

**“After the Dust Settles:  
The Criminal Justice System  
in the Aftermath of a Terrorist Attack or Large Scale Disaster”**

by

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Across the country, communities are creating or revising emergency management plans. In the event of a terrorist attack, natural disaster, or other large-scale emergency, the primary concern will be minimizing injury, loss of life and property damage. After the immediate threat subsides, the focus will shift to recovery. Finally, the dust will settle. Issues which were important prior to the incident will resume some, if not all, of their former importance.

One question that will have to be addressed is what happens to the criminal justice system in the aftermath of a terrorist attack or natural disaster? In the immediate vicinity of the disaster site, issues involving destruction of property, possibly including the courthouse, police station or prosecutor’s office may be faced. Even if courthouses remain open, issues may arise which hinder criminal prosecutions. Evidence may be destroyed. Witnesses may be unavailable because they are dead, injured or responding to the disaster. Many courts are addressing the potential problems by creating procedures to insure continuity of operations to enable the courts to remain open.

What happens when prosecutors must return to court to face defense motions based on the breakdown of the criminal justice system caused by a terrorist attack or large-scale disaster? Unfortunately, the criminal justice system does not allow its participants the luxury of neglect, no matter how temporary. It is unlikely that defendants

will be inclined to accommodate police and prosecutors responding to an emergency. Rather, it is more likely that they will seek to benefit from the shift in focus. Inevitably, defense attorneys will file motions alleging all types of constitutional error, in particular, speedy trial violations. In an ideal world, the safety of the community at large and the battle against international terrorism would take precedence over the rights of criminal defendants; however, we do not live in an idea world.

Prosecutors should prepare for disasters in advance by examining the procedures in place in their jurisdiction for emergency management and disaster recovery, particularly with respect to what happens to the court system in the aftermath of an attack. The time to consider such issues is now; rather than during the chaos of responding to a crisis. Although there are many questions, no easy answers exist. This article is intended to encourage prosecutors to start thinking about issues that may arise. While solutions will most likely have to be put in place by courts, legislatures or governors, prosecutors can offer suggestions to insure that criminal defendants do not benefit from a terrorist attack.

What can a prosecutor do to avoid problems in the aftermath of a large-scale disaster? First, look at existing plans. Many localities already have disaster plans in place as a result of planning for natural disasters or Y2K problems.<sup>1</sup> Others have disaster plans that were drafted to deal with problems created by riots in the 1960's. Although such plans are old, they may provide a valuable starting point for the drafting of updated disaster plans. Next, look at other states to see procedures they have in place to deal with

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<sup>1</sup> In New York, “[t]he Y2K computer problems had provoked the court system, the police, and other city justice agencies to plan and practice how they would cope without computers, telephones and electricity.” Root, supra at 2.

the court system in the aftermath of an emergency. The problems experienced by New York and its subsequent recovery can be examined.

Without question, New York City was devastated as a consequence of the terrorist attacks, which occurred on September 11, 2001.

As a result of the tragedy on September 11, the courthouse was closed from September 11, 2001 until September 17, 2001. During this state of emergency, mail delivery, vehicular traffic and pedestrian traffic were suspended in the area in which the courthouse and the District Attorney's office are located. Additionally, the courthouse, the District Attorney's office and nearby businesses were without phone service.<sup>2</sup>

Manhattan's courthouses were located close to the disaster site and within the "frozen zone", which was an area that city officials ordered evacuated to facilitate the efforts of emergency personnel.<sup>3</sup> The police headquarters lost telephone service.<sup>4</sup> Numerous adults and children were detained longer than the law allowed.<sup>5</sup> Police officers who were busy saving lives, searching for the dead, collecting evidence and assisting in other recovery efforts were unable to attend court.<sup>6</sup>

The Manhattan District Attorney's Office made a blanket request to delay all criminal court cases for two weeks. Judy Harris Kluger, the chief administrative judge of the criminal courts, denied the request. Judge Harris stated, "There didn't seem to be any reason for a blanket adjournment."<sup>7</sup> "In the initial weeks after the attack on the World

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<sup>2</sup> *People v. Aquino*, 189 Misc. 2d 572, 574 - 575, 734 N.Y.S.2d 371, 373 (2001).

