Federal Bar Association
Massachusetts Chapter

Newsletter

Christopher E. Hart, Editor

OCTOBER 20, 2015

IN THIS ISSUE:

President's Farewell Column

By Lisa M. Tittemore

At our terrific Annual Judicial Reception this June, I described the story of the FBA's Massachusetts Chapter as a story about the power of a small group of volunteers working to achieve an important mission, while having fun, building professional relationships, and developing friendships. That's a true story. Our Chapter Officers and Board have worked hard and accomplished much. I deeply appreciate the privilege to have led this amazing group of people.

Over this past year, I have tried to keep in the forefront of our minds the important mission of the FBA:

> *To strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.*

To accomplish the FBA's mission, we must support the independence of the judiciary, work to protect the rule of law, and foster diversity and inclusion in the legal profession. These are some of the core issues that I have tried to focus on and address in a number of ways throughout this past year, and which I am sure we will continue to address in numerous programs and initiatives as we move forward. We must continue working on critical issues such as filling judicial vacancies and funding for the courts.

With this mission in mind, we accomplished a lot. Our June 10, 2015, Annual Judicial Reception honoring the Honorable Nathaniel N. Gorton was a tremendous success. Well over 400 of you – friends, family, colleagues and members of the bar – joined us to recognize Judge Gorton's tremendous contributions to our community.

We are deeply indebted to Court Clerk Rob Farrell for all that he does. And we were saddened by Viginia Hurley's passing in September. As Court Outreach Coordinator, Ginny was always at the center of what the FBA was doing. We miss her greatly and feel her absence.

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Incoming President
Matthew C. Baltay, Foley Hoag LLP

Matthew Baltay was installed as President of the Federal Bar Association of Massachusetts effective October 1, 2015.

Matthew Baltay with Senator Orin Hatch of the Senate Judiciary Committee at the Annual FBA National Meeting on September 12, 2015 in Salt Lake City, Utah.

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President's Farewell Column

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Immediate Past President, Michelle Schaffer implemented a key strategic goal of the Chapter: to create substantive law based committees. She successfully created twelve (12) new committees for our Chapter. These committees have already resulted in additional high quality programming for the benefit of our members. For example:

- Our **Civil Rights Committee** chaired by Suffolk Law School Professor Karen Blum and Michelle Hinkley held a highly praised seminar on Litigating Section 1983 Cases in Federal Courts featuring Judge Timothy Hillman and Professor Blum. Mary Bonauto presented a program recently on "Establishing the Constitutional Right of Freedom to Marry."
- Our **Intellectual Property Law Committee**, led by Brandon Scruggs and Bo Han organized several panel discussions, including a recent brown bag lunch meeting to discuss pending patent reform legislation.
- Our **Diversity Committee** led by Erika Reis and Raquel Webster organized an excellent discussion of diversity in the federal courts this spring. With Michelle Schaffer and myself, the Committee organized a program honoring the women judges of the federal bench in Massachusetts.
- Our **Philanthropy Committee**, under the leadership of Amy Bratskeir and Sara Colb, also was busy this summer, including an FBA MA Volunteer Day at the Pine Street Inn, and organizing volunteer lawyers to participate in a program for elementary school children run by Bankruptcy Judge Frank J. Bailey (leading to the conviction of Goldilocks).
- We have numerous other programs in the works, including the CARE/RESTART job interview skills program, traditionally co-sponsored with the Massachusetts Black Lawyers Association.
- Our **Bankruptcy Committee** has organized a Bankruptcy for Non-Bankruptcy Attorneys (or those just starting out) Breakfast with Judge Bailey, which is scheduled for later in October. **Hold Oct. 27.**
- Our new **Immigration Law Committee**, chaired by Matthew Maiona and Sara Ward, has already held standing room only lunch meetings featuring Immigration Judges Robin Feder and Brenda O'Malley. Keep an eye out for more immigration law programs this Fall!

We have done a tremendous job developing our expanded geographic footprint with our divisions in Worcester and Springfield, which are extremely active and growing thanks to the invaluable work of Nate Olin and Ken Pickering. The Western Division in Springfield will be hosting a discussion with Magistrate Judge Kenneth P. Neiman on mediation, and they have four additional programs with the judiciary already set up through May!

Our "Young Lawyers" colleagues are extremely active, including organizing their "Brief Bites" lunch series, and a second annual, back by popular demand, clothing drive. Our local law school chapters continue to provide excellent opportunities for law students to meet and collaborate with working attorneys.

I am very proud that the National FBA organization has recognized our Chapter with numerous awards this year, and in past years. Matthew Baltay and Christopher Hart published our Chapter's newsletter this year, which won an "Outstanding Newsletter" award at the Federal Bar Association's Annual Meeting on September 12.

Matthew Baltay also ran our very successful ***Breakfast with the Bench*** series this year, for which we are indebted to the incredible generosity of the Massachusetts federal court staff and judges. In the past months, we have hosted breakfasts featuring Chief Judge Patti Saris (New Developments at the Federal Court), Judge Nathaniel Gorton (The FISA Court and Jury *Voir Dire*), Judge Douglas P. Woodlock (The Future of Aggregate Litigation: Class Actions and MDL Matters), Chief Judge Lynch and Judge Barron (First Circuit Caseload and Appellate Issues), Judge Marc Wolf (the Role and Assignment of Senior Judges), and most recently, A Conversation with Judge Denise Casper. We have upcoming breakfasts planned with Judge George O'Toole in October and Judge Indira Talwani in November, as Scott Lopez picks up the helm on organizing future breakfasts.

Finally, our own chapter won the "Chapter Acting President Excellence Award" for its work this year. This chapter should be incredibly proud of these accomplishments.

Additional work is always done by many folks behind the scenes, and I am deeply grateful for all that has been done whether or not specifically mentioned in this column. You know who you are and my thanks go out to all of you.

