THE DEFENSE OF DELAY

ANNALS OF JUSTICE

By Steve LaCheen

Conventional wisdom holds that "delay helps a defendant" in criminal cases. On the most practical level, an untried defendant has not been convicted; and a defendant yet to be convicted is, generally speaking, not in prison. Delay by its very definition is not a disposition; and the undisposed-of case often "hangs heavy" over the head of the untried defendant, a stressful situation that can lead to even more problems. It is true, however, more often than seems probable, that during the course of a legal proceeding, something totally unanticipated occurs which changes the entire complexion and ultimate outcome of a particular matter; and delay, of course, enhances that possibility.

Sometimes it is simply the passage of time that reduces the level of severity with which a particular offense is viewed. The embezzlement of $150,000 that was front-page news at the time of the arrest doesn't seem quite so enormous when it comes to sentencing after cases involving two or three times that amount have been reported in the interim. And there are the infinite variety of injuries and illnesses and other unexpected disabilities that befall defendants en route to sentencing, which serve not only to humanize them but to evoke judicial sympathy, and even generate the unspoken idea that they have received partial punishment already, and, in any event, have been rendered a lot less likely to become recidivists. And, sometimes, witnesses die, or move away, or forget.

The first time delay that ever played a major role in the resolution of a case of mine occurred when I represented Richard Murray, a pizza delivery man who was arrested when he delivered a pizza to the home of a woman whose daughter had identified him during a prior delivery as the man she saw fleeing her mother's bedroom on an earlier occasion. When she confronted her mother, she was told that the man had attempted to force himself upon her; so she called the police, and a detective had instructed her to order another pizza so as to be certain of the identification. She did; she was certain; and the police were there to arrest him.

At the preliminary hearing, the mother and daughter both identified Richard as the trespassing molester, but something about their stories made no sense. The woman testified that, on the night of the incident she was awakened from sleep when she sensed someone lying in bed next to her. Half-asleep, she first thought it was her husband, until she realized that he was out of town at the time. She turned to face the person alongside her who, fully clothed, had gotten up and left the room. She heard her daughter cry out, "Who are you?" and then heard the front door open and close. The daughter was positive in her identification, and emphatically denied even the possibility that her identification of Richard was based upon recollecting him from a prior pizza delivery rather than the bedroom incident.

To an experienced eye, in retrospect, the prosecution's case does not appear to have been as strong as it seemed so long ago; but at the time I was certain that Richard would be convicted; and so, I came up with one legal maneuver after another to obtain one postponement after another. As the result, the case dragged on for more than two-and-a-half years. During all that time, I continued to try to get the assigned detective to at least re-examine the facts of the case without the presumption of guilt. Little by little, I think he began to have some questions about the reliability of the witnesses' identification, if not their credibility. As a result, he never objected to a request for postponement, even initiating one or two as a courtesy to me.

And then, just at the point when I had completely run out of reasons and excuses for further postponements, the witnesses became unavailable. When pressed for a reason, the detective advised that they had moved, leaving no forwarding address. After two further continuances for the same reason, the Commonwealth moved to dismiss the charges; and that was that. The detective, Gary, with whom I had long been on a first-name basis, said that he personally thought that Richard, after being "on probation" for about three years, had already paid a fair price for whatever his "misdeed" on that night.

Later, thinking over his choice of words, it occurred to me that the detective personally believed that, in the absence of the

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complainant’s husband, Richard had probably been an invited guest, until his presence had been discovered by the daughter; but rather than dismiss her as not being credible, Detective Gary had decided to leave it to me to sort out.

I have been involved in several other cases in which the passage of time has been the determinative factor. In one, the defendant suffered a life-threatening pregnancy and miscarriage, requiring hospitalization, courtesy of which she eventually received only a two-month sentence for driving the getaway car in a daring New Year’s Day 1970 armed robbery of E.J. Korvette’s department store, for which she had been facing 20 years.

In another, I represented a judge who had been convicted and sentenced for accepting a “Christmas gift” from a local union. The judge was in his mid-sixties when he came to me, already designated to report to federal prison camp in 30 days’ time. When he complained of abdominal pain, I sent him for a medical exam, which revealed a large intestinal tumor, which supported a motion for stay of execution for surgery, which in turn justified the need for recuperation and follow-up physical therapy; and so on and so forth, for more than four years, by which time his health had deteriorated to the point that he was simply allowed to remain free to die peacefully in his bed at home.

I had similar experiences, with less deadly consequences, in several other matters in which defendants came to me after being convicted, and we “kept the ball in the air,” long enough to be able to obtain a better disposition than the one which brought them to me for relief in the first place. In one such case, while preparing for a long-delayed sentencing before a judge with the well-earned nickname of “The Hammer,” he was appointed to the appellate bench and the case was re-assigned to the judge of choice of the defense bar at the time, who, happily for my client, did not fail to prove himself worthy of that regard.

