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Puerto Rican Murderer's case May influence Tsarnaev appeal

1st Circuit addresses venue questions in U.S. v. Casellas

By: Kris Olson August 20, 2015

A petition argued Aug. 18 before the 1st U.S. Circuit Court of Appeals on behalf of a notorious Puerto Rican murderer may provide some clues as to how receptive the same court will be to the appeals of Boston Marathon bomber Dzhokhar Tsarnaev.

Boston attorney Martin G. Weinberg argued that his client's Sixth Amendment right to an impartial jury was violated because at least nine jurors in his federal case knew that Pablo Casellas had been tried in state court, convicted and sentenced to 109 years in prison for the murder of his wife.

Those jurors later also would find Casellas guilty of federal charges of lying to an officer after reporting that he had been the victim of a carjacking, which prosecutors in the state case posited had been staged to place what became the murder weapon in the hands of thieves rather than Casellas himself.

How zealously had the murder case against Casellas, the son of a federal judge, been followed?

"So notorious had Casellas become and so incited were the emotions of the public that when news of Casellas' murder conviction was announced at a major [baseball game] on the evening of the verdict, January 22, 2014, just two-and-a half months prior to the voir dire in [the federal] case, the game stopped while the stands erupted in a raucous celebration," Weinberg and co-counsel Kimberly Homan wrote in their appellate brief.

If Casellas can make a strong case for a change of venue, Tsarnaev is not far behind, Boston defense attorney and former Middlesex County prosecutor David R. Yannetti said. The parallels between the cases extend even to the facts, he noted.
While a baseball stadium in Puerto Rico erupted in cheers with news of Casellas' conviction, Boston's Fenway Park held a moment of silence on One Boston Day, which was observed between the verdict and sentencing in Tsarnaev's case.

***Rideau* rides again?**

As even casual observers of *United States v. Tsarnaev* are aware, an avalanche of pretrial publicity alone will not necessarily require a trial to be moved, nor will it provide easy fodder for a claim of reversible error after the fact.

As the trial judge weighing Casellas' change-of-venue request noted, "The last time the Supreme Court overturned a conviction solely because pretrial publicity caused the community to become presumptively prejudiced was in 1963 in Rideau v. Louisiana."
In Rideau, the defendant's surreptitiously taped confession was repeatedly broadcast on local television to a small community.
"The Court found that the broadcast confession was 'in a very real sense ... Rideau's trial — at which he pleaded guilty to murder,'" U.S. District Court Judge Joseph R. Goodwin wrote.

A key question for the appellate panel, then, was whether Weinberg was claiming Casellas is the new *Rideau*. While the district court distinguished the present case, the appellant's brief argues that Casellas was in even a worse spot than Rideau.

"Here, the jury knew that another jury just like them had found Casellas guilty of the heinous murder of his wife, information which the district court barred from the trial of this case as too likely to prejudice Casellas' right to a fair trial," the brief states. "Casellas may have denied his guilt of the murder ... but, given his conviction and 109-year

sentence, jurors would have believed that he was lying about his guilt of the murder and ... would have readily assumed that he was lying about the carjacking as well, particularly given the connection between the two events."

How case compares to *Tsarnaev*

Tuesday's proceedings drew to the courtroom a member of Tsarnaev's defense team, Assistant Federal Public Defender Timothy G. Watkins, and the marathon bombing case is referenced frequently in the parties' briefs.

The first reference during oral arguments was to 1st Circuit Judge Juan R. Torruella's stinging dissent in Tsarnaev's second petition for mandamus relief, in which Torruella argued that, by either of two measures, the voluminous publicity about the case had created a presumption of prejudice that could not be rebutted.

"There is no sound basis for refusing to apply a presumption of prejudice to a high-profile, omnipresent, emotionally-charged case like this — particularly where the entire Boston community has been terrorized, victimized, and brutalized by such a horrendous act of violence," Torruella wrote. "No amount of voir dire can overcome this pervasive prejudice, no matter how carefully it is conducted."
Still, the voir dire conducted in Tsarnaev was far more extensive than in United States v. Casellas, the appellant argues in his brief. After soliciting drafts from the parties, "the court inexplicably eschewed the use of any advance jury questionnaire," the brief states, describing the ensuing voir dire as "relatively brief" and "insufficient to counteract the effect of the sensationalistic publicity which saturated Puerto Rico for almost two years prior to trial or to eliminate jurors with what should have been disqualifying knowledge of Casellas' conviction for the murder of his wife."

Torruella called the press coverage of the marathon bombing "unparalleled in American legal history," but Weinberg argued that Casellas was in an even worse position, with knowledge widespread among prospective jurors about a high-profile conviction that was "inextricably intertwined" with the charges on which he was about to be tried.

To place Tsarnaev in a similar situation, Weinberg argued, one would need to be attempting to try him fairly, two months after he received his death sentence, on charges of lying to authorities about how he acquired a bomb part.

Another factor that may distinguish Casellas from Tsarnaev is the time lapse between the media onslaught and the proceedings. The district court, Casellas' brief notes, relies heavily on the 2010 Supreme Court decision in *Skilling v. United States*, in which there was a four-year lapse between news breaking about the Enron bankruptcy scandal and an executive's trial.