I hope this gives you a feel for the Chapter's exciting plans for the upcoming year. I am pleased to be turning over the Chapter in such good shape to incoming President Matthew Baltay, who is already making plans to continue the important work of the FBA's Chapter in Massachusetts. Please contact me or Matthew, or any of the FBA MA Officers or Board members to share your ideas and suggestions!

The FBA Massachusetts Chapter thanks Lisa Tittemore for her work & leadership!

In Memoriam:

The FBA and the entire legal community mourn the loss of Ginny Hurley, a longtime member of the FBA and court staff.

Chapter Awards

The Massachusetts Chapter was recently recognized for its outstanding work and efforts in numerous categories at the September 12, 2015 Annual Meeting. Congratulations to all for their time and hard work!

1. CHAPTER ACTIVITY PRESIDENTIAL EXCELLENCE AWARD

2. OUTSTANDING NEWSLETTER AWARD

3. CHAPTER MEMBERSHIP GROWTH RECOGNITION AWARD

4. CHAPTER COMMUNITY OUTREACH
(for CARE/RESTART job interview workshop)

Upcoming Events:

Tuesday, October 27, 2015, 8am
U.S. Bankruptcy Court, 12th Floor Library
Breakfast with Massachusetts Bankruptcy Judge Frank J Bailey. The topic will be "Bankruptcy Issues for Non-Bankruptcy Attorneys." ***RSVP to Peter Netburn, pnetburn@hermesnetburn.com***

Wednesday, October 28, 2015, 8am
Moakley Courthouse, Judges' Dining Room
Breakfast with Judge George A. O'Toole, Jr. The topic will be "Jury Empanelment - Generally." ***RSVP to FBARSVP@lawson-weitzen.com***

Tuesday, November 17, 2015, 8am
Moakley Courthouse, Judges' Dining Room
Breakfast with Judge Indira Talwari. The topic will be her first year on the bench. ***RSVP to FBARSVP@lawson-weitzen.com***

Wednesday, November 18, 2015, 12pm - 2pm
Moakley Courthouse
CARE & RESTART Jobs Workshop, overseen by Magistrate Judge Hennessy and Judge Kelley. The topic will be her first year on the bench. ***RSVP to ma.fba.philanthropy@gmail.com***

Additionally, the Massachusetts Chapter of the FBA is presenting a discussion series with the five federal judicial officers located in the Western Division:

:: **Tuesday, November 17, 2015**
United States Bankruptcy Judge Henry J. Boroff
Topic: TBD

:: **Thursday, January 21, 2016**
United States District Judge Michael A. Ponsor
Topic: TBD

:: **Wednesday, March 16, 2016,**
United States District Judge Mark G. Mastroianni
Topic: TBD

:: **Thursday, May 12, 2016**
United States Magistrate Judge Katherine A. Robertson
Topic: TBD

Each event will take place at the Springfield federal courthouse (300 State Street) and is scheduled to run from 4:00-5:30 p.m., including a 45-minute discussion with the judge followed by a 45-minute wine and cheese reception. All FBA members are welcome to attend free of charge. For further information, please contact: **Nathan A. Olin, Esq.** c/o Connor, Morneau & Olin, LLP, *nolin@cmolawyers.com* or (413) 455-1730.

Reception and Panel Honoring Women Who Serve on the MA Federal Bench

On October 6, 2015, the Federal Bar Association hosted a historic panel discussion of the women judges who serve on the Federal Bench in Massachusetts, Michelle Schaffer, Past President of the FBA, moderated an interesting discussion on past, present and future roles of the women attorneys and judges in Massachusetts.

Picture at the October 6, 2015 event, from L to R: The Honorable Patti B. Saris, The Honorable Allison D. Burroughs, The Honorable Sandra Lynch, The Honorable Joan N. Feeney, The Honorable Denise J. Casper, The Honorable Rya W. Zobel, The Honorable Page Kelley, The Honorable Katherine A. Roberston, The Honorable Marianne B. Bowler, The Honorable Carol J. Kenner, The Honorable Indira Talwani, The Honorable Jennifer C. Boal, The Honorable Joyce Alexander Ford.

Other FBA Gatherings:

The **FBA MA Aviation/Transportation Law Committee** teamed up with the **FBA National Transportation and Transportation Security Law Section** to host a very interesting discussion regarding Developments in Unmanned Aerial Systems/Drones.

From L to R: Tom Lehrich, Dave Bannard, Scott L. Jones, Robert Farrell and Lisa M. Tittemore.

From L to R: IP committee Co-chair Brandon Scruggs, and presenters Rob Moore, Steve Chow, and Michael Newman.

2015 Newly Appointed Judges Reception

By Lisa M. Tittemore, Sunstein Law

On September 16, 2015, the FBA MA Chapter hosted a very enjoyable and extremely well-attended welcome reception for newly appointed Judges to the Federal District Court for the District of Massachusetts, which was co-sponsored by the MBA and WBA of Mass. It is an exciting time to practice before the Court as we get to know the many new Judges who have joined the bench in recent years. FBA MA President Lisa Tittemore welcomed all of the attendees and provided the below biographical information regarding the Judges.

U. S. District Court Judge Allison D. Burroughs

Judge Burroughs is a graduate of Middlebury College and received her JD from the University of Pennsylvania Law School in 1988. Prior to joining the bench, Judge Burroughs was a partner at Nutter McClennen & Fish in Boston. Before entering private practice, she served in the Boston and Philadelphia offices of the US Attorney's Office. During her 16 years as an Assistant US Attorney, Judge Burroughs developed trial and investigation expertise in white collar and economic crimes. Among her many other activities, Judge Burroughs was a founding member of Womenade Boston, a non-profit that supports programs for teenage girls and women. Judge Burroughs was nominated by President Barack Obama on July 31, 2014, to a seat vacated by Judge Rya Zobel when she took Senior Status; her nomination was confirmed by the Senate on December 16, 2014, and she received her commission on January 6, 2015. Judge Burroughs courtroom is in Boston.

