Can Tsarnaev Get a Fair Trial in Boston? Of Course Not.

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The Boston Marathon bombing trial of Dzhokhar Tsarnaev, which began with jury selection this week, is the most significant terrorism trial in America since the Oklahoma City bombing trials of Timothy McVeigh and Terry Nichols in Denver in 1997 and 1998.

There are many similarities between the two high-profile cases — murder, terrorism, and conspiracy charges, for one thing, universally despised defendants for another — but there is one main difference, at least at the start. Tsarnaev will be on trial for his life in a federal courthouse within walking distance of the April 15, 2013 blast site while the Oklahoma City bombers were tried hundreds of miles from the ruins of the Alfred P. Murrah federal building they blew to bits on April 19, 1995

Over and over again, Tsarnaev's lawyers have argued that their client cannot get a fair trial in Boston while charged with murder and mayhem that: 1) was televised live and 2) struck at the very core of the City's identity by turning one of its most cherished events into a bloody massacre. Over and over again, they have asked to move the capital trial out of Massachusetts — to Virginia, for example, where the Zacarias Moussaoui 9/11 terror conspiracy trial was held—by pointing to the pervasive media coverage of the Marathon bombing and its aftermath. Coverage that by its very nature — relentless, dramatic, fueled by government leaks, dripping with detail — has prejudiced their client's right to be tried by jurors who had not yet adjudged Tsarnaev guilty.

And over and over again the federal courts have rejected these arguments and moved forward with the trial in Boston, the place where the phrase "Boston Strong" quickly morphed from a slogan into a mantra. Jurors don't have to be ignorant of the facts of the case against Tsarnaev, U.S. District Judge George A. O'Toole, Jr. ruled in September, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." This standard — one of convenience, not principle — renders meaningless a defendant's constitutional right to a fair trial by making venue requests virtually impossible to win no matter how much prejudicial pretrial publicity infuses a jurisdiction rocked by monumental crime.

The venue rulings so far in the Tsarnaev case (and there may be more to come after jury selection gets underway) tell the defendant, his prospective jurors, and the world that the law is content to take it on faith that Massachusetts' residents, including those who live and work at or near the blast site, will be able to be of two minds when they swear an oath to give Tsarnaev his constitutional presumption of innocence. That they will unlearn what they have learned about him, forget what they have seen about his brother, and clear out of their heads the sounds they have strained to hear, week after week after week, since April 2013.

All of this is unconstitutional, absurd, and contrary to human nature, but it is by no means an accident. Since U.S. District Judge Richard Matsch moved the McVeigh and Nichols trials out of Oklahoma City (the federal courthouse there was itself damaged by the blast) the United States Supreme Court has made it more difficult for high-profile defendants to have their trial venues changed. In *Skilling v. United States*, for example, the justices waited until *after* Jeffrey Skilling had been tried and convicted before they concluded that he had not deserved a venue change out of Houston for his Enron-related crimes.

If you commit a high-profile mass murder in a big city, recent venue decisions tell us, you have virtually no chance to have your trial moved to another venue. If your confession is not broadcast, printed, or otherwise widely disseminated before trial your chances go down, too. Time is a factor as well. The longer the delay between the alleged crimes and jury selection the less chance you have of changing venue. To merit moving a trial, the Supreme Court said in *Skilling*, news coverage has to present "the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice."

Read the *Skilling* decision and then read the venue papers filed in the Tsarnaev case. Pay specific attention to the examples of media coverage offered by the bombing suspect's attorneys. Recollect the images you remember from those awful days in Boston in April 2013. The explosion. The blood at the finish line on Boylston Street. The subsequent manhunt and shootout. The covered boat. And then ask yourself how much prejudicial pretrial publicity there would have to be to a defendant like Tsarnaev to get the federal courts to move his trial to another venue. Has the coverage of this tragedy not been "vivid" and "unforgettable"?

The law always has presumed that a community that suffers a grievous loss has the right to seek justice for that loss. And in most cases there is no reason to move even those criminal trials that generate intense local interest. But the Boston Marathon bombing was no ordinary crime and the Tsarnaev trial is no ordinary capital case. Tsarnaev has at least as much of a right to a venue change as did McVeigh and Nichols. And if he does not get that venue change the result of his trial — surely a conviction and perhaps a death sentence — will be forever tainted by the stubborn refusal of the courts to guarantee him the fairest possible trial the Constitution requires.

The views expressed are the author's own and not necessarily those of the Brennan Center for Justice.

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