On another occasion, a highly publicized political corruption case was initially randomly assigned to a highly moralistic judge, known for his severe sentencing practices. At a conference with counsel the day before jury selection, the judge developed a cough he was unable to control, which so disrupted the proceedings he declared a recess and recused himself. The case was reassigned to a judge who had himself been elected to state office prior to his appointment to the bench. He fully understood urban politics and, even after a lengthy trial ending in conviction, made it clear that he regarded the defendant’s over-indulgence at the public trough as “an exaggerated sense of entitlement,” rather than the out-and-out Theft of Services advanced by the government to justify its quest for a double-decade sentence, and imposed a sentence of one-quarter that length, which left the prosecution fuming.

In another matter, I was retained to represent a defendant who

had been convicted of violating the Anti-Apartheid Act, which prohibited American companies from doing business with South Africa. The nature of the offense was that the defendant, an engineer, was involved in the importation of missile shell casings from South Africa, by way of Italy, and of instructing some South African visitors in wind-testing certain equipment. The defense was that the defendant had been feeding the information he gained from those trips to the CIA by way of debriefings after each trip abroad. The problem with the defense was that there was no one to testify to it.

In our efforts to investigate the possibility of seeking a new trial based upon newly discovered evidence, we attempted to subpoena documents from the CIA. That required both me and my secretary to obtain CIPA clearance, requiring us to be vetted by the Secret Service; and then I had to travel to D.C. to view documents in a sealed room, all of which generated numerous opportunities for delay due to scheduling conflicts.

By the time we were actually scheduled for sentencing more than four years later, apartheid was no longer the order of the day in South Africa. Nelson Mandela was president, and that country had become a treaty partner of the U.S. So, the case had lost its sex appeal for the prosecutors; and the defendant received a two-year sentence, greatly reduced from the 10-year term the government had been seeking.

My most memorable case of delay helping a defendant, however, is still an open file. I represented the defendant, "Jose Quizas," in an unsuccessful appeal of his conviction and sentence. While waiting for the Court of Appeals to issue its mandate and return the case to the district court for implementation of sentence, the defendant called me every day to ask if the Bureau of Prisons had designated the federal prison to which he should report to serve his sentence. A month passed, then another. I told Jose he needn't call every day; I would call him when I received notice from the court.

The notice never came. To this day, checking the Court of Appeals docket confirms that the appeal was denied and the mandate was issued the following month. A check of the District Court docket, however, does not record the mandate was ever received or the file returned. My file is still open and I, superstitiously, will probably keep it so; but Jose has long since gone AWOL.

Aside from all those developments that, although unanticipated, are within the range of common experience, there are those that are not only unexpected, but so far outside the mainstream of expectation as to seem the handiwork of some supernatural puppeteer, one whose appearance and handiwork are as random as they are evident. Sometimes, of course, it's just the luck of the draw in ending up in front of a judge who, for reasons seldom explained, and often never made clear, makes an "off the wall" judgment in one's favor. I have over the years seen a number of such unexpected resolutions which seemed to materialize out of thin air, not only unanticipated in their occurrence but extraordinary to the point of beggaring belief.

Something like that happened in one of the earliest criminal cases I handled, involving two elderly men who had been arrested after being observed engaging in oral sex in a train station lavatory. The defendants would have pled guilty if the prosecutor had agreed to probation, but that option never presented itself; so we went to trial in a courtroom ordered cleared of spectators by the fatherly, white-haired judge, known for his short stature and resemblance to the actor Spencer Tracy. The arresting officer, a vice-squad cop, testified that, from the vantage point of a peephole in the ceiling, he had not only observed the act in question but had photographed it, and he proffered the demonstrative evidence to the court.

"You took these photos yourself?" asked the judge. "Yes, Your Honor."

"Describe the position you had to assume to do so."

The officer described how he had to contort himself to be able to accomplish his photographic coup. "And how long had you stationed yourself in that station?"

"I kept my post there, off and on, the entire day, Your Honor." "Watching people engaging in urinating and evacuating their bowels?" "Yes, Your Honor."

"Disgraceful," said His Honor. "May I see the evidence, please?"

The judge reached for the photos, which the officer proudly handed over, only to be shocked to see them ripped in half and then torn again. "Disgraceful," repeated the judge; and, looking at the officer, he said, "I find your conduct disgraceful. I find the defendants not guilty, and I am ordering the Police Department to shut down this illegal eavesdropping operation and to transfer this officer to foot patrol for six months."

The judge reached for the photos, which the officer proudly handed over, only to be shocked to see them ripped in half and then torn again.

"If anyone needs an explanation," the judge continued, "this court finds that even a public restroom can be a private place, and even a police officer can be a trespasser, and that evidence obtained thereby should never see the light of day. Bailiff, call the next case."

We left the courtroom, and the building, almost at a trot; the co-defendant and his lawyer heading in another direction. Over coffee at Horn & Hardart's across the street, I tried to explain to my client and his wife how the judge had reached the desired result on the basis of legal principles that were completely unavailing according to the law at the time, and would remain so for at least six years into the future, a circumstance in which delay was decidedly not advantageous to the universe of defendants-to-come in the interim. ■

DISCLAIMER: *The writer hastens to assure his readers that he does not advocate delay for the purpose of delay, and in no way advocates a violation of Rule of Professional Conduct 3.2, which clearly provides, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."*

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