<sup>3</sup> Root, Oren. *The Administration of Justice Under Emergency Conditions: Lessons Following the Attack on the World Trade Center*, Vera Institute of Justice (January 2002), p. 1. [hereinafter Root].

<sup>4</sup> Root, Executive Summary.

<sup>5</sup> Root, Executive Summary.

<sup>6</sup> Root, 9 – 10.

<sup>7</sup> *Criminal Courts in Manhattan Refuse Request to Delay Cases*, New York Times, 9/21/01. New York's Chief Judge, Judith S. Kaye, emphasized the importance of keeping the justice system functioning. She believed that "the court system had a responsibility to show that it would not succumb to terrorism". Root, p. 1.

Trade Center, prosecutors announced ‘not ready’ on many criminal matters, citing to the WTC disaster as the cause of the delay.”<sup>8</sup> Although many continuances were granted, the court required each case to be reviewed individually.

After any disruption in the criminal justice system, criminal defendants will file motions alleging failure to comply with speedy trial deadlines. In New York, Criminal Procedure Law (hereinafter CPL) § 30.30 grants a statutory right to a speedy trial. Prosecutors are required to announce that they are “ready” for trial within specified time periods. If the prosecution is not ready, a defendant can seek release from incarceration or the dismissal of criminal charges. Delays may be defended if the prosecution can show “exceptional circumstances”. New York Governor George E. Pataki attempted to prevent the release of criminals and dismissal of criminal charges due to speedy trial violations.<sup>9</sup> On September 11, 2001, the Governor issued Executive Order Number 113 declaring a disaster emergency in the State of New York.<sup>10</sup> On September 12, 2001, he signed Executive Order Number 113.7 temporarily suspending time limitations for commencing trial or filing an appeal.<sup>11</sup>

Despite Governor Pataki’s efforts, some defendants have successfully filed speedy trial motions. In People v. Aquino, the Criminal Court of the City of New York

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<sup>8</sup> *Criminal Courts in Manhattan Refuse Request to Delay Cases*, New York Times, 9/21/01.

<sup>9</sup> CPL § 30.30 excuses delay when an “exceptional circumstance” has rendered material evidence temporarily unavailable to the prosecution. Arguably, delays attributable to the terrorist attacks would have been excludable even without the Governor’s order. Each case would have to be examined individually to determine whether the time was excludable.

<sup>10</sup> Acknowledging the magnitude and realities of the disaster response, the Governor’s order applied to the entire state of New York, not just New York City.

<sup>11</sup> The Order states: “Sections 30.10 and 30.30 of the Criminal Procedure Law, so far as it bars criminal prosecutions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 113 issued on September 11, 2001, until further notice; Sections 460.10, 460.30, 460.50 and Article 460 of the Criminal Procedure Law, so far as it relates to a limitation of time to appeal in which a limitation period concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 113, issued on September 11, 2001, until further notice . . .”

held that Executive Order 113.7 did not apply to cases in which the defendant sought release from incarceration as opposed to dismissal of the charges.<sup>12</sup> Because the Court released the defendant, it did not address the validity of Executive Order 113.7.

Similarly, in Monroe County, New York, dismissal due to a speedy trial violation was granted in People v. Ocasio.<sup>13</sup>

In federal court, a blanket extension was granted based upon the disaster. “[O]n September 17, 2001, Chief Judge Michael B. Mukasey, on the application of the United States Attorney, entered a global order granting a prospective 30-day exclusion of time in all pending criminal cases in the Southern District of New York.”<sup>14</sup> The U.S. District Court found that the exclusion of time immediately following September 11 was justified in the interests of justice.

