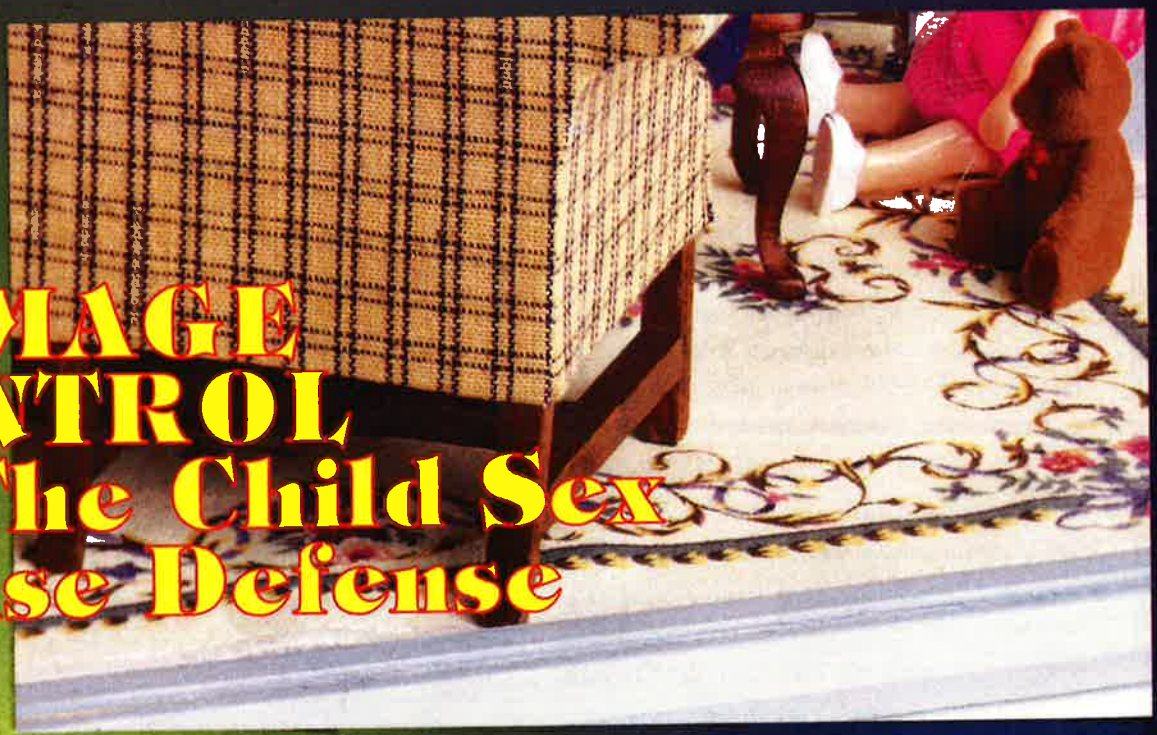
The Champion

National Association of Criminal Defense Lawyers January/February 1995



DAMAGE CONTROL In The Child Sex Abuse Defense

FOURTH AMENDMENT FORUM

By Howard M. Srebnick and Scott A. Srebnick

Justice Delayed

Defending a largescale wiretap case presents a tremendous challenge for the defense attorney. In advance of trial, counsel must listen to and analyze a multitude of taped conversations of the defendant and co-defendants. Counsel must study the wiretap applications, affidavits, and sealing orders to determine whether there are any colorable statutory (Title III, 18 U.S.C. § 2510, *et. seq.*) or constitutional (Fourth Amendment) attacks to be mounted. The trial itself can last for months.

The government, for its part, has a formidable challenge as well. Presenting such a case to a jury requires a significant amount of pretrial preparation. In many narcotics cases, for example, the wire has intercepted conversations in a foreign language (typically, Spanish) so that the tapes must be transcribed, translated, and turned over to the defense as part of discovery.[1] All of this takes time.

On the one hand, the defendant is entitled to mount whatever statutory and constitutional challenges are available. The price, of course, is time, for any motion filed by the defense means further delays in the trial schedule. Naturally, the more complicated and serious the case, the more likely that the defendant will have been deemed a flight risk and/or danger to the community. The defendant, therefore, may be detained awaiting trial while all of this trial preparation is ongoing.

