He was not aware that the Porco investigation had been closed in 1996, only learning of it in connection with this hearing.

Lombardo did acknowledge that in addition to conveying information to the police department, information on a homicide would "most times" involve informing an Assistant District Attorney, but he didn't know if one had been consulted in the Porco homicide. He agreed that under the circumstances presented by this third party admission, based on his years of experience, "an ADA would at least be conferred with." While testifying that his own unit would be finished once the information was turned over to the New York City Police Department, and there is no follow-up responsibility for his investigative staff, he agreed that such information would have also been subject to a conference by the police with an Assistant District Attorney.

Lombardo was careful and deliberate in his testimony and volunteered little. He was a far more closed and cautious witness than Chief Ponzi would be when he [*9] testified. While Ponzi acknowledged that the Porco killing, involving as it did, the son of a notorious organized crime figure, was a case of high interest, Lombardo characterized it as one case among many. Lombardo qualified practices such as retaining certain records as a "some-times" practice, Ponzi unequivocally testified to the fact that retention was a matter of course. His failure to connect the "Johnny Loads Sinagra" identified by Novoa to the "Johnny Loads" Aviles told him about two years earlier seems dubious. Nonetheless, his testimony regarding what Novoa told him in 1995, buttressed as it was by the Mallewich memo, was completely credible and believable.

The next witness was **JOHN NOVOA**. Novoa testified that he knew Joey Scarpa through John Sinagra and that he had known Sinagra since he was seven years old. He testified that he began working for Sinagra in Sinagra's bagel store and then began selling marijuana for him. He did that for two years and then began selling cocaine for Sinagra until the end of 1993.

Novoa testified that on Halloween of 1989, Joey Scarpa came to his apartment with Patrick Porco in a panic because they had "hit" Dominic Masseria on 15th Avenue. Then, in the spring of 1990, at a corner bagel store where John Sinagra and Joey Scarpa were present, Novoa testified that they "told me what happened with Pat" and that Joey had said they had "clipped" Pat because they thought he was a rat regarding the Masseria killing. While in this 1990 meeting Joey told him about the killing, Scarpa did not indicate who the triggerman was. Sinagra was present at this meeting while Joey was talking but said nothing himself about the matter. Neither of these incidents appear to have been told to Mallewich or Lombardo in 1995. Novoa relates that later, in 1993, he talked to Sinagra about the Pat Porco killing in his car in Brooklyn. Novoa testified that Sinagra "told me that when Pat Porco got killed, that Joey was driving the car, he was in the passenger seat and he spun around and shot Pat, Pat was pleading for his life and he shot Pat in the mouth." Later while living with and selling drugs for Joey Scarpa, in the fall of 1994, they had a discussion in Scarpa's house on Staten Island about the murder of Patrick Porco. Novoa testified that Scarpa told him that "John was driving the car and that he (Scarpa) shot him in the mouth. And they had a hard time getting him out of the car..."

After the shooting death of Joey Scarpa in March 1995, Novoa began cooperating with law enforcement. He confirmed meeting Detective Sorrentino the day that Joey Scarpa was killed and that was the only time he dealt with her. He was adamant that when he met Tommy Dades back in 1995, the only subject of discussion was the Joey Scarpa killing. He categorically denied discussing the [*10] Patrick Porco murder with Tommy Dades until November or December of 2005. Dades would deny in his testimony talking to Novoa at all in 1995, disavowing the claim that he had made in his affidavit. Novoa recounted telling Mallewich and Lombardo about the Patrick Porco murder. While testifying that he told them that John and Joey had killed Pat, he initially testified that he told them that Joey Scarpa had taken credit for killing Pat and only afterwards acknowledged also telling Lombardo that John Sinagra also had taken credit for killing Porco. While acknowledging that he had told Lombardo about the conversation with Sinagra in the car, he then became uncertain about whether he told them about the conversation with Scarpa at the house on Staten Island. His direct examination ended with him testifying that he told Lombardo and Mallewich both what John Sinagra had told him concerning the Porco murder and what Joey Scarpa had said. "I told him that both of them took credit for the shooting because I heard both stories. Both of them, never at any point were conflicting with what happened with his foot getting stuck in the car...John told me that Joe was driving the car and he shot him and Joe told me that John was driving the car and Joe shot him. But everything else was completely the same." This is not reflected in the Mallewich memo of what Novoa told the investigators which names just Sinagra as the shooter.