The administration of justice in this District ground to a temporary halt as a result of acts of warfare against the United States that created a public emergency. The larger interests of justice in this District -- not to mention supervening necessity -- surely required suspending proceedings in this case. Although the drafters of the Speedy Trial Act did not provide a particular exclusion of time for such public emergencies (no doubt failing to contemplate, in the more innocent days of 1974, that emergencies such as this would ever occur), the discretionary interests-of-justice exclusion is surely sufficiently capacious to cover the situation. Indeed there is authority for granting such an exclusion in the case of a public emergency caused by a natural catastrophe.<sup>15</sup>

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<sup>12</sup> 189 Misc. 2d 572, 574, 734 N.Y.S.2d 371, 373 (2001). The Court found that the period from September 11 until September 17, 2001, when the court was closed, could be excluded as an exceptional circumstance pursuant to CPL § 30.30(a)(4)(g); however, all time after September 17 was chargeable to the People.

<sup>13</sup> 2002 Slip Op 50081U, 2002 N.Y. Misc. LEXIS 129 (3/7/2002)(Not published in the official reports). (Delay was not justified under the “exceptional circumstances” provision of CPL § 30.30(4)(g) because the courthouse was only closed for part of the day on September 11, 2001.)

<sup>14</sup> United States v. Correa, 182 F. Supp. 2d 326, 326 (S.D.N.Y. 2001)(Interests of justice in granting a continuance and exclusion from speedy trial consideration period between September 11 and October 1 outweighed the interests of the public and the defendant.) The United States Courthouse was less than half a mile from the World Trade Center. Id.

<sup>15</sup> Correa, supra. The Court went on to discuss Furlow v. United States, 644 F.2d 764 (9<sup>th</sup> Cir. 1981) in which the Ninth Circuit approved an exclusion of time from speedy trial calculations due to an emergency occasioned in the Eastern District of Washington by the eruption of the Mt. St. Helens volcano.

In examining issues which may arise with respect to speedy trial problems, prosecutors can review cases in which courts have ruled on speedy trial continuances in the aftermath of a number of disasters, including hurricanes,<sup>16</sup> riots,<sup>17</sup> and volcano eruptions.<sup>18</sup> Additionally, California has court rules designed to address what happens in the aftermath of an earthquake.<sup>19</sup> Florida, which has experienced several devastating hurricanes, can also provide guidance. In Florida, the Chief Justice of the Supreme Court shall:

Have the power, upon the request of the chief judge of any circuit or district, or sua sponte, in the event of natural disaster, civil disobedience, or other emergency situation requiring the closure of courts or other circumstances inhibiting the ability of litigants to comply with deadlines imposed by rules of procedure applicable in the courts of this state, to enter such order or orders as may be appropriate to suspend, toll, or otherwise grant relief from time deadlines imposed by otherwise applicable statutes and rules of procedure for such period as may be appropriate, including, without limitation, those affecting speedy trial procedures in criminal and juvenile proceedings, all civil process and proceedings, and all appellate time limitations.<sup>20</sup>

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<sup>16</sup> State v. Hernandez, 617 So. 2d 1103 (FL Ct. of App. 1993).

<sup>17</sup> See, State v. Rogers, 402 So. 2d 50 (FL Ct. of App. 1981)(Error to discharge defendant when speedy trial rule was tolled by order entered by Chief Judge of Dade County tolling speedy trial during emergency circumstances caused by rioting.)

<sup>18</sup> See, Furlow, supra.