U. S. District Court Judge Allison D. Burroughs

Magistrate Judge Katherine A. Robertson

Magistrate Judge Robertson is a graduate of Princeton University, and obtained her JD at Western New England College School of Law in 1990. She began her legal career as law clerk to U.S. District Judge Frank H. Freedman in Springfield from 1990 through 1992 and then with the Honorable John M. Greaney of the Massachusetts Supreme Judicial Court until 1996. Judge Robertson was a partner in the firm Bulkley, Richardson and Gelinas in Springfield, where she had a primary focus on employment law and complex business disputes. In 2011, Judge Robertson joined the Appellate Division of the Hampden County District Attorney's Office. She was appointed to the Court as Magistrate Judge on January 6, 2015. Judge Robertson's courtroom is in Springfield.

Magistrate Judge Katherine A. Robertson

Magistrate Judge Donald L. Cabell

Magistrate Judge Cabell is a graduate of the University of Massachusetts/Amherst, and received his JD from Northeastern University School of Law in 1991. Judge Cabell began his legal career at the firms which were then Hale & Dorr and Peckham, Lobel, Casey, Prince & Tye in Boston. In 1995, Judge Cabell joined the U.S. Attorney's Office, working in the major crimes and anti-terrorism, and national security units. For the 2 years prior to his selection as Magistrate Judge, Judge Cabell was the Justice Attache in the Office of International Affairs at the US Embassy in Paris France. He was appointed to the Court as Magistrate Judge on January 21, 2015. Judge Cabell's courtroom is in Boston.

Magistrate Judge Donald L. Cabell

FBA IP Committee Brown Bag Lunch: the Interplay between Patent Office Proceedings and District Court Patent Litigation

By Brandon Scruggs, Sunstein Law

On July 23, the Intellectual Property Committee of the Massachusetts FBA held a brown bag lunch on the interplay between proceedings at the U.S. Patent and Trademark Office (PTO) and patent litigation in federal district courts. The three panelists were Robert Asher of Sunstein Kann Murphy & Timbers LLP, Dan Lev of Pierce Atwood LLP, and Andrej Berbic of Wilmer Cutler Pickering Hale and Dorr LLP. The event was well-attended and included lively discussion between panelists and attendees.

The America Invents Act created new proceedings before the PTO such as Inter Partes Reviews (IPRs), Post-Grant Reviews (PGRs), and Covered Business Method Patent Reviews (CBMs). In many cases, these proceedings provide a faster and more cost effective way to challenge the validity of a patent relative to district court litigation. Over the past two years, these proceedings have grown in popularity while trends in related decisions from the PTO, district courts, and Federal Circuit are beginning to emerge.

Robert Asher discussed issues related to real party in interest and estoppel. Mr. Asher reviewed the factors considered when determining whether a non-party is a real party in interest and discussed cases where failure to identify all real parties in interest were fatal to IPRs. Mr. Asher also discussed the varying scopes of estoppel for IPRs, PGRs, and CBMs and potential tactics to avoid estoppel from PTO proceedings in concurrent or later district court litigation.

Dan Lev discussed stays and discovery related to PTO proceedings. Mr. Lev reviewed the factors courts consider when determining whether to stay a patent case pending resolution of an IPR. He also discussed statistics showing that roughly 70% of requests for stays pending IPRs or CBMs are granted (at least in part), with those percentages being higher in jurisdictions such as N.D. Cal. (~75-80%) and D. Del. (~66-75%) versus E.D. Tex. (~30-50%). Mr. Lev also discussed discovery requests in PTO proceedings, the factors the PTO considers when reviewing such requests, and statistics showing the results of such requests. Over the last couple of years, the PTO has denied roughly 50-70% of discovery motions. Mr. Lev discussed strategies to improve the odds of succeeding on both requests for a stay in district court and discovery requests before the PTO.

Andrej Barbic discussed claim construction and settlement considerations for PTO proceedings. Mr. Barbic discussed the "broadest reasonable interpretation" standard for claim construction for IPRs, which the Federal Circuit recently confirmed. He also discussed various tactical considerations for claim construction in IPRs, since parties often need to take claim construction positions in IPRs before claim construction proceedings in parallel district court litigation. Mr. Barbic discussed how settlements can play out in IPRs. Settlements in IPRs are complicated by the fact that the law allows the PTO to decide the merits of the proceeding even after the parties have settled and requested termination of the IPR. For early settlements, the PTO is much likely to terminate the IPR. For later settlements, especially after an oral hearing before the PTO, the PTO may be more likely to proceed to a decision regardless of whether the parties settle.

Slide presentations from each speaker are available upon request, which should preferably be made by email to IP Committee Co-Chair Brandon Scruggs at bscruggs@sunsteinlaw.com.

Interested in contributing to the Newsletter? Contact Matthew Baltay at mbaltay@foleyhoag.com.

Pine Street Inn

Dear Board,

Sara Colb, co-chair of the Philanthropy Committee, and I could go on about our helpful member-volunteers, Rob Farrell's civic-minded staff who joined, and all we learned about the Inn. But I am attaching photos that tell a better story than my hyperbole (yes, that is Howard Friedman in a hairnet).

Thank you to Harvey, Howard, Andrew Jacobs, Rob Farrell and his fearless crew: Lisa Urso, Elizabeth Sonnenberg, Brendan Garvin, Peelu Kumar, Nancy Cashman, Taylor Halley, Freddy Perdomo and Arnold Pacho. They eagerly spiced raw meat and cracked more eggs than we have ever seen at one place and time (among other glamorous work).

But the photos don't show the Inn's dynamic staff who patiently taught us to wrap hundreds of sandwiches to be delivered to the homeless that day. Or the chef who carefully planned a menu of mango curry stew. Or the Volunteer Coordinator who led a thought-provoking tour. We saw rooms where hundreds sleep each night and where extra mattresses were laid on the floor this past winter for the increased need (due to Long Island closing and this winter's record snow and cold).