As to some defendants, the tapes and transcripts are not particularly incriminating. Perhaps the defendant is intercepted only a limited number of times. As to other defendants, the tapes are critical, either because they are terribly incriminating or (surprisingly) exculpatory. The defense camp may have mixed emotions about how quickly the case should come to trial. With little to gain from pretrial motions, the pretrial detainee may want to push the government to trial quickly, thinking that the government will be unable to meet discovery deadlines. A co-defendant on bond, however, may be content just to postpone the case for six months, a year, or more, to give counsel time to analyze the wires, file motions to suppress, and let the defense gel with the tapes.

The government, of course, wants to try the case only once, and only after it has had time to prepare. A year to get ready is just right. After all, it intends to offer thousands of pages of transcripts which need to be typed up, translated, and turned over to the defense in advance of trial. It can take months to get all of that together.

An accelerated trial date is the government's enemy under these circumstances. Worse yet is an accelerated trial date as to some defendants and a belated trial date as to others. Then the government faces the prospect of two (or more) lengthy trials and having to show its hand to at least one group of defendants.

The defense camp is at a strategic crossroads. A defendant who wishes to challenge the wire must file his motions to suppress and, as a practical matter, forego a speedy trial. The pretrial detainee who has little to gain from those motions wants to push the government. He may be willing to forego motions to suppress in exchange for a speedy trial or release from pretrial detention.

Thus, the pretrial detainee may file two preliminary motions: one for dismissal or a severance with an immediate (speedy) trial date; and one for revocation of the pretrial detention order. He alerts the court that he is willing to forego (withdraw) motions to suppress if the court severs him and accelerates his trial date. Obviously, if the government faces the prospect of two (or more) trials, and/or the release of a pretrial detainee, plea offers will undoubtedly improve.

The court naturally will prefer to try jointly indicted defendants together. But even if an indictment has properly joined all defendants under Rule 8(b), Federal Rules of Criminal Procedure Rule 14 authorizes a district court to "order an election or separate trials of counts, grant the severance of defendants or provide whatever other relief justice requires" where a defendant may be prejudiced by a joint trial.[2] Courts will grant a severance "if there is a risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[3]

The pretrial detainee will find support for his motions in the Speedy Trial Act, the Bail Reform Act, and the Fifth, and Sixth Amendments to the Constitution. The Speedy Trial Act ordinarily entitles a defendant to a trial within 70 days of arraignment or initial appearance, whichever is later.[4] That time constraint is subject to many exceptions, pretrial motions, for example.[5] In a multi-defendant case, this includes pretrial motions of co-defendants, *unless the court has granted a severance.*[6]

Fundamental notions of due process also place constraints on the government's power to delay prosecution once an indictment has been obtained. A person may be irreparably prejudiced by undue delay in his or her prosecution. As the Supreme

HOWARD M. SREBNICK, *formerly a law clerk to United States Circuit Judge Irving L. Goldberg and United States District Judge Edward B. Davis, is a trial and appellate attorney with the Federal Public Defender's Office in Miami, Florida.*

SCOTT A. SREBNICK, *formerly a law clerk to United States District Judge Sidney M. Aronovitz, has a private trial, appellate, and post-conviction practice in Miami, Florida.*

Court observed: "A defendant may invoke due process to challenge delay both before and after official accusation."[7]

Rule 48(b) of the Federal Rules of Criminal Procedure provides the court with a procedural vehicle to dismiss an indictment when a defendant has been deprived of due process of law:

> If there is unnecessary delay in presenting the charge to a Grand Jury, or in filing an information against a defendant who has held to answer to the district court, *or if there is unnecessary delay in bringing a defendant to trial*, the court may dismiss the indictment, information or complaint.

