

MASSACHUSETTS LAWYERS WEEKLY

Venue ruling may impact 'Tsarnaev'

In a decision with possible implications for an appeal by Boston Marathon bomber Dzhokhar Tsarnaev, the 1st U.S. Circuit Court of Appeals reversed the conviction of a Puerto Rican man tried in federal court on charges of making false statements to a federal officer in the immediate aftermath of a state court jury finding him guilty of murdering his wife in a related case.

Pablo Casellas-Toro asserted that he should have been granted a change of venue due to the pervasive and prejudicial pretrial publicity, which denied him his Sixth Amendment right to trial by an impartial jury.

After the body of Casellas-Toro's wife was found, media outlets in Puerto Rico constantly covered the case, reporting that the defendant "was a drug user, that he threatened people with firearms, that he was involved in a hit-and-run accident, and that he drunkenly bragged about assassinating the then-governor of Puerto Rico," U.S. District Court Judge Joseph R. Goodwin wrote.

Eight days after his conviction, a grand

jury indicted Casellas-Toro on three counts of making false statements to a federal officer. Casellas-Toro allegedly told that officer that he had been the victim of a carjacking, during which two of his guns had been stolen.

Investigators came to believe Casellas-Toro concocted the carjacking story to place the weapons subsequently used to kill his wife in other hands.

When 160 potential jurors were asked whether they had ever heard of Casellas-Toro, there was "almost an unanimous show of hands," according to the judge. Nonetheless, the judge opted not to grant the change of venue, even though the prosecution did not resist the transfer.

While noting that the bar was high to reverse the conviction based on that refusal — an "abuse of discretion" or "manifest error" needed to be found — the 1st Circuit determined that such a decision was required under a test articulated by the U.S. Supreme Court in *Skilling v. United States*.

On balance, the four factors mentioned in *Skilling* — size and characteristics of the community, nature of the publicity, the time between the media attention and the trial, and whether the jury's decision indicated bias — militated in favor of establishing a "presumption of prejudice," the 1st Circuit found.

While jurors might ultimately reject as unfounded opinions that they had heard in the media or from others, Casellas-Toro's murder conviction was another matter, the 1st Circuit noted.

"Here, because the just-concluded murder case and this case are intertwined, the murder conviction 'invited prejudgment of his culpability,'" 8th Circuit Judge Duane Benton wrote for the panel, which also included judges from the Federal Circuit and 3rd Circuit. Judges from the 1st Circuit recused themselves because the defendant is the son of a judge who sits in the circuit.

The jury's verdict — a conviction on all three counts, two of which the judge threw out as unproven — also supports a presumption of juror bias, the 1st Circuit said.

While there is some dispute over whether the presumption of prejudice can be rebutted, the 1st Circuit concluded that the government could not meet its burden in Casellas-Toro's case, in which 96.6 percent of the prospective jurors knew of the murder, more than half knew of the carjacking, and 65 percent of the potential jurors were excused for cause, casting a dim light on their

avowals of impartiality.

Boston lawyers Martin G. Weinberg and Kimberly Homan represented Casellas-Toro. Weinberg called the decision "a win for the right to an impartial jury." Given the paucity of decisions on the issue, he called the ruling a "significant contribution to the jurisprudence" on when a defendant has a constitutional right to a change of venue.

"This case illuminates the pathway for the Tsarnaev defense team," offering guidance on the circumstances under which a presumption of prejudice applies and, if that presumption is rebuttable, the criteria for doing so, Weinberg said.

Specifically, Tsarnaev's lawyers will have to show that the "depth of emotional prejudice" was as pervasive as was demonstrated in *Casellas-Toro*, he added.

Ultimately, Weinberg said, the "real issue" in Tsarnaev's appeal will be whether the presumption of prejudice is rebuttable, an issue that the *Casellas-Toro* court reserved, dealing with it by presuming that it was rebuttable but finding that the government had not met its burden.

If the 1st Circuit tackles that issue and finds a rebuttable presumption of prejudice, the manner in which U.S. District Court Judge George A. O'Toole Jr. conducted voir dire will be key, Weinberg said.

The government will now have to decide whether it wants to re-try Casellas-Toro.

The 24-page decision is *United States v. Casellas-Toro*, Lawyers Weekly No. 01-320-15. The full text of the ruling and Lawyers Weekly's opinion digest of the case can be found at masslawyersweekly.com.

— KRIS OLSON

Judicial Vacancies

SUPERIOR COURT

Deadline: Jan. 13

• Judge (three vacancies)

DISTRICT COURT

Barnstable District Court

Deadline: Jan. 27

• Judge

Chelsea District Court

Deadline: Jan. 27

• Judge

Plymouth District Court

Deadline: Jan. 27

• Judge

Worcester District Court

Deadline: Jan. 27

• Judge

Woburn District Court

Deadline: Jan. 27

• Judge

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