Novoa expressed great self-pity, claiming his life had been ruined by being present when Joey Scarpa was killed. He acknowledged entering into a number of cooperation agreements with the District Attorney's office while simultaneously acknowledging many arrests, convictions and open cases for everything from credit card fraud to robbery and guns. Characters like Jay Novoa have become an all too regular part of the criminal justice system, cooperating with law enforcement authorities and providing valuable information while simultaneously continuing to engage in criminal undertakings. Novoa's testimony is a further demonstration of the difficulty in accurately recalling details so many years after the event. To the extent that his testimony differs from that of Lombardo and Mallewich regarding whether or not he told them that both Scarpa and Porco had each individually taken credit for the shooting, the Court has no trouble fully crediting the testimony of Lombardo and Mallewich, supported as it is by Mallewich's contemporaneous memorandum as to what Novoa told them in 1995. To the extent that Novoa's testimony differs from that of Dades, the testimony of both have to be viewed critically. Novoa is a narcissistic career criminal and Dades, for his part, admitted to casually swearing to

in inaccurate and misleading affidavit. Nevertheless, both of them agree on the critical point that Novoa never [*11] discussed the Porco killing with Dades until 2005.

The People's third witness was **JOSEPH MALLEWICH**, who was employed with the District Attorney's office from 1987 to 2001. Prior to that, he had worked for the Department of Investigation. He testified that on March 21, 1995 together with his direct supervisor, Al Lombardo, he interviewed John Novoa at a hotel at JFK airport. Unlike Lombardo, who believed Novoa was already present when they arrived at the hotel room, Mallewich's recollection was that they arrived first and Novoa was delivered later by a member of the New York City Police Department. While not an important discrepancy, it is a further illustration of the effect that the passage of time has on memory and recall. Though neither had been assigned to the Patrick Porco homicide, they discussed it, amongst other matters, with Novoa. Afterwards, they flew Novoa down to Fort Bragg.

Mallewich had a clear recollection as to what Novoa recounted regarding the Porco homicide. He testified that Novoa said that "Scarpa and Johnny Dades Sinagra were the two individuals responsible for the homicide and Sinagra had shot, was responsible for the shooting, and that's basically it." He recounted that Novoa had told them that in July or August of 1993, Sinagra had told Novoa he had shot Porco and that in 1994, Novoa was also told by Joey Scarpa that Sinagra had been the shooter. This was different than Novoa's testimony, but consistent with the recollection of Lombardo. Officer Mallewich prepared a report of this interview with the information that Novoa provided regarding the Porco homicide. *People's Ex. 2*. The report was signed off on by Lombardo and sent to their supervisor, Ponzi. Mallewich notified the NYPD by phone within days of his report to Ponzi. Mallewich had no subsequent interaction with Novoa regarding the Patrick Porco homicide.

Mallewich then recounted that in 1996, he met with Detective Sorrentino at the office of the District Attorney. Sorrentino had been tasked with closing the "cold" Porco file. Mallewich provided her with the information contained in his memorandum. That report reflected the information from Novoa regarding the admissions by both Sinagra and Scarpa acknowledging Sinagra as the shooter in the Porco homicide. While testifying he did not give an actual copy of his report to the detective, he acknowledged providing her access to it. He denied ever telling the detective that John Novoa had ever indicated that Joe Scarpa was the shooter in the Porco homicide. Mallewich acknowledged that as Novoa's handler at the time (1995-96) nobody else would have spoken to him and in fact nobody else knew where Novoa was located to debrief him. Mr. Mallewich acknowledged that in comparing Detective Sorrentino's report closing the Porco homicide with his own report, there were large sections where his report was incorporated verbatim into [*12] Sorrentino's report closing the investigation. All that was different was Sorrentino's critical substitution of Scarpa's name for Sinagra's as the shooter. He never spoke to Thomas Dades about or gave him his memorandum about the Porco homicide.

Mallewich's testimony also sought to explain the reasons this important 1995 memorandum came to be so belatedly known to the Sinagra prosecutors. Despite his obvious professionalism, rather shockingly, Mallewich casually revealed that upon his retirement he took some of his case files, including this one, home with him. Further evidence at the hearing demonstrated there were no procedures in place to prevent such a practice. [*13] While Mallewich's conduct in removing this file was inexcusable, causing harm to the defense and embarrassment to the DA, nevertheless his testimony regarding what he was told by Novoa and what he told Sorrentino is entirely credible and believable.

The next witness was **JOSEPH PONZI**, Chief Investigator for the Brooklyn District Attorney, employed by the district attorney for 29 ½ years. Ponzi explained the operation of his office, that they predominantly work their own cases and these internal investigations don't involve the police department. They also work on cases and interview subjects on cases opened by the New York Police Department. Chief Ponzi acknowledged that when a case was turned over to the police department, "like an open homicide investigation" the practice of his office would be "to want to know what was happening." He further indicated that there are certain procedures in the police department where there could be a disposition of a case without communication to the district attorney's office. Aware that the New York Police Department had opened an active investigation into the homicide of Patrick Porco, he testified that Mallewich would be responsible for conveying the substance of the Novoa interview regarding the Porco killing to the police. [*13] Based on his experience as a supervisor, he acknowledged that organized crime investigations such as the instant one were considered highly important. He, unlike Inspector Lombardo, acknowledged that the Joey Scarpa homicide was "the focus of a lot of attention." While a forthright and forthcoming witness, testifying all these many years later, Chief Ponzi could not even specifically recall reading his critical March 21, 1995 report back in 1995. While certain he would have discussed the case with Mallewich at the time, he could not recall what that conversation was. He did, however, state categorically that he never discussed the document with Tommy Dades or with Detective Sorrentino. Indeed, he testified that he, like Lombardo, only became aware that this murder investigation had been closed two weeks before this hearing. His only direct conversation with John Novoa occurred on a subsequent date when he, together with federal authorities and members of the New York City Police Department, including Dades, were trying to get Novoa to cooperate on a wide range of racketeering cases at a meeting that was held at the Fort Hamilton Army Base. He too acknowledged the similarity in the language used in Investigator Mallewich's report identifying Sinagra as the shooter and Detective Sorrentino's report which closed the Porco homicide, with the singular exception of her naming Scarpa as the shooter. Though he was disturbed to learn Mallewich had removed files on his retirement, he had a high level of confidence in Detective Mallewich's professionalism.