The Inn makes 3,500 meals daily that are served there, on the street and at other shelters. They rely on volunteers to help prepare all of this food.

When we first sent out the invite to just the Board, we had more interest from the FBA than the Inn could accommodate in one shift.

So we look forward to doing this again soon with a new crew.
Please stay tuned.

Thanks very much for supporting this meaningful effort.

Amy & Sara

Changing Venue In Criminal Cases: Lessons From The Tsarnaev Trial

By Michael D. Ricciuti, Kathleen D. Parker, Patrick C. McCooe, K&L Gates LLP

One of the key issues to be resolved in the appeal by convicted Boston Marathon bomber Dzhokar Tsarnaev of his conviction and death sentence is whether his failed motions for a change of venue should have been granted and his case transferred out of the District of Massachusetts. The First Circuit splintered sharply during the pre-trial skirmishing on whether a fair trial for Tsarnaev could have been had in the district where the Marathon Bombing and its aftermath occurred. Substantively, Tsarnaev argued that pretrial publicity and public sentiment required the Court to presume that the views of those in the jury pool in the District of Massachusetts were so fixed against Tsarnaev that prejudice had to be presumed such that no impartial jury could be seated. The government parried that claim, and argued that the court's juror screening mechanisms and careful *voir dire* would work as it is intended, and in any event, Tsarnaev could file an appeal after trial if he could show that these methods did not provide an impartial jury. The district judge thought a fair trial could be had here and denied Tsarnaev's motions. Tsarnaev's two applications for a writ of mandamus were also denied. The standard to win mandamus relief is extraordinarily high, so it is not surprising that two members of the First Circuit twice refused to grant pre-trial mandamus relief from the District Court's decisions. What is surprising, however, is that, despite this high standard, Judge Toruella concluded in two strongly-worded dissents that Tsarnaev was entitled to extraordinary mandamus relief denied by the First Circuit majority.

In his dissents, Judge Toruella noted the strength of Tsarnaev's argument for change of venue and, in his second dissent, asked whether anyone could ever be granted the extraordinary remedy of mandamus and whether there could ever be a successful change of venue motion if there were not one here. The Tsarnaev appeal will help answer that question, and will determine whether the heavy reliance the court and the government put on the *voir dire* process to obtain an impartial jury was justified. Through this appeal, the Tsarnaev case will also decide whether this case will follow the path of Massachusetts' last death penalty case, against Gary Lee Sampson, which must be re-tried because of failures in seating an impartial juror.

A. The Positions and Decisions Below

The Constitution requires federal criminal trials to be held in the state where the crime was committed and trial before an impartial jury. This requirement, however, is not absolute. Rule 21(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."

Tsarnaev argued for a change in venue under Rule 21(a). He claimed that it was pointless to proceed to *voir dire*, as preliminary results of a survey he commissioned showed an overwhelming presumption of his guilt in the District of Massachusetts, a prejudgment that the death penalty was the appropriate punishment, and an extraordinarily high percentage of people in the jury pool that had attended or participated in the 2013 Boston Marathon or knew someone who did. Based on this, Tsarnaev argued that prejudice against him had to be presumed. Pending further survey analysis, Tsarnaev claimed that the community from which potential jurors was to be drawn was so affected by adverse publicity and/or by the events of the Marathon Bombing and its aftermath that this was one of those extreme cases in which a presumption of prejudice arose such that *voir dire* of potential jurors could not be expected to secure a fair and impartial jury. Among the cases the defense relied upon was the case against Oklahoma City bomber Timothy McVeigh, which was moved from Oklahoma to Colorado.

The government opposed and insisted on proceeding to *voir dire*. The government claimed that potential juror prejudice should only be presumed in the rare case where pretrial publicity had effectively displaced the judicial process, and that it was premature to conclude that prejudice existed without questioning a single potential juror. The government distinguished McVeigh on the grounds that both parties in McVeigh agreed that the case had to be moved since the main courthouse in Oklahoma City had been severely damaged by the bombing and the only question was where to move the trial, the facts in McVeigh were far different than those in Tsarnaev's case, and, in any event, that case is not law in the First Circuit.

The defense, in turn, attacked reliance on *voir dire* to obtain an unbiased jury. Among other reasons, Tsarnaev claimed that any jurors hearing the Marathon Bombing case in Massachusetts would fear community disapproval of any verdict favorable to Tsarnaev, and that even well-meaning potential jurors with a close connection to the Marathon and the bombings would be less able to set aside preconceived notions about guilt and punishment in the case-- particularly where Tsarnaev's survey found that 90% of

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those questioned already believed him to be guilty. Further, he argued that waiting for *voir dire* to think these issues through was too late; if *voir dire* evidenced concerns about seating a fair and impartial jury, the practical difficulties of moving a trial as complex as this on short notice would be prohibitive.

The government was unmoved by Tsarnaev's arguments and claimed that it was "nearly impossible" under Supreme Court precedent to prove that a jury pool was so contaminated by negative pretrial publicity that a court could not even lawfully attempt to seat a fair and impartial jury using juror questionnaires and live questioning by the court and the parties. The government argued that from a pool of some five million people living in eastern Massachusetts, despite the news coverage of the bombing, the Court should "trust *voir dire*, which has proven effective for centuries," and that the law presumed qualified prospective jurors who claimed they would be able to put aside any pre-trial opinions would be able to apply the required presumption of innocence in their deliberations.

On September 24, 2014, the district court denied Tsarnaev's motion to change venue. It rejected the defense's contention that a fair and impartial jury could not be found in an area the size of eastern Massachusetts and that a presumption of prejudice existed. The Court expressed its confidence that questionnaires and live *voir dire* could sufficiently identify and weed out prejudiced prospective jurors from the jury. The Court cited a string of recent, high-profile cases in Massachusetts, including the case against infamous fugitive James "Whitey" Bulger, and found that they showed that impartial juries could be seated in Massachusetts that would carefully evaluate evidence, despite heavy press attention.

