



Dzhokhar Tsarnaev Trial Set to Start Despite Attempts to Delay Proceedings

Experts believe that the jury selection process for the case could be difficult.

By Susan Zalkind | Boston Daily | January 2, 2015 2:58 p.m.



IMAGE VIA ASSOCIATED PRESS

On Friday, Judge George O'Toole, Jr. called Dzhokhar Tsarnaev's last minute efforts to move his pending trial out of Boston and delay court proceedings "unnecessary," adding that it would disrupt the schedules of the 1,200 people expected to show up for jury duty selection.

Just after 5 p.m. on New Year's Eve, the defense petitioned the First Circuit of Appeals and argued that it would be impossible to find a fair jury for the trial in Boston, because the entire region has been traumatized by the 2013 Boston Marathon bombings. In the petition, the defense wrote that victims of the bombing include "not only those persons killed and injured," but also residents of Cambridge, Watertown, marathon runners and spectators, and the entire city itself. "Thus, every member of the jury pool is, in effect, an actual victim of the charged offenses," they wrote.

As of Friday morning, the appeals court has yet to rule on the petition.

Tsarnaev's case, which is scheduled to start on Monday, January 5, is expected to take more than three months before a verdict is reached. Because Tsarnaev could face capital punishment, the trial will consist of two parts: one where jurors decided on his guilt, and a second sentencing phase, where they will decide if he should receive the death penalty.

The legal teams preparing for Tsarnaev's capital case have been busy this holiday season. In the last week-and-a-half, they've submitted more than 100 new court filings, which represents an eighth of the total documents filed in court since Tsarnaev was first indicted.

The flurry of motions mostly stems from the defense's efforts to move the trial out of Boston, as well as their attempt to postpone the case in the wake of receiving new evidence from the prosecution. Though Judge O'Toole had previously pushed back the starting date by a couple of months—the trial was originally set to begin in September 2014—he has since shut down all of Tsarnaev's attempts at moving and delaying the process.

In their effort to move the case, Tsarnaev's attorneys have repeatedly cited the trial of Timothy McVeigh, who was convicted of killing 168 people and injuring hundreds more after detonating a bomb outside of a federal building in Oklahoma City, Oklahoma in 1995. McVeigh, who is known as "The Oklahoma City Bomber," was tried in Denver, Colorado. He's one of only three people to actually be executed in a federal death penalty case since 1988.

Attorney Stephen Jones, who represented McVeigh, believes it's extremely difficult to find a fair jury in an area where there is a risk of "demonization of the defendant in the community." But none the less, it's frequently done on an increasing basis. "Judges prefer now the fiction of trying to seat a jury and allowing voir dire by the lawyers," he wrote in an email. Voir dire is the legal term for the process of weeding out jurors who may be biased.

"If a jury is seated, then of course the judges say and hold that a change of venue was not necessary. A substantial part of it depends on whether, in fact, the judge allows substantial voir dire," said Jones.

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O'Toole has previously ruled that, "though there may be some similarities," McVeigh's case differs from Tsarnaev's because of the extensive physical damage McVeigh inflicted on the federal courthouse itself, and because both parties agreed to move the trial. O'Toole has also cited Jeffrey Skilling, the former Enron CEO, who was charged in another highly publicized case, but was still tried in Huston, Texas, where his crimes were committed.

Former federal Judge Nancy Gertner also believes that the nature of Tsarnaev's case will make for a challenging jury selection process. "What makes this case unique and difficult is that Boston is the victim and Boston is a small [city]," she said.

The jury selection process itself is expected to take weeks. Gertner said even with the large jury pool it will be difficult to find a jury that is not directly connected to the case. "If it was a bank robbery, you wouldn't allow someone who banks there to be a juror," she said.

Gertner said O'Toole's job will be to find people who may have been exposed to the case but can still be fair with their deliberations. "There may well be people who are in the circle who will say, 'Oh yes, I can be fair.' The challenge for the judge is to say, 'can I believe you?'"

Veteran Boston-area defense attorney Martin Weinberg said if he was handling Tsarnaev's case, he wouldn't rule out people who had been exposed to the bombing. "You don't want a jury who has never read the paper, seen the TV, or doesn't even know about the marathon bombing. That would not be a fair cross section of the community," he said. "Really what you're hunting for is a juror that can really divorce themselves from the media. It's very rare for an appellate court to disrupt a trial."

But Weinberg said it's possible Tsarnaev will appeal on the basis that the jury selection was unfair, after the months-long trial is over.

Gertner agreed, and said it's likely the Tsarnaev case will be appealed as well. "If Tsarnaev is found guilty and sentenced to death, this case will be appealed for decades," she said.

This final back-and-forth between the prosecution and defense, so close to trial, has also revealed additional information in the case itself. In a motion, the defense disclosed that the government turned over Ibragim Todashev's computer hard drive.

According to investigators, Todashev allegedly implicated himself and Tamerlan Tsarnaev, Dzhokhar Tsarnaev's deceased brother, in the gruesome murder of three men in a Waltham apartment in 2011. Todashev was later shot to death in his Orlando apartment by a Boston FBI agent following a five-hour interview about his alleged connection to Tamerlan and the triple homicide. That agent was later cleared of charges in the shooting, and the investigation into the Waltham murders remains open.

During Tsarnaev's upcoming trial, the defense is expected to cite Todashev's confession in an attempt to build on their argument that their client acted under his manipulative and possibly murderous older brother, Tamerlan.

In the latest motion, the defense cited another reason the defense might be interested in Todashev. They claimed that his hard drive contains conversations between Todashev and Tamerlan that include "links to, and attachments of, what the government would surely characterize as 'radical materials.'"

In a motion, the defense also wrote that they received from the prosecution a transmitter found on the Watertown site that matches a second one found at the site of the marathon bombings near Copley Square in 2013.

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