While Inspector Ponzi opined that the third party admission detailed by Novoa was insufficient to seek an indictment, he acknowledged that before making a decision whether or not to charge someone, he would confer with an Assistant District Attorney. He had no recollection of doing so in this case. While testifying that a third party admission was a "weak form of evidence," he acknowledged, "that further investigative efforts would be required." Inspector Ponzi indicated that sending the report to the NYPD, "might be the end of the investigative involvement," "[t]he case detective who is responsible for investigating either the Porco murder or the Shiro (Scarpa) murder would be in a regular conferral with a district attorney...there would be an open dialogue about additional evidence.... there is an ongoing dialogue more with the legal staff than the investigative staff." Chief Inspector Ponzi indicated that, "detectives and DA's always discuss the evidence that detectives have developed on their open homicide cases." "There is always open dialogue." And Inspector Ponzi further observed that, "I would think on a homicide case, particularly in a highly

publicized case, I would venture to say there is a general dialogue in which there would be a conferral and a concurrence."

In this case no evidence was produced indicating that an Assistant District [*14]Attorney had been conferred with on the Porco homicide and, in fact, the District Attorney's office vigorously asserted that no such conferrals had occurred.^[FN4]

The next witness was retired Detective **ANDREA SORRENTINO**, who worked for the New York Police Department from 1983 to 2003. A little after a month as a homicide detective, she was assigned as lead detective on the murder of Joey Scarpa. In connection with that, on March 20, 1995 she interviewed John Novoa at the 61st Precinct. Novoa was very scared and talked only about the Scarpa homicide and did not discuss the Patrick Porco homicide at all. After Novoa testified later that day in front of the Grand Jury on the Scarpa homicide, she had no further contact with Novoa. Eventually the Scarpa homicide was turned over to and made part of a larger federal racketeering case, and her involvement ended.

Detective Sorrentino's testimony is a good example of the problems both the defendant and the People face in such delayed prosecutions. Detective Sorrentino had not been the original homicide detective assigned to the Porco murder in 1990. Detective Sorrentino could not remember how she came to be involved in the Patrick Porco homicide case. She had no independent recollection of taking *any* actions of her own in the Porco matter. By the time she became involved, it was considered a "cold case." After reviewing the paperwork, she assumed that she became involved because the district attorney notified her that the victim in her homicide (the Scarpa killing) was responsible for the Porco homicide. She based this conclusion solely on the fact that her report indicated she had met with Mallewich, though she could not remember this meeting. Relying on the paperwork in the file, she concluded she was given "information from an investigator in the DA's office that Joseph Scarpa was responsible for the homicide of Patrick Porco." There was no documentation of this and of course, the Mallewich report says otherwise. Immediately after this meeting with the district attorney, she closed the Porco case. The file entered into evidence as *People's Ex. 3* contains no references to either Sinagra or Scarpa prior to this meeting with Mallewich. Sorrentino candidly acknowledged that she had no recollection of [*15]what was in the Porco homicide folder. Relying exclusively on her report, Sorrentino testified that it must've been Mallewich who told her that Joey Scarpa had been the shooter on the Porco homicide, notwithstanding that, as noted, she didn't even have an independent recollection of ever meeting with Investigator Mallewich. She candidly acknowledged that she could not recall how she came into possession of the information that was contained in her Exceptional Clearance report which closed the Porco homicide on the basis that Joey Scarpa, now deceased, was the shooter. She acknowledged the striking similarities between her report and the Mallewich report but could not explain it. She testified that her assignment was not to investigate the Patrick Porco homicide but to close it. Indeed, the DA sought to establish through her that in 1996 there was a high level of homicides in Brooklyn and enormous pressure to close cases. The Mallewich memo was not in the Porco file, but Detective Sorrentino acknowledged that perhaps it was read to her and she took notes on it. Again, she had no independent recollection.