On December 1, 2014, Tsarnaev filed a second change-of-venue motion, re-emphasizing and bolstering the arguments he had made previously. On December 31, 2014, the district court denied that motion, which was reflected in a written order dated January 2, 2015. In it, the district court again emphasized that the *voir dire* process adopted by the district court -- and which was about to begin -- would root out any bias.

B. The First Circuit Decisions

Even before the district court's opinion on the second motion was issued, Tsarnaev sought from the First Circuit a writ of mandamus for an order requiring the district court to change the trial's venue and for a stay of jury selection. By order dated January 3, 2015, two circuit judges, Chief Judge Lynch and Judge Howard, denied the motion. They found that the First Circuit had been on notice of the petition before it was filed on December 31, had "carefully reviewed" the application, and concluded that "petitioner has not made the extraordinary showing required to justify mandamus relief." Judge Torruella dissented and wrote that he had not been able to review "even a small part" of the 9,500 page record in this "profound[ly] important[]" case due to the timing of the filings, and added:

> Tsarnaev's argument that the entire city of Boston and its surrounding areas were victimized -- as evidence by the city's virtual lockdown and images of SWAT team members roaming the streets and knocking door-to-door in Watertown -- is compelling. At first glance, Tsarnaev makes a much stronger case for change of venue here than there was in [a case involving Jeffery Skilling, a former Enron executive who moved to change the venue of his trial out of Houston, where Enron had been based], where a change of venue was found to be unwarranted, and [the case against Oklahoma City bomber Timothy McVeigh], where a change of venue was granted. … Considering the time and cost commitment of composing a venire and conducting *voir dire* -- something both the government and the district court emphasize heavily -- once jury selection begins, it will not only cause irreparable harm to Tsarnaev, but it will also set an irreversible and unstoppable process in motion. Thus, I strongly believe that a stay should have been granted to allow a full, fair, and reasoned analysis of this extremely important issue that goes to the heart of our constitutional guarantee of "an impartial jury" and "due process of law."

On January 22, 2015, Tsarnaev moved a third time before the district court for a change of venue, arguing that questionnaires returned by 1,373 prospective jurors showed "[g]reat local prejudice will prevent a fair trial by an impartial jury" since all but 4 of the potential jurors had been exposed to publicity about the case, and that 68% of them already believed that Tsarnaev was guilty.

The government opposed, arguing that it was not surprising that potential jurors would have heard about the Marathon Bombing, as "the largest mass-casualty terrorist attack on American soil since September 11, 2001," and asserting that familiarity with the case "doesn't mean jurors can set aside their beliefs and apply the presumption of innocence." Indeed, the government argued, the criminal justice system presumes that jurors will set aside any preconditions and decide a case based on the evidence. The government stated that "[c]ourts, including the Supreme Court, routinely express great confidence in the efficacy of *voir dire*; but they virtually never find that the facts of any case warrant a finding of presumed prejudice. The Supreme Court itself has not done so in over 50 years, and it has never done so where the district's population even approaches the size of this one's. The First Circuit has never done so in any reported case."

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On February 3, 2015, Tsarnaev again moved the First Circuit for a writ of mandamus ordering the district court to grant a change of venue and to stay jury empanelment. Tsarnaev argued that based on 1,373 questionnaires, 85% of potential jurors either believed Tsarnaev was guilty or had a connection to the bombing or both, and that 68% believed Tsarnaev was guilty -- even after hearing the court's admonition about the presumption of innocence. Indeed, 40% said they were "unable" to set aside their opinions and decide the case based solely on the evidence. Further, Tsarnaev argued that the bombing and its aftermath established "jurors' close association with victims, witnesses, places, and Boston itself as a community under attack [which was] indisputably idiosyncratic to the Eastern Division, and the permeation of the associations demonstrated in the jury questionnaires is a direct result of the Court's determination to hold the trial in Boston." The "depth and breadth of emotion voiced by summonsed jurors in their questionnaires compels the conclusion that venue must be changed" since "the emotional connections will inevitably carry with them a perceived obligation on the part of jurors to convict and sentence the defendant to the most severe punishment available." Tsarnaev further argued that *voir dire* would fix none of this, but rather that *voir dire* had only showed:

> more evidence of bias … It is unrealistic to expect that even the most sincere and scrupulous jurors can shield themselves from the biases and connections that inundate the communities in which they, themselves, live. And the record also demonstrates that neither the district court nor the parties can be confident of identifying every juror who is either unable to recognize and acknowledge bias, or intentionally conceals it. The conduct of jury selection to date has damaged both the appearance of impartiality and public confidence in the fairness of the proceedings beyond repair. … [Moreover,] it is the jurors whose biases are not uncovered, either through the questionnaire or *voir dire* questioning, who pose the greatest threat to the integrity of the proceedings.

Tsarnaev thus argued that there was a presumption of prejudice that could not be overcome, and that *voir dire* could not effectively cure community bias. He cited a 1952 First Circuit case for the proposition that:

> the naïve assumption that prejudicial effects can be overcome by instructions to the jury [is] … an unmitigated fiction… One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.

Tsarnaev asserted that the risk was too high that any jury seated in Massachusetts would include jurors who wanted to convict and punish Tsarnaev and a writ of mandamus ordering a change of venue was needed.

The government again opposed the motion and argued *voir dire* could be relied upon to root out bias and that the *voir dire* process thus far had been "reassuring." It further asserted that the First Circuit had never decided that a district court's decision not to change venue was subject of mandamus, but that even if it were, Tsarnaev had not met the high standard which required a showing that the district court clearly and indisputably abused its discretion in denying the motion and that Tsarnaev would suffer irreparable harm from the denial. As to the latter point, the government argued that Tsarnaev could seek review for any juror bias he found after trial in the event he was convicted.