The fact that the government wishes to use sophisticated forms of evidence to prove its case — tape recordings and transcripts — should not undercut a defendant's right to a speedy trial, especially if the defendant is incarcerated. The government should not indict someone unless it is prepared to prove the accusation. Indeed, for that reason, the government is given broad latitude in deciding when to indict; thus, challenges to *pre*-indictment delay are rarely successful. *Post*-indictment delay challenges, however, are of greater concern to the courts because of the staggering burden that lingering charges place on a defendant: they "disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."[8] "[A]n official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection."[9]

In assessing the constitutional violation, courts consider (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.[10] The Supreme Court has noted that the lower courts have generally held that a post-indictment delay of one year is presumptively prejudicial.[11] Furthermore, the Supreme Court has held that governmental negligence in pursuing prosecution, even though not deliberate, may justify dismissal:

> While the government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug trafficking, it was still findable negligence and the finding stands.[12]

The Fifth Amendment and the Speedy Trial Act also place limits on how long a pretrial detainee can be forced to wait for the government (and even co-defendants) before he gets his day in court. The general rule is that pretrial detention of prolonged duration violates due process. The inquiry focuses on (1) the length of detention; (2) the extent of the prosecution's responsibility for the delay of the trial; and (3) the strength of the evidence upon which the detention is based[13] requires that a pretrial detainee be tried within 90 days of his detention or be released. The periods of delay enumerated in § 3161(h) (*e.g.*, filing of pretrial motions) are excluded from the time computation under this 90-day time limitation.

In *United States v. Salerno*,[14] the Supreme Court upheld pretrial detention against a constitutional attack without deciding "the point at which [pretrial] detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal [supporting pretrial detention]." The First,[15] Second,[16] Third,[17] Fifth,[18] Seventh,[19] Ninth,[20] and Tenth[21] Circuits have all agreed with the basic principle that a defendant cannot be detained indefinitely. Notably the Tenth Circuit has forced the government's hand in complicated, multi-defendant cases by actually ordering the pretrial release of detainees who have been awaiting trial for too long.[22]

Thus, the pretrial detainee can demand that the district court try him or release him pretrial. Failing immediate relief from the district court, the detainee can take an interlocutory appeal from the detention order.[23] The defendant, having moved for a severance and an immediate trial date, can identify the concrete prejudice caused by his joinder with co-defendants who have asked for a delayed trial: prolonged detention. The court can cure the prejudice only by ordering an immediate trial or the detainee's immediate release.

The defendant can also identify other sources of prejudice attendant to the joint trial. Perhaps the most obvious is the cost, in both time and money, to the defendant during such protracted proceedings. A defendant and counsel may be required to sit by for lengthy periods while evidence relating solely to the co-defendants is introduced.[24] For the less affluent, this will impact on the right to counsel.

Although the right to counsel *of choice* is circumscribed, (*Wheat v. United States*;[25] *Caplin & Drysdale v. United States*,[26]) courts nevertheless make every effort to honor it.[27] When a joint trial stands in the way of a defendant's counsel of choice, courts should take a second look.

Joint trials are preferred precisely because of the purported financial advantages to the government in not having to duplicate its efforts. But the savings to the government by trying several defendants together comes at the expense of each defendant, especially one against whom the evidence is relatively modest. That defendant must shell out the fees to retain private counsel to sit through a protracted, joint trial, fees that would otherwise be affordable were the defendant tried in a shorter, more streamlined trial. Even if we can accept that the joint trial is more efficient than two streamlined trials, to cripple a defendant financially to the point that it interferes with his ability to retain counsel of choice is to put too high a price on "judicial economy."[28]

The Ninth Circuit has commented with great concern on just this point, observing the impact that some joint trials have on the ability of the accused to retain counsel of choice:

> Defendants may have difficulty obtaining their counsel of choice, either because they cannot afford the staggering attorney fees . . . or because attorneys are unwilling to suspend the balance of their practice for such a protracted period of time.[29]

The courts have been especially troubled by the "megatrial" phenomenon: huge, complex prosecutions involving numerous defendants and drawing together numerous, and often disparate, alleged crimes.[30] The courts and commentators[31] alike have recognized the debilitating effects such lengthy and complex cases can have on juries,[32] on trial judges,[33] on appellate judges,[34] and especially, on defendants.[35]

With too many defendants and too many lawyers, the trial court can expect delays, sidebars, disjointed objections, and other disruptions in trying to manage the trial.[36] Conflicting trial tactics are sure to prompt mid-trial motions for mistrial and severance due to prejudicial spillover. Most anyone (but the prosecutor) would agree that a case with fewer defendants and fewer charges makes for a cleaner, more streamlined trial.