The time frame encompassed by this case spans Detective Sorrentino's entire career as a homicide detective. The Joey Scarpa homicide was her first as a lead homicide detective, and she is now retired. She could recall absolutely nothing about this matter and her testimony in the end consisted of nothing more than identifying her report closing the Porco case for "Exceptional Clearance." The Court remains mystified how and why, when most of the information cited in Detective Sorrentino's report closing the Porco homicide case came directly from Inspector Mallewich's memorandum, the singular exception is the dramatic substitution of the name Scarpa for Sinagra. The only thing that can be clearly established is that this investigation was closed based upon incorrect information and no further investigative steps *of any kind* were taken in connection with the Porco killing until 2005.

The name John Sinagra is never mentioned in her report nor did she have any independent recollection of Investigator Mallewich mentioning Sinagra's name.^[FN5]

The next witness was **THOMAS DADES**, a retired detective from the New York City Police Department and employed at the time of the hearing as a [*16]consultant to the Brooklyn District Attorney's Office. On March 21, 1995, he was a detective at the 68th Precinct when John Novoa was brought in after the Scarpa murder. Dades testified that he had no contact with him on that day. Dades freely acknowledged that he made a mistake on the affidavit he submitted in this matter when he swore he had spoken to Novoa on that date. Novoa claims that they did speak on that date, but only about the Scarpa murder. Dades now says his first contact with Novoa was at the meeting at Fort Hamilton Army Base where the authorities were trying to induce Novoa to cooperate with law enforcement. Dades was working as part of a joint city and federal task force and says he first contacted Novoa sometime late in 1997. At that time, Novoa was in danger as the police had uncovered a murder conspiracy against him. Novoa's interest in cooperating with law enforcement authorities at that time was to assist in the prosecution of the individuals involved in the Joey Scarpa murder. Scarpa's killer was eventually apprehended in 1998. Thereafter, Novoa continued to supply information to law enforcement. Dades testified that in his discussions with Novoa about Joey Scarpa, Novoa mentioned that Scarpa was the one who killed Patrick Porco. Dades testified that he then contacted the homicide detective who kept track of organized crime killings in Brooklyn who confirmed to him that another detective had closed the case by Exceptional Clearance because Joey Scarpa, the perpetrator, was deceased. This was in 1998; two years after the Porco case had been closed. Dades explained that no notes of his meetings with Novoa were taken because the U.S. Attorney forbade state investigators from taking notes since they would eventually have to be turned over to the defense. According to Dades, between 1998 and 2005, the subject of the Porco murder was not brought up again between him and Novoa. Dades had no responsibility for the investigation of the death of Dominic Masseria or Patrick Porco.

Dades testified that he and Mallewich had never worked together. He also acknowledged never speaking to Detective Sorrentino about the Porco murder. Having played no role in the earlier Porco investigation, he testified to never having heard any of the names linked with the Patrick Porco murder until 2005.

Dades testified that he could not recall reading the ninth paragraph of his affidavit in support of the District Attorney's original opposition to a linger hearing for defendant Sinagra. Indeed Dades testified that the paragraph made no sense to him.^[FN6] Dades acknowledged that he did not carefully read his affidavit, that [*17]his understanding was simply that its subject was his previous contact with Novoa and that, "They were trying to state that I did not have any information on John Sinagra until 2005, that I was not made aware of John Sinagra's name until 2005, which is correct."

It is a cause of concern to the Court that a former detective and district attorney investigator would casually sign an affidavit being submitted in a murder case without either correcting clear factual errors or clarifying confusing statements. More distressing is that the District Attorney would choose to use Investigator Dades as its factual witness in its original opposition to the defendant's motion to dismiss on due process grounds. Dades stated categorically at this hearing that "I have had nothing to do with the investigation before, during, or presently into the investigation of your client regarding the Patrick Porco homicide. Nothing." Indeed when asked by the Court about submitting an affidavit in connection with what the District Attorney knew, if anything, about the Patrick Porco murder prior to 2005, he admitted he was incompetent to address that issue, that he had no idea regarding that information and had had no previous involvement.

While Dades has substantial credibility issues, on the question of what he knew, and when, of the Porco killing, his testimony is consistent with Novoa's testimony and the Court is satisfied that Dades did not have the Sinagra information until 2005.^[FN7]