On February 6, 2015, the district court denied Tsarnaev's third motion for a change of venue, concluding that ongoing *voir dire* was successfully identifying jurors who could be fair and impartial.

On February 27, 2015, the First Circuit issued an 80-page opinion on Tsarnaev's renewed mandamus petition. Again splitting 2 to 1, the First Circuit, through Chief Judge Lynch and Judge Howard, rejected Tsarnaev's petition because he had failed to meet the high standards for relief. The Court found that knowledge of the bombings by potential jurors "does not equate to disqualifying prejudice," and cited the district court's refusal to change venue in the prosecution of Zacharias Moussaoui, an alleged co-conspirator in the September 11 attacks, in the Eastern District of Virginia, "minutes by car from the Pentagon." The court opined that "[t]o compel the district court to change course, a petitioner must show not only that the district court was manifestly wrong, but also that the petitioner's right to relief is clear and indisputable, irreparable harm will result, and the equities favor such drastic relief. In the case before us, we cannot say petitioner has met these onerous standards and relief must be denied."

The court rejected Tsarnaev's claim that he was clearly and indisputably entitled to a change of venue in light of the size of the Boston area from which jurors would be drawn, the type of press coverage of the Marathon Bombing, the views expressed by prospective jurors during *voir dire*, and the passage of two years since the bombings, all of which suggested that despite familiarity with the case, prospective jurors had not become so prejudiced that a fair jury could not be seated. Indeed, the court found that the ongoing *voir dire* process showed that the "careful selection process and the trial judge's expressed confidence in finding sufficient jurors … is supported by the record and

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persuasively undercuts [Tsarnaev's] argument" on prejudice. That process, which included questionnaires and face-to-face questioning of potential jurors, gave the district court a "sturdy foundation to assess fitness for jury service." Further, the First Circuit asserted that the comments from some potential jurors that revealed a bias against Tsarnaev were not representative of the views of "all members of the venire," especially since those who expressed extreme views were, in fact, excused for cause and others "have expressed their ability to be fair and impartial." The court further stated that it "cannot say that the procedures put in place by the trial judge are either insufficient on their face or so inadequately implemented as to justify an interruption of the process and a change of venue." Further, because Tsarnaev could not show irreparable harm -- since he still had the right to appeal any conviction based on the jury selection process -- the majority rejected his petition.

Judge Torruella again dissented. Expanding on his earlier opinion, Judge Toruella found that Tsarnaev had shown pervasive prejudice that *voir dire* could not overcome, "no matter how carefully it is conducted." Finding that prejudice was established by inflammatory, saturating publicity as well as the number of jurors showing a "disqualifying prejudice that the trial court may legitimately doubt the avowals of impartiality made by the remaining jurors," Judge Toruella asked "[i]f not here, when?" He stated:

> If a change of venue is not required in a case like this, I cannot imagine a case where it would be. The entire city of Boston has been terrorized and victimized, and deep-seated prejudice against those responsible permeates daily life. If residents of the Eastern Division of the District of Massachusetts did not already resent Tsarnaev and predetermine his guilt, the constant reporting on the Marathon bombing and its aftermath could only further convince the prospective jurors of his guilt. Adding the death penalty element to these circumstances, and the makings for a presumption of prejudice abound. If a presumption does not exist here, when would it? How big must a terrorist attack be? How numerous and widespread must the body count and impact be? How pervasive and detailed must the coverage be before a federal court must presume the existence of prejudice?
>
> By refusing to grant a change of venue in this case -- one of the most well-known, well-publicized, and emotionally-resonant terrorist attacks ever to go to trial -- both the district court and the majority are suggesting that there could never be a case which mandates a change of venue. If their decisions are allowed to stand, we might as well erase Rue 21(a) from the Federal Rules of Criminal Procedure, some of the due process principles from the Fifth Amendment, and the "impartial jury" phrase from the Sixth Amendment.

C. What's Next

The driving point of Judge Toruella's second dissent -- if not a change of venue is not appropriate here, when would it be? -- is not easily rebuffed. Procedurally, however, the standard to justify mandamus relief was prohibitively high. The standard on appeal is less so. The First Circuit, and perhaps the Supreme Court, will have to grapple with Judge Toruella's query and ask how a community could be impacted by an event any more than Boston in the wake of the Marathon bombing. The event itself is one of the largest public events held in Boston -- and virtually anywhere else in the country. More than that, following the bombing, the government subsequently shut down Boston and its surrounding communities while the manhunt for Tsarnaev was ongoing. That act was, if not unprecedented, extraordinarily unusual, and affected the entirety of the community in a profound, personal way, including potential members of the jury, their friends and relatives.

The reliance on *voir dire* has its drawbacks. As Tsarnaev pointed out, well-meaning jurors may tell a judge that he or she could decide the case based solely on the evidence and not be able to ultimately separate his or her preconceived notions from the evidence presented. Others may simply lie about their potential prejudices during *voir dire* and be seated on the jury. One need not go far to find an example of that. The last death penalty case tried in the District of Massachusetts, against Gary Lee Sampson, ended with a jury deciding on the death penalty in 2003. In 2011, that decision was vacated because a juror was not completely truthful during *voir dire* about her past interactions with law enforcement concerning her daughter and former husband, which the trial judge found would have resulted in her exclusion.

Despite the presumptions of the law, *voir dire* is not foolproof, and the quantum of evidence that can be found regarding potential and former jurors is far greater now than it has ever been. If a juror seated on the Tsarnaev trial has done what Tsarnaev and Judge Toruella were afraid of -- mistakenly believed, or falsely claimed, that he or she could be impartial, because of pressures imposed by the unique aspects of this case -- the trial may have to be done again. Trying a case like this is a hardship on everyone involved and the possibility of putting all of the participants in the trial through another is troubling, as those involved in the Sampson case will discover. The Tsarneav appeal, however, could clarify the law governing pre-trial of venue motions so that the next high profile case will benefit from clearer appellate guidance.