The Second Circuit, recognizing the difficulties associated with megatrials, has held that if the trial is expected to last four months or longer, the government must:

> present a reasoned basis to support a conclusion that a joint trial . . . is more consistent with the fair administration of justice than some manageable division of the case into separate trials. . . . In determining whether the prosecutor has made an adequate showing, the judge should weigh the interests of the prosecution, the jurors, the courts, and the public.[37]

The Ninth Circuit has imposed a similar rule, recognizing that megatrials produce questionable benefits and staggering hardships.[38] Although severance motions have historically met with little success, an increasing number of trial judges are granting severance motions to divide long, complicated trials into more manageable parts.[39]

Now, all of this has seemingly little to do with the Fourth Amendment, except that the opportunity to press these issues will typically arise in a complicated wiretap case where Fourth Amendment issues abound. The defendant does not want to forfeit any colorable challenges to the wiretap; but at the same time, he may want a speedy trial. If the motions for severance, accelerated trial date and revocation of the pretrial detention order are denied, then the defendant can pursue his suppression motions. The speedy trial claim is preserved for post-trial appellate purposes, and the defendant can seek interlocutory review of the detention order.

If the court grants the motions and orders an immediate, severed trial, the defendant must, of course, be ready to go forward. The government must be ready, as well. The tapes and transcripts must be produced as discovery ASAP. Importantly, taped conversations in foreign languages have no evidentiary value without the transcripts. If the government cannot turn over the tapes and transcripts on time, the court will entertain motions to exclude evidence. At that juncture, the government may tender a plea offer that would otherwise not be on the table. ■

The authors thank Susan Van Dusen for her research and writing contribution on the topic of "megatrials."

NOTES

1. *See generally* United States v. Onori, 535 F.2d 938 (5th Cir. 1976).

2. *See also* American Bar Association Standards for Criminal Justice, Joinder and Severance Section 13-3.1 (severance should be granted whenever it is "deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense").

3. Zafiro v. United States, 113 S. Ct. 933, 938 (1993).

4. 18 U.S.C. § 3161(c)(1).

5. 18 U.S.C. § 3161(h)(1)(F).

6. 18 U.S.C. § 3161(h)(7).

7. Doggett v. United States, 112 S. Ct. 2686, 2692 n.2 (1992) (citing United States v. MacDonald, 456 U.S. 1, 7 (1982)).

8. United States v. Marion, 404 U.S. 307, 320 (1971).

9. Albright v. Oliver, 114 S. Ct. 807 (1994).

10. Barker v. Wingo, 407 U.S. 514, 530 (1972).

11. Doggett v. United States, 112 S. Ct. 2686, 2691 n.1 (1992); *see, e.g.*, United States v. Davenport, 935 F.2d 1223, 1239 (11th Cir. 1991) (defendant claiming Speedy Trial violation must show actual prejudice unless length of delay, reason for a delay, and assertion of right to a speedy trial, all weigh heavily against government.) Matthews v. Lockhart, 726 F.2d 394, 396 (8th Cir. 1984) (17-month post-indictment delay presumptively prejudicial).

12. Doggett, 112 S. Ct. at 2691.

13. 18 U.S.C. § 3164

14. 107 S. Ct. 2095, 2101 n.4 (1987).

15. United States v. Zannino, 798 F.2d 544, 548 (1st Cir. 1986).

16. United States v. Millan, 4 F.3d 1038, 1043 (2d Cir. 1993); United States v. Ojeda-Rios, 846 F.2d 167, 169 (2d Cir. 1988); United States v. Jackson, 823 F.2d 4, 7 (2d Cir. 1987); United States v. Gonzalez Claudio, 806 F.2d 334, 341 (2d Cir.), *cert. dismissed*, 107 S. Ct. 562 (1986).