Next, **NOEL DOWNEY**, a former Assistant District Attorney for 14 years before retiring in 2007 as the Bureau Chief of the Rackets Division, testified candidly and entirely credibly. Downey led the investigation and made the Grand Jury presentation that returned the indictment against Sinagra. He was assisted by, amongst others, Bryan Wallace, as well as Detective Investigator Patrick Lanigan and Dennis Boodle. Thomas Dades, who Downey testified was a seasoned organized crime detective, joined his team as a consultant. Dades' experience with a number of witnesses who became federal cooperators was employed in making the introductions of such cooperators to members of the District Attorney staff. This included the introduction to Downey of Linda Shiro, a main prosecution witness in this case. As discussed below, Shiro was not called as a witness at the hearing. For almost 30 years, she was the common law wife of Greg Scarpa Sr., a feared Columbo crime family capo. It was at his first meeting with Linda Shiro in 2005 that Mr. Downey heard for the first time information concerning the Patrick [*18]Porco homicide. At subsequent meetings, she detailed John Sinagra's involvement in that homicide. She told Downey how Sinagra admitted to her his involvement in the killing and his claim that he had done the actual shooting. Mr. Downey testified that this information was conveyed to Thomas Dades. Dades indicated he had never heard the name John Sinagra before. It was at that point that Dades suggested that Mr. Downey talk with Jay Novoa and Dades arranged an interview with Novoa in 2005. Novoa repeated to Downey in 2005 what he had told the District Attorney investigators in 1995: that is, that John Sinagra had admitted to him his involvement in the shooting of Patrick Porco. Mr. Downey testified that Novoa had related, in addition to the information he gave to the District Attorney investigators in 1995, the further claim that, in the early morning hours of the murder of Patrick Porco, both Sinagra and Scarpa admitted their involvement in the murder. While Mr. Downey testified that at that point he did not have sufficient evidence to prosecute Sinagra, he began an investigation based on the assumption that since "it appeared to me that Sinagra liked to talk about this incident" he was curious to see if there were other individuals out there who had the same conversations that Mr. Sinagra had with Jay Novoa."

Novoa gave Mr. Downey information about Sinagra's narcotics business and further provided him the name of "Fat" Bryan Kirschner who had also been involved in the Sinagra-Scarpa drug business. In addition to providing Kirschner's name, Novoa provided contact information for Kirschner. Dades had Novoa reach out to Kirschner. Kirschner provided information to the District Attorney's office about the car he believed was used in the homicide; a car used in Sinagra's drug business that disappeared immediately after the homicide. Kirschner also gave Downey specifics about additional comments and admissions Sinagra made to him regarding the Porco killings and the vivid details Sinagra gave in recounting it. Kirschner, in turn, provided the name of Michael Valvo, who upon interview, confirmed that the car referred to by Kirschner had been used in the Sinagra drug business and then disappeared around the time Porco was killed.

Based on all this Downey obtained the instant indictment.

Downey had never seen the Mallewich report. Downey indicated that if he had had just the 1995 Novoa information, the proper procedure would've been, "rolling up your sleeves and conducting an investigation." That pointedly was not done in 1995 when Novoa originally gave the District Attorney's investigators this information. [*19]

Mr. Downey concluded his testimony by indicating that if he had had the Novoa information contained in the Mallewich memo, notwithstanding that it was insufficient to commence a prosecution, he would've both passed it on to the police department and would have, as a matter of his own personal practice, followed up with the police to see what was happening with that investigation.

At the time Kirschner cooperated with the Kings County District Attorney's office in 2005, Downey indicated he had an open narcotics case in another state and the District Attorney agreed to bring his cooperation in this matter to the attention of the sentencing authorities in that case. No evidence was presented as to whether or not Kirschner would have, like Novoa, been available to cooperate back in 1995. The People chose not to call him as a witness in this hearing.

The People's last witness was senior investigative attorney in the rackets division **BRYAN WALLACE**. Wallace had been assigned to respond to the defense's motion to dismiss the indictment because of the 16-year delay between the crime and the arrest. The affirmation he prepared both for

himself and the affidavit for Inspector Dades, as well as his memorandum of law, was received into evidence as *People's Ex. 5a, 5b, and 6*. Notwithstanding that Dades testified that he had had nothing to do with the Porco investigation either at the time it occurred or since, Wallace explained that he chose to submit an affidavit from Dades because, "he was the person I consulted regarding my information."

Wallace testified that Dades told him his only prior information about the Porco homicide was his knowledge that the police closed the case by Exceptional Clearance and Dades had learned this at the time or within a year of the closing of that case in 1996. Wallace, in consultation with others, prepared the affidavit that Dades eventually executed. The Court asked Wallace to explain how and why in his own affirmation he claimed that, "the only relevant fact is that the only surviving witness with knowledge of the facts did not disclose that knowledge until late 2005." He testified that the witness referred to was Linda Shiro and that her knowledge of the crime was also a third party admission by the defendant. Wallace was asked how in light of the fact that Bryan Kirschner and John Novoa were also presented to the Grand jury as witnesses to similar third party admissions he could claim that Linda Shiro was the "one surviving witness." Agreeing that his language "should have been more specific," Wallace tried to explain that he was referring to details that only Shiro knew, not claiming that she was the only witness [*20] with any information. While it is certainly true that Linda Shiro may have known some details that other witnesses did not, both Novoa and Kirschner were clearly material witnesses, actually and potentially available before 2005 and certainly still alive.

The Court finds that Wallace, while innocent of any knowledge of the information Novoa provided the DA's investigators in 1995 at the time he drafted his affidavit, failed in his obligation to make a thorough inquiry of who in his office may have had prior involvement in the Porco homicide case. Instead he relied on Dades who by his own admission was incompetent to address this issue.

Novoa's disclosures regarding Sinagra's admissions, first provided by him in 1995, were eventually corroborated before the Grand Jury by Linda Shiro and Bryan Kirschner in 2005. Neither Shiro nor Kirschner were called as witnesses at this hearing.

[*21]

Findings of Fact

Based on the credible evidence adduced at the *Singer* hearing, the Court determines the following facts to have been established.

During the investigation of the Porco homicide, the police learned from interviews with Porco's sister, girlfriend, and close friend, their belief that the killing was connected with a shooting that had occurred on 15th Avenue the previous Halloween. *People's Ex. 3*. The incident separately referred to by Porco's sister, girlfriend and close friend was the shotgun killing of Dominick Masseria on Halloween night 1989. At the time the police investigating the Porco killing were told of these witnesses' suspicions, the Masseria case had been closed with the arrest of Reyes Aviles on November 6, 1989. Aviles began cooperating shortly after his arrest and had *already* spoken to Alfred Lombardo, an investigator from the District Attorney's office with whom he had been cooperating in connection with the Masseria killing. Aviles's information confirmed the suspicions of Porco's friends, as he admitted that he was present on Halloween night with Patrick Porco and Joseph Scarpa in a limousine when a fourth person, whom Aviles knew only as "Craig", fired two-shot gun blasts, killing Masseria. The police failed to re-interview Aviles based on the information provided by the witnesses close to Porco. In a subsequent call from prison, Aviles told Lombardo that the word on the street was that "Fat Carmine and Johnny Loads killed Porco." Aviles repeated this information to Lombardo after his release from prison in 1993. At this point there was no evidence to arrest anyone in the Porco homicide.

In 1995, Joseph Scarpa was himself shot to death in Brooklyn. A friend and criminal associate of Scarpa, Jay Novoa, was present when Scarpa was killed and immediately began cooperating with law enforcement. In 1995, while investigators from the District Attorney's office were questioning him, he told them that Scarpa and the defendant, John Sinagra, had killed Porco because of their belief that he was informing in connection with the Masseria homicide and that both had acknowledged that Sinagra was the shooter. This information was forwarded to the New York Police Department.

While this third party admission did not provide sufficient evidence to charge Sinagra, nevertheless, it was a vital evidentiary lead, yet no further investigations were undertaken. While evidence of this high profile homicide involving organized crime connections was obtained by the DA's own investigators, there was no conference by either the investigators or the police with an Assistant District Attorney, though it was standard and proper practice to do so. The result was that there was no oversight by the District Attorney, even though its investigators had obtained this important information.

Despite Novoa's unequivocal statements implicating Sinagra to the District Attorney's investigators, the next year, with no further investigation and after meeting with Mallewich, Detective Sorrentino, copying verbatim Inspector Mallewich's report of the Novoa debriefing, closed the homicide investigative file by erroneously substituting the name Joey Scarpa for John Sinagra as the shooter. Because Scarpa was now dead this permitted the police to mark this file closed due to "Exceptional Clearance." Had the correct information been recorded, the file would not have been closed, thereby requiring the police to revisit the case periodically. Instead the case was closed and nothing was done.

In the year 2000, Linda Shiro went public with information concerning her relationship with Gregory Scarpa Sr. That year, she told an author with whom she was collaborating on a [*22]possible life story, the very details regarding the Porco murder and Sinagra's role in it that the District Attorney would ultimately present through her to a Grand Jury in 2005. In 2001, Shiro was cooperating with federal authorities in the prosecution of organized crime figures.

It is implausible that the District Attorney was unaware of this cooperation, since documentary evidence established that Thomas Dades was present in 2001 when the FBI was debriefing Shiro. *Defendant's Ex. H*. Because the Porco file had erroneously been closed in 1996, notwithstanding that Linda Shiro was freely talking about these and other events both publicly, privately and to law enforcement since at least 2000, no one ever bothered to ask her about the Porco murder until ADA Downey did in 2005.

The People have argued that it would have been "preposterous" for anyone in law enforcement to entertain the idea that Linda Shiro had knowledge of the murder or that she would cooperate between 1990 and 2005. Notwithstanding that the burden is on the People to show the reasonableness of the delay, the District Attorney chose not to call Linda Shiro as a witness. Thus, there is no evidentiary support in the record that Shiro was unavailable to law enforcement in regards to the Porco killing before 2005 and convincing evidence exists to the contrary. As noted, Linda Shiro had, in 2000, been talking to a ghostwriter about the very events Shiro recounted five years later before a Brooklyn Grand Jury. She was cooperating with the FBI in 2001. It is clear to the Court that the only reason the New York City Police and the Brooklyn District Attorney's office was unaware that Linda Shiro possessed and was prepared to reveal information about the Porco murder was simply because no one asked her.