<sup>19</sup> The California Rules of Court allow the Chairperson of the Judicial Council to extend the time allowed for commencing, pursuing or deciding any appellate proceeding when “earthquake, fire, or other public calamity, or the danger thereof, or the destruction of or danger to the building housing an appellate court, renders it necessary”. California Rules of Court, Rule 45.1. In 1989 and 1994, in the aftermath of earthquakes, the Judicial Council of California adopted Earthquake Emergency Rules. The rules did not address statute of limitations problems, nor did they address trial court time problems, as the trial courts retained the discretion to handle trial court time problems under existing statutes and rules. (Earthquake Emergency Rule C, repealed 1/1/02).

<sup>20</sup> Fla. R. Jud. Admin. 2.020 (a)(2)(B)(iv). After Hurricane Andrew destroyed parts of Dade County on August 24, 1992, the Florida Supreme Court issued an order applicable to Dade County tolling “all time limits authorized by rule and statute affecting the speedy trial procedure in criminal and juvenile proceedings beginning August 24, 1992, for two weeks”.

On November 8, 2001, the Florida Supreme Court convened a Work Group on Emergency Preparedness to develop proposed emergency preparedness guidance.<sup>21</sup>

The speedy trial issue is just one of many that may arise. While it is impossible to anticipate every potential challenge, prosecutors should also consider the following issues: What happens when the court is unavailable for a lengthy period of time? Are incarcerated defendants entitled to be released if they are not indicted within the appropriate period of time? What happens to statutes of limitations or time limits for appeals? What happens to cases that are in the middle of trial? Is there a double jeopardy issue if a mistrial is declared? What happens in juvenile court? What happens when large numbers of witnesses lose their lives or are unavailable for an extended period of time? What happens when evidence is destroyed?

Next, prosecutors should determine whether there are court rules in place for dealing with the problems that may occur. If no court rules exist, prosecutors can suggest that they be created. In the alternative, the prosecution may have to rely on the executive or legislative branch for relief. The prosecutor should consider whether relief from the executive or legislative branch is constitutional or whether it violates the separation of powers doctrine. For example, it has been suggested that Governor Pataki's order is unconstitutional because it violates the separation of powers doctrine.<sup>22</sup> If a solution does not meet constitutional muster, it is equivalent to no solution at all.

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<sup>21</sup> Florida Supreme Court Administrative Order, No. AOSC01-54 (November 8, 2001). The Report and Recommendation, which should be available by early summer, may provide guidance to other states seeking to create emergency preparedness plans.

<sup>22</sup> Feinman, Paul G. and Brooks Holland, *Grounds May Exist to Challenge Orders Suspending Speedy Trials in Aftermath of September Attack*, New York Bar Journal (February 2002).

Finally, responses must be tailored to address the specific emergency being faced. For example, some emergencies will bring an increase in crime while others will bring a decrease.<sup>23</sup> In New York, the “decline in court intake contributed significantly to the courts’ ability to deal with and recover from the emergency.”<sup>24</sup> On the other hand, riots would bring an increase in crime and accompanying problems. Emergency management plans must allow flexibility to deal with unanticipated problems.

By considering these issues in advance, prosecutors can avoid many of the problems that would otherwise arise in the aftermath of a terrorist attack, natural disaster or other emergency. “Few disasters can be anticipated. But advance planning may mean the difference between a disabled court and a court that reacts efficiently and returns to normal function quickly.”<sup>25</sup> It is suggested that prosecutors evaluate any disaster plans that may be in place and provide suggestions now rather than waiting until they are confronted with a breakdown in the criminal justice system. By providing input and suggestions to improve emergency management plans, prosecutors can attempt to prevent criminals from benefiting from a terrorist attack or large-scale disaster.

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<sup>23</sup> Reported crime dropped dramatically in New York City following the World Trade Center attacks. “Citywide, there were 54.4 percent fewer arrests from September 11 through October 10 as compared to the previous year; arraignments declined 56.8 percent in the same period.” Root, supra at 3.

<sup>24</sup> Id.

<sup>25</sup> *Emergency Preparedness in the Judiciary*, The Third Branch: The Newsletter of the Federal Courts, Vol. 33, No. 11 (November 2001).