

In The United States Court of Appeals
For The First Circuit

UNITED STATES OF AMERICA

Appellee

v.

DZHOKHAR TSARNAEV

Defendant - Appellant

MOTION TO APPOINT COUNSEL ON APPEAL

The Defendant-Appellant, Dzhokhar Tsarnaev, pursuant to 18 U.S.C. §§ 3005 and 3599 and First Circuit Local Rules 46.5 and 46.6, moves this Court to appoint counsel in this direct appeal from his convictions and death sentences. Mr. Tsarnaev specifically moves the Court to (1) substitute, as counsel on appeal, David Patton and the Federal Defenders of New York, and Gail Johnson, Esq., of Boulder, Colorado, for trial counsel Miriam Conrad and the Federal Public Defender Office for the Districts of Massachusetts, New Hampshire, and Rhode Island, and David Bruck, Esq.; and (2) temporarily continue the assignment of his remaining trial counsel, Judy Clarke, Esq., to enable her to transition the

representation to appellate counsel, after which time an additional substitution motion will be made to the Court.

The requested substitution of counsel comports with Local Rule 46.6(b), and with the policy of the Judicial Conference as set forth in the Judiciary Guidelines, which calls for the assignment of new counsel in federal death-penalty appeals. Guide to Judiciary Policy, Vol. 7, Pt. A, Chap. 6, § 620.40 (“the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial”). The Judicial Conference’s policy recognizes that “[c]apital appellate work is a specialty, and a lawyer is rarely a specialist in both trial and appellate representation,” and that “there is value in bringing fresh perspective to issues that have been litigated below.” Guide to Judiciary Policy, Vol. 7, Pt. A, Chap. 6, App. 6A, p.95. *See also* First Circuit Local Rule 46.5(b).

The requested substitution also comports with the practice of other circuits in federal death-penalty appeals,¹ including cases in which Federal Defender

¹ *See, e.g., United States v. Torres*, No. 14-1 (4th Cir.) (appointing entirely new set of attorneys on appeal); *United States v. Umana*, No. 10-6 (4th Cir.) (same); *United States v. Troya*, No. 09-12716-P (11th Cir.) (same); *United States v. Sanchez*, No. 09-12716-P (11th Cir.) (same); *United States v. Runyon*, No. 09-11 (4th Cir.) (same); *United States v. Hager*, No. 08-04 (4th Cir.) (same); *United States v. Mikhel*, No. 07-99008 (9th Cir.) (same); *United States v. Kadamovas*, No. 07-99009 (9th Cir.) (same); *United States v. Honken*, No. 05-3871 (8th Cir.) (same); *United States v. Agofsky*, No. 04-41219 (5th Cir.) (same); *United States v.*

Offices were relieved for appeal.² And, most important, it would provide Mr. Tsarnaev with high-quality, cost-effective representation.

About three months ago, undersigned counsel notified Chief Judge Howard that Mr. Patton and his office had agreed to replace her and her office on Mr. Tsarnaev's appeal and that she would be requesting their substitution (as well as the substitution of new CJA counsel). That substitution is made possible by a cost-containment initiative of the Judicial Conference that established a protocol allowing a Federal Public or Community Defender Organization to be appointed to an out-of-district case when, as here, the need arises.³ The Administrative Office of the United States Courts, which reviews such out-of-district representations, has authorized Mr. Patton and his office to handle Mr. Tsarnaev's appeal.

In support of this motion, undersigned trial counsel, Federal Public Defender Miriam Conrad, further states as follows:

1. This is the federal death-penalty case arising out of the Boston Marathon Bombing. Following a lengthy jury trial in the United States District Court for the District of Massachusetts, Mr. Tsarnaev was convicted on all counts

Mitchell, No. 03-99010 (9th Cir.) (same).

² See, e.g., *United States v. Agofsky*, No. 04-41219 (5th Cir.); *United States v. Mitchell*, No. 03-99010 (9th Cir.).

³ Mr. Patton's office is a Community Defender Organization. See 18 U.S.C. § 3006A(g)(2)(A)-(B).

and sentenced to death on six of the capital counts. Judgment entered on June 24, 2015. An order denying a motion for new trial was entered on January 15, 2016. A timely notice of appeal was filed on January 29, 2016. The appeal has been docketed in this Court.