17. United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986).

18. United States v. Hare, 873 F.2d 796, 801 (5th Cir. 1989)

19. United States v. Infelise, 934 F.2d 103, 104-05 (7th Cir. 1991).

20. United States v. Gelfuso, 838 F.2d 358, 359 (9th Cir. 1988).

21. United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986); United States v. Aguirre, 13 F.3d 407, 1993 WL 503181 (10th Cir. 1993) (unpublished); United States v. Denogean, 13 F.3d 407, 1993 WL 483018 (10th Cir. 1993) (unpublished); United States v. Martinez, 13 F.3d 407, 1993 WL 483031 (10th Cir. 1993) (unpublished).

22. *See* United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986).

23. *See, e.g.*, United States v. Gates, 935 F.2d 187, 188 (11th Cir. 1991).

24. *See Andrews*, 754 F.Supp. at 1175.

25. 108 S. Ct. 1692, 1697 (1988).

26. 109 S. Ct. 2646, 2652-53 (1989).

27. *See* United States v. Urbana, 770 F.Supp. 1552 (S.D. Fla. 1991) (disqualifying counsel of choice only as a measure of last resort), for it lies at the heart of our adversarial process. Caplin & Drysdale, 109 S. Ct. at 2652-53 (Blackmun, J. dissenting).

28. *Cf.* United States v. Chica, 14 F.3d 1527 (11th Cir. Feb. 24, 1994) (Fifth Amendment's "Double Jeopardy Clause does not contain a judicial economy exception.").

29. United States v. Baker, 10 F.3d 1374, 1390 (9th Cir. 1993).

30. *See, e.g.*, United States v. Badalamenti, 626 F.Supp. 658 (S.D.N.Y. 1986) (17 month trial involving 20 defendants).

31. *See* American Bar Association Report, *Jury Comprehension in Complex Cases* (December 1989); Federal Bar Council Committee On Second Circuit Courts, *A Proposal Concerning Problems Created by Extremely Long Criminal Trials* (1989); G. Lefcourt & E. Horowitz, *Megatrials Mean Megaproblems,* CRIMINAL JUSTICE MAGAZINE p.21 (Fall 1988); J. Goldberg, *RICO Megatrials: The More The Messier,* WHITE COLLAR CRIME REPORTER p.1 (September 1991); S. Shmukler & J. Shmukler, *Megatrial Madness*, COMPLEX CRIMES JOURNAL p.141 (1991); G. Cotsirilos & M Kennelly, *Splitting Megatrials Into Manageable Pieces,* CRIMINAL JUSTICE MAGAZINE p.19 (Summer 1991).

32. *See* ABA Report, *Jury Comprehension in Complex Cases, supra*, at 31-33 (observing juror hostility and boredom in even relatively short "megatrials").

33. *See* United States v. Gallo, 668 F.Supp. 736, 755 (E.D.N.Y. 1987) (observing that lengthy trials tend to compromise a "judge's ability to remain detached and objective")

34. *See Baker,* 10 F.3d at 1391 (commenting on "the practical impossibility of a thorough review of the record, and the strain on judges and court clerks from reading the 'briefs'. . .").

35. *See* United States v. Andrews, 754 F.Supp. 1161, 1176 (N.D. Ill. 1990) (finding it unlikely that a jury can give a defendant "the individual justice that the law demands" in such cases).

36. *Baker*, 10 F.3d at 1389-90 (highlighting complications of a megatrial).

37. United States v. Casamento, 887 F.2d 1141, 1152 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

38. *Baker*, 10 F.3d 1374, 1392 (9th Cir. 1993).

39. *See* United States v. Andrews, 754 F.Supp. 1161 (N.D. Ill. 1990) (dividing 178-count, 38-defendant indictment into five trials); United States v. Shea, 750 F.Supp. 46 (D.Mass. 1990) (dividing 57-count, 23-defendant indictment into two trials); United States v. Gambino, 729 F.Supp. 954 (S.D.N.Y. 1990) (dividing 15-defendant indictment into two trials); United States v. Vastola. 670 F.Supp. 1244 (D.N.J. 1987) (dividing 114-count, 21-defendant indictment into two trials); United States v. Gallo, 668 F.Supp. 736 (E.D.N.Y. 1987) (dividing 22-count, 16-defendant indictment into seven trials); United States v. Mancuso, 130 F.R.D. 128 (D. Nev. 1990) (referring severance motion to magistrate with directions to determine manageable units for trial).