The Categorical Approach and the Applicability of *Johnson v. United States* to Immigration Law

By Melissa Stewart and Anthony Rufo, Foley Hoag LLP

The Supreme Court recently reaffirmed its fidelity to the categorical approach in federal immigration law. In *Mellouli v. Lynch*, No. 13-1034, the Court found that the categorical approach should apply equally to drug paraphernalia possession offenses as it does to drug possession and distribution offenses. The categorical approach has long been used in the immigration context to determine which state law criminal convictions are considered deportable offenses under federal law, but the use of the approach is not limited to the immigration context. Courts also apply the categorical approach to the Armed Career Criminal Act (ACCA) in order to determine whether prior convictions in state court subject a defendant to a mandatory minimum sentence under a federal "three strikes" statute. The Supreme Court's recent decision in *Johnson v. United States*, No. 13-7120, analyzes the ongoing use of the categorical approach in relation to the ACCA.

The *Johnson* majority voided a portion of the ACCA, the so-called residual clause, finding it unconstitutionally vague in violation of the right to due process. The Court in *Johnson* is careful not to call in to question the applicability of the categorical approach, but it does include in its analysis the nature of the approach that eschews an examination of the particular conduct that may lead to a criminal conviction. The court reasoned that the use of the categorical approach under the ACCA distinguished it from "almost all" other statutory contexts. Except, of course, the immigration context.

This article provides an overview of the categorical approach in light of *Mellouli* and examines how the determination that the residual clause of the ACCA is unconstitutionally vague and has potential implications on immigration law. We then outline how practitioners can utilize this decision in advocating for their clients.

The Categorical Approach in the Immigration Context

The Immigration and Nationality Act (INA) outlines several categories of crimes that are considered removable offenses. If an admitted alien is convicted of a removable offense, they are considered deportable. These crimes include, but are not limited to, convictions related to controlled substances, aggravated felonies, and certain crimes involving moral turpitude. What is considered to be a removable offense under the INA often involves numerous complex subcategories and references to other areas of federal law.

The categorical approach is meant to simplify the comparison between state law and federal law in determining what constitutes a removable offense. The immigration judge need only to look at the elements comprising the minimum conduct required to violate the state criminal statute to see if these elements match the generic federal definition for that category of removable offense. No evaluation of an individual's conduct is required. If an individual is convicted in state court of a crime whose elements come within the definition of a removable offense as defined by federal law, they are considered deportable. In contrast, a categorical match does not exist if there is any element by which it is possible for a person to be convicted under a state criminal statute, or the relevant portion thereof, that is not encompassed within the generic federal definition. If there is no categorical match, then no conviction under such a state statute should be considered a deportable offense.

The categorical approach allows the immigration judge to avoid a trial within a trial, or rehearing the facts of the criminal case that lead to the conviction. The approach has its complexity and its mechanics cannot be fully discussed here, but it nonetheless supports the principles of efficiency and predictability. Namely, non-citizen criminal defendants can better anticipate the immigration consequences of a guilty plea and their counsel can better advise them of those potential consequences, as required by the Sixth Amendment under *Padilla v. Kentucky*.

Mellouli v. Lynch

The Supreme Court decided *Mellouli v. Lynch* on June 1, 2015. The case concerned the criminal conviction and subsequent deportation of Moones Mellouli, a Tunisian citizen and lawful permanent resident. Mellouli was convicted of possessing drug paraphernalia for an unnamed drug, a misdemeanor under Kansas law. The drug paraphernalia in this case was his sock, and the unnamed drug it was used to conceal was Adderall - four tablets, to be exact.

The Court found the appeals court's analysis affirming Mellouli's deportation flawed. The Eight Circuit adopted the reasoning from the Board of Immigration Appeals' (BIA) decision in *Matter of Martinez Espinoza*, which applied a different standard to state convictions for drug paraphernalia possession

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offenses than the standard used for drug possession and distribution convictions. Under the categorical approach, state law convictions for drug possession or distribution are only deportable offenses if the basis for a conviction in state court relates to "a controlled substance" as defined by federal law under the Controlled Substances Act (§ 802). If the basis of a conviction for drug possession or distribution is a state law that is not limited to substances defined in § 802, it is not a categorical match and the offense cannot be considered deportable. However, under *Martinez Espinoza*, the analysis for drug paraphernalia offenses was decoupled from the definition of controlled substances under federal law. A paraphernalia offense was considered deportable if it was "associated with the drug trade in general." As the Supreme Court pointed out, this leads to anomalous and potentially absurd results, in that "minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses." According to the Court, the BIA's interpretation was "owed no deference" under *Chevron* "[b]ecause it makes scant sense."

The Court then properly applied the categorical approach to drug paraphernalia offenses. In order for a drug crime to be considered a removable offense under the INA, it cannot be tied to a controlled substance not defined under § 802. Accordingly, it held that Mellouli's conviction for possessing drug paraphernalia in the form of a sock concealing four unnamed pills was not a removable offense because it arose under a statute which was not limited to § 802 controlled substances.

Johnson v. United States

In *Johnson v. United States*, the Supreme Court considered whether the residual clause of the Armed Career Criminal Act was unconstitutionally vague. Congress enacted the ACCA in 1984 to provide enhanced sentences for felons who commit crimes with firearms, provided they have been previously convicted of violent felonies and/or serious drug offenses three or more times. Pursuant to the ACCA, a violent felony is any crime punishable by imprisonment for more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, [or] involves use of explosives." The residual clause further provides that a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another" shall be considered a violent felony. The Supreme Court has long held that the categorical approach should be used to determine which state court convictions constitute violent felonies under the ACCA. As in the immigration context, the categorical approach as applied to the ACCA looks at the elements of conviction, not conduct.