2. Mr. Tsarnaev is incarcerated at the federal super-maximum security prison, the U.S. Penitentiary Florence-ADMAX (“ADX”), in Florence, Colorado. He remains financially unable to obtain counsel.

3. Mr. Tsarnaev was represented in the district court by the Boston Federal Public Defender’s Office and two capitally “learned” CJA counsel, Judy Clarke of San Diego, California, and David Bruck, of Lexington, Virginia, who were assigned by the district court as “learned” counsel prior to trial, pursuant to 18 U.S.C. §§ 3005 and 3599.

4. This will be only the second direct appeal from a federal death sentence in this Circuit since the current federal capital statutes were enacted more than a quarter-century ago.⁴ Because Mr. Tsarnaev has been sentenced to death, appellate counsel will owe an extra duty of care to present all “arguably meritorious” issues “under the standards applicable to high quality capital defense representation,” and to “present issues in a manner that will preserve

⁴ The only previous such direct appeal was *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007).

them for subsequent review.” *A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.15.1(C) (rev. Feb. 2003). *See also id.* (commentary) (“‘Winnowing’ issues in a capital appeal can have fatal consequences When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored . . .”).

5. Even by the standards of other federal death-penalty cases, representing Mr. Tsarnaev will be especially demanding on appeal, just as it was at trial. Because of the extraordinary nature of the case, undersigned counsel and two experienced Assistant Federal Public Defenders devoted substantial time to the case. The Federal Public Defender’s Office also contributed significant non-attorney staff and other resources to Mr. Tsarnaev’s representation. Ms. Clarke and Mr. Bruck also devoted substantial time to the case.

6. The district court proceedings proved to be extremely complex. The 74-page indictment contained 30 counts and covered not only the Marathon bombing in Boston, but three additional incidents in the Boston area: the homicide of an MIT police officer; the carjacking of a motorist; and a confrontation with police that culminated in Mr. Tsarnaev’s arrest. Pretrial proceedings included extensive motion practice as well as mandamus litigation in this Court regarding the district court’s refusal to change venue. The district-court docket contains more than 1,600 entries. Jury selection, the trial, and the

sentencing hearing consumed 47 court days. The admitted exhibits include thousands of pages of documents, hundreds of physical and demonstrative exhibits, and scores of audio and video recordings. Moreover, the saturation media coverage and other publicity that surrounded every aspect of this case have imposed further demands on Mr. Tsarnaev's trial counsel; no doubt this will continue during the appeal.

7. The governing statutes, 18 U.S.C. §§ 3005 and 3599, authorize this Court to appoint three counsel in a federal capital appeal, as requested here, "if necessary for adequate representation." Guide to Judiciary Policy, Vol. 7, Pt. A, Chap. 6, § 620.10.10(b). Other circuit courts have made such appointments in appeals less complex and demanding than Mr. Tsarnaev's. *See, e.g., United v. Coonce*, No. 14-2800 (8th Cir.); *United States v. Wilson*, No. 13-3566 (2nd Cir.); *United States v. Taylor*, No. 09-5517 (6th Cir.); *United States v. Kadamovas*, No. 07-99009 (9th Cir.); *United States v. Caro*, No. 07-05 (4th Cir.); *United States v. Gabrion*, No. 02-1386 (6th Cir.).

8. The continuity provision of the governing statute suggests that appointment of three counsel for this appeal is appropriate. It provides: "Unless replaced by *similarly qualified* counsel upon the attorney's own motion or upon motion of the defendant, *each attorney so appointed* shall represent the defendant throughout every subsequent stage of available judicial proceedings, including ...

appeals.” 18 U.S.C. § 3599(e) (emphasis added). *See Martel v. Clair*, 132 S. Ct. 1276, 1283-84 (2012).

9. Mr. Patton and his office, the Federal Defenders of New York, as well as Ms. Johnson, are highly qualified and well situated to represent Mr. Tsarnaev in this appeal.

10. Mr. Patton’s