"Similarly, in Tsarnaev, the Court found that '[t]he nearly two years that have passed since the Marathon bombings has allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish,'" the brief states. "Here, there was no such abatement, and the saturation coverage continued to the time of trial, producing prejudicial effects that had not dissipated by the time of trial."

In a recent filing in Tsarnaev's bid for a new trial or new penalty phase, however, defense counsel argue that there was no real "abatement" in the "saturation coverage" of the marathon bombing, either. At most, there was a lull, but a new wave of emotionally charged stories filled the airwaves and even jurors' social media feeds during the proceedings, which coincided with the second anniversary of the bombing (see sidebar).

Casellas also has another thing Tsarnaev doesn't: a prosecution that, at least initially, did not oppose a change of venue.
"At some point, the prosecutor candidly admitted it would be easier to move [the case]," U.S. Justice Department appellate attorney Kirby Heller acknowledged at oral arguments. "But that's not the test."

Yannetti called Casellas "almost unique," given the circumstances outlined above unfolding within a "small, insular community." While changes of venue are "very rarely granted," he called it "astounding" that the district court judge did not allow one here.
"Instead of importing a judge from West Virginia [as was done], they should have exported the case to West Virginia," he said.
The timing of One Boston Day may prove to be "critical" in Tsarnaev's appeals, Yannetti suggested.
"It's One Boston, not One Montana, One California or One Iowa," he said. "Everything was happening in the very city that was about to decide whether this man lives or dies."

Here, the press coverage was "most intense and most personal," and it ramped up anew as essentially the only contested part of the proceedings, the penalty phase, unfolded.

That coverage fueled "incredible and justified sympathy for victims" but may also have contributed to a desire for revenge among the jury that could have manifested itself in the death sentence.
"Who knows how affected by [the press coverage] they were," Yannetti said. "I frankly don't understand why change of venue is so rarely granted."

While acknowledging that it is not the standard used, he noted that it is clear in many high-profile cases that a defendant has a better chance of getting a fair and impartial jury if a case is moved.

Yannetti said it would be interesting to see whether the 1st Circuit renders its decision in Casellas before oral arguments are held in an appeal of Tsarnaev. Depending on which way the decision goes, each side in Tsarnaev will try to draw further parallels or distinctions, he noted.

"It's interesting that both of these cases are in the pipeline at the same time," he said.

What is the test?

After 1st Circuit judges recused themselves from the appeal brought by the son of a judge within the circuit, the panel for oral arguments featured three judges from across the country: Duane Benton, who normally sits in the Kansas City, Missouri-based 8th Circuit; David B. Sentelle, from the Federal Circuit in Washington, D.C.; and Kent A. Jordan from the Philadelphia-based 3rd Circuit.
Jordan asked whether Casellas' appeal was premised on a claim of actual prejudice or presumed prejudice.
"Both," Weinberg replied.

Weinberg suggested that the burden of proof should shift to the government. Rather than requiring the appellant to prove the judge abused his discretion by accepting the jurors' statement that they could be fair, the burden should be on the government to rebut a presumption that they were prejudiced.

If a juror's statement could rebut a presumption of prejudice, what, if anything, remained of the presumption, Jordan asked Heller.
Heller agreed there "isn't very much left."

"The court has used the term 'presumption' very loosely," she said. "It pays lip service [to the term], but it doesn't serve to do much," except to put some burden on the government to rebut the presumption.

Jordan would later press Heller on whether the 1st Circuit follows the "disjunctive," or either-or, test announced in United States v. Rodriguez-Cardona. As described in the government's brief, "To raise the presumption, a defendant must show that "(a) inflammatory publicity about a case has so saturated a community that it is almost impossible to draw an impartial jury from that community, or (b) so many jurors admit to a disqualifying prejudice that the trial court may legitimately doubt the avowals of impartiality made by the remaining jurors."

When Heller attempted to argue that a "quantum of pretrial publicity is not enough" and that jurors' responses during voir dire need to be scrutinized, Jordan interrupted her.

"So you're saying it's not a disjunctive test. ... It might be logically, but in practice, the 1st Circuit does not follow [Rodriguez-Cardona]," he said.

"Yes," Heller eventually replied.

She closed her argument by stressing that what matters is whether there is a "fixedness" in the jury's opinion of the defendant, which she claimed was not present in the case.

"This particular jury ... all entered the jury box saying they didn't have an opinion about the defendant's guilt," Heller said.
Jordan would later ask Weinberg why the 1st Circuit should not defer to the determination of the District Court judge "there on the scene" who found the jurors' claims of impartiality credible, "given the standard of review that binds us."
Jordan queried whether Weinberg was implying that, to rebut a presumption of prejudice, a juror would have had to have claimed essentially zero knowledge of Casellas' conviction.

Jordan pointed to the 1975 Supreme Court case *Murphy v. Florida*, in which "mere knowledge" gleaned from news accounts of a prior felony conviction or certain facts about the charged crime among the jury pool were insufficient to establish that the defendant had been denied due process.

Weinberg responded that the press reports targeting his client were far more "toxic." The defendant in Murphy, who was known in the press as "Murph the Surf," was "almost a folk hero," Weinberg said.

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Boston, MA 02108

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