The Underlying Case

The FBI began investigating Samuel James Johnson in 2010 because of his participation in the Aryan Liberation Movement. During the investigation, Johnson showed undercover agents his collection of firearms, including an AK-47 rifle. Johnson was arrested and charged with multiple weapons offenses and he ultimately pleaded guilty to one count of being an armed career criminal in possession of a firearm. Johnson had been previously convicted of attempted robbery, robbery, and possession of a sawed-off shotgun. Based on these convictions, considered by the trial judge to be violent felonies under the ACCA, the district court sentenced Johnson to a mandatory minimum of fifteen years in prison. Johnson appealed his conviction to the Eight Circuit, arguing that the district court should not have considered his convictions for attempted robbery and possession of a sawed-off shotgun violent felonies under the ACCA, and, moreover, that the ACCA residual clause is unconstitutionally vague. The Eighth Circuit affirmed the sentence, after which Johnson appealed to the Supreme Court.

The Supreme Court's Opinion

Recognizing that the Court has consistently held that the promise of due process prohibits vagueness in criminal statues in order that ordinary people are put on fair notice of what conduct is being specifically prohibited, the majority held that the residual clause was vague and, accordingly, constitutionally impermissible.

The Court rejected arguments that the ACCA residual clause could be applied using some method other than the categorical approach and, in this context, found the provision to be problematic for two reasons. First, unlike the portion of the ACCA that defines violent felonies as crimes that have "*as an element* the use . . . of physical force," the residual clause concerns *conduct* that poses a "serious risk" of injury to others. As a result, when applying the categorical approach to crimes alleged to be covered by the residual clause, courts must go beyond merely analyzing the individual elements that may give rise to a conviction and consider, instead, the kind of conduct involved in such crimes in the "ordinary case." Departing from precedent established in *James v. United States* in 2007, the Court reasoned in *Johnson* that such an undertaking leaves "grave uncertainty" about how to estimate the risk of violence for a particular crime.

A basic requirement of the categorical approach is determining what elements, at a minimum, comprise the basis for a conviction under state law. Defining what constitutes an "ordinary case," however, necessarily goes beyond this and seeks, instead, to define how a statute is typically applied. The Court considered this process of idealizing how a particular

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crime would normally play out to be wholly speculative and ultimately detached from an underlying criminal statute's elements, a process that is at odds with how the categorical approach is typically applied.

In addition, the Court found that the residual clause leaves too much uncertainty as to the degree of risk necessary to render a felony violent. The provision, the Court reasoned, refers only to conduct that poses a "serious potential risk" of violence without further clarification. Applying such consideration to real-world events would be one thing, but the Court could not embrace such imprecision as applied to a "judge-imagined abstraction."

Johnson's Potential Impact on Immigration Law

As the Court reaffirmed in *Mellouli*, the categorical approach is generally used to determine whether an alien has committed a removable offense under federal law based on a state criminal conviction.

Under the INA, an alien that has been convicted of an "aggravated felony" may be deported. Aggravated felonies include offenses that constitute a "crime of violence," defined in part under 18 U.S.C. § 16(b) as "any other offense that is a felony and that, by its nature, involves a ***substantial risk that physical force*** against the person or property of another may be used in the course of committing the offense" (emphasis added). Although not identical to the ACCA residual clause's language ("otherwise involves conduct that presents ***a serious potential risk of physical injury***"), § 16(b) does bear a striking similarity and poses the same problematic risks in the application of the categorical approach. Is it possible then, that §16(b) is likewise unconstitutional?

An obvious distinction between the INA and the ACCA is that the former is a civil rather than a criminal statute. Nonetheless, similar Fifth Amendment considerations may apply in regard to removability under the INA. The Supreme Court has not previously voided grounds for removability as a result of statutory vagueness, but "in view of the grave nature of deportation," the High Court, in *Jordan v. De George*, examined the "application of the vagueness doctrine" to the INA, "despite the fact that [it] is not a criminal statute." This stands to reason because, as the Court stated in *Fong Haw Tan v. Phelan*, "deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." Accordingly, the principals that underpin the Supreme Court's decision in *Johnson* may be equally applicable to the definition of "crime of violence" in § 16(b). Indeed, the same two issues identified as problematic in the ACCA residual clause (use of the "ordinary case" inquiry and uncertainty regarded overall degree of risk required) appear to be present in the statutory language of § 16(b) and its associated case law.

Most federal circuit courts of appeal and the BIA have adopted the "ordinary case" standard as set forth in *James* as the applicable standard under § 16(b). If the "ordinary case" inquiry was too indeterminate for the residual clause of the ACCA, it stands to reason that the same conclusion may be reached with respect to nearly identical language in § 16(b). Likewise, the language in § 16(b) regarding crimes that pose a "substantial risk" of physical force, it can be argued, does not provide sufficient certainty as to the degree of risk contemplated, as was the case regarding the "serious potential risk" language in the ACCA as per *Johnson*. The holding in *Johnson*, however, is limited and, while it directly overrules the Court's prior inconsistent holding in *James*, it has no direct effect on immigration law. *Johnson* does, nonetheless, provide a basis upon which to argue that § 16(b) also violates the principles of due process.

In order to preserve the matters for appeal based on *Johnson*, immigration practitioners should make at least two arguments before an immigration judge in matters in which § 16(b) is alleged as the grounds for removability. First, and most obvious, is to argue that § 16(b) is void for vagueness in light of *Johnson*. Second, in the alternative, even if § 16(b) is not void, the "ordinary case" standard, it may be argued, is no longer applicable as *Johnson* overruled the Court's holding in *James*. Of course, this begs the question as to what standard should be applied in the alternative. The ultimate answer to this inquiry resides in the hands of the courts, or perhaps Congress, as the traditional categorical approach as applied to § 16(b) seems unworkable in light of *Johnson*.

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