Both Chief Ponzi and former Assistant District Attorney Downey indicated, and the Court agrees, that the receipt of the Novoa information should have generated an investigation: Ponzi saying that further investigative efforts would be required or in Downey's words, "rolling up your sleeves and conducting an investigation." The failure to do so was negligent and unreasonable.

By Novoa was cooperating in 1995 regarding the Porco homicide. When finally in 2005, Downey rolled up his sleeves after a 16-year hiatus, within a few short months the District Attorney was able to put together the case indicting John Sinagra. Linda Shiro repeated, when asked in 2005 what she had told others in 2000. When asked in 2005, Novoa freely provided the name of "Fat" Bryan Kirschner who in turn cooperated with and was also presented as a witness by the District Attorney to the Grand Jury that indicted the defendant. The record is bereft of any evidence regarding Kirschner's availability to corroborate Novoa between the years 1995 and 2005. The People did not call Bryan Kirschner as a witness at this hearing.

Both Kirschner and Shiro would be the most relevant witnesses regarding their own availability in the years before 2005. Notwithstanding that they appear to be in the people's control, having testified before the Grand Jury, and to have relevant information on the question at issue, the People chose not to present either of them at the hearing, undermining their assertions of unavailability in prior years.

Conclusions of Law

Originally the District Attorney's office categorically stated that it had no information about the [*23]Porco homicide and the defendant's participation therein until 2005. The People's opposition stated that, "the only relevant fact is that the only surviving witness [Shiro] with material knowledge of the crime did not disclose that knowledge until late 2005."

With the surfacing of this 1995 memorandum regarding information provided by Jay Novoa, the People's position regarding the defendant's *Singer* motion has shifted from having no evidence before 2005 to now claiming that they were unable to gather sufficient evidence until 2005.

The People now argue that the 1995 Novoa information was not sufficient to proceed and, conceding that mistakes were made, contend that even if the case had been properly handled and kept open it would have made no difference. The People claim that for the next decade, until 2005, it was "unlikely to the point of improbability that any witness or any other evidentiary means of corroborating Novoa's statement," would have been available. The People's argument rests on the premise that no corroboration was available to the People until 2005 when Shiro unexpectedly revealed to the District Attorney the involvement of her son and the defendant in the murder of Patrick Porco. As previously noted, this claim is unsupported by the record and in fact contradicted by it.

"Where there has been a protracted delay (here 16 years), the burden is on the prosecution to establish good cause". *People v. Singer, supra*. The People have not met that burden. The record is bereft of any evidence that corroborating information from Bryan Kirschner and Linda Shiro could not have been obtained if a professional investigation continued in 1995 instead of being negligently closed, based on Joey Scarpa's death. The People have failed entirely in establishing that the delay in this case was reasonable. They have failed to sustain their claim that Linda Shiro was unavailable until 2005. They failed both at the hearing and in their post-hearing arguments to even address the question of Kirschner's availability prior to 2005.

In considering the five factors set forth in *Taranovich, supra*, the Court makes the following findings: the delay in this case was extensive, sixteen years between the crime and the indictment. "The greater the delay, the more probable it is that the defendant will be harmed". *Taranovich* at 445. The delay in this case was unreasonable. The People have the burden to establish good cause for the delay and have failed to support its claim that corroboration of this information was not available until 2005. Simply put, this case, like that in *Staley, supra*, simply fell between the cracks. The information that was available to the police in 1995, while insufficient by itself to initiate a formal proceeding was neither investigated nor pursued. Of course, the underlying charge, murder, could not be more serious. Nonetheless, in *Singer, supra*, which also involved a murder, the Court recognized that even for such a serious charge "unreasonable delay in prosecuting a defendant constitutes a denial of due process". *Singer* at 253. The defendant has been incarcerated approximately 15 months, though all of this was, of course, in the post rather than the pre-indictment period, which is not the focus of this *Singer* hearing. However, an untimely prosecution may be subject to dismissal even though the defendant has not been estrained or incarcerated. *Singer* at 253. As to prejudice, while not particularized by the defense beyond claiming that some impeachment material has been rendered unavailable, the record is replete with vivid illustrations of the consequences of the passage of time. Even criminal justice professionals, such as Inspector Lombardo and Detective Sorrentino, given the passage of so much time, could not recall events related to this case. The testimony at the hearing demonstrates the wisdom of the Court's instruction that "where the delay is great enough, there need be neither proof or fact of prejudice to the defendant". [*24] *Taranovich* at 447.

In the Court's review of the cases discussing the question of reasonableness regarding due process claims, few deal with the circumstances presented herein. In *Singer*, after already having *all* of their evidence, the police waited 3 ½ years to arrest the defendant. In cases such as *Vernace, supra* and *LaRocca, supra*, no violation was found, notwithstanding a 17-year delay in these murder prosecutions, because the People established that they had a good cause for the delay because they still *lacked* sufficient evidence because of the refusal of witnesses to cooperate.

This case presents a more unusual circumstance. Here the People's lack of sufficient evidence was a consequence of their own negligence. The only Court of Appeals case that appears to address a similar situation is *People v. Staley, supra*. In *Staley*, the defendant was arrested, the charges were then dismissed without prejudice for later presentation to the Grand Jury and then, "apparently forgotten for more than 2 ½ years." *Staley* at 91.

The Court of Appeals in *People v. Staley*, held that "the primary responsibility for assuring prompt prosecution lies with the prosecutor. The failure of that responsibility if unexplained by acceptable excuse or justification, dictates dismissal." *Id.* at 793. Based solely on Novoa's 1995 statement regarding Sinagra's admission, there was not enough evidence to commence a prosecution against him. However the subsequent inaction of the police after closing this file based on erroneous information was both negligent and unreasonable. No District Attorney was conferred with, a

serious deviation from standard operating practice. The result was a failure of both oversight and direction. Linda Shiro was cooperating with law enforcement in 2001, but because the Porco investigation had been closed on erroneous grounds five years earlier, she was never asked any questions about the Porco homicide. John Novoa, when re-interviewed in 2005, immediately led the police to two additional witnesses, Bryan Kirschner and Michael Valvo, who each also cooperated. The record is bereft of any evidence regarding the availability or lack thereof of any of these witnesses subsequent to 1995 when Novoa started cooperating. The People have failed to meet their burden to establish that corroborating information was not available or could not have been obtained earlier.

Negligence is not good cause. The People have failed to meet their burden that there was good cause for this lengthy 16 year delay. As a consequence of this unreasonable delay, the defendant's due process rights have been violated, mandating dismissal of the indictment. *People v. Singer, supra*; *People v. Staley, supra*.

This constitutes the Decision and Order of the Court.

Gustin L. Reichbach

J.S.C.

Dated: June 11, 2007

Footnotes

Footnote 1: Defendant was charged with one count of Murder 2 in a four-count indictment returned against co-defendant R. Lindley De Vecchio former supervising agent of the FBI. It is alleged that De Vecchio aided in four organized crime murders by providing information to his long-time informant Greg Scarpa Sr.. Sinagra is charged with committing one of those homicides. Because of delays in the De Vecchio case, Sinagra's case was severed on motion of the DA as it could be tried months before De Vecchio's case. De Vecchio was at liberty on bail, Sinagra was not.

Footnote 2: Lombardo testified that the hand-written notes naming Sinagra were given to him "sometime during the interview and I put them into my file", but he could not identify when he received them or who gave him these notes. He identified the police as the potential source of such information. While located in the Aviles file, it is apparent that these questions were designed to be asked of Jay Novoa who was specifically identified in the fifth question, though Inspector Lombardo could not remember posing these questions to Novoa.

Footnote 3: It appears that some of the deficiencies and administrative failures revealed in this case are now being addressed. For others, no remedial actions have yet been instituted. Inspector Mallewich, while well regarded by his peers, took official files home with him when he retired from the District Attorney's office. Such a practice was unauthorized. Inspector Ponzi testified that in light of that revelation, procedures have now been put in place for case documents to be passed up the chain of command and files maintained in the area of the Assistant Chief.

The Court inquired whether there was any policy in the District Attorney's office, or any procedures in place where, under circumstances such as presented here, where the District Attorney's own investigator has interviewed a witness at the request of the police, that witness names an individual as confessing to a murder and a report is sent to the New York City police, for the DA's office to follow-up on what happens to this information. The Assistant District Attorney indicated that while there was not such a policy at the time (1995) and there isn't one now, "there may come to be one in the future." Clearly the circumstances of this case argue powerfully for such procedures to be implemented.

Footnote 4:

After two witnesses testified that either an investigator or someone from the NYPD would confer with a District Attorney on an open homicide, the Court instructed the District Attorney to make an inquiry relative to this. The People represented that "there is no record or recollection of a referral by the NYPD either with the homicide unit, the investigations unit or the organized crime unit relating to the Patrick Porco homicide." The Court found this response extraordinary under the circumstances of this high profile murder and "certainly one of the many mysteries that have arisen in connection with this hearing."

Footnote 5: It should also be noted the Sorrentino report closing the Porco killing, *People's Ex.3* states that, "it was verified during subject investigation that Porco was planning to cooperate with the Kings County District Attorney's office against Scarpa in the Masseria homicide." She could not recall how she obtained this information, or on what it was based. All of the other witnesses called by the People during this hearing

estified with certainty and credibility that Porco was not cooperating with the District Attorney.

Footnote 6: Paragraph 9 reads: "The information made available in 2005 concerning the defendant was not available to law enforcement for a variety of reasons. Certain witnesses did not feel comfortable bringing this information at the time of the crime or shortly thereafter because these witnesses were closely associated with the Columbo crime family."

Footnote 7: Dades resigned from the District Attorney's Office after his testimony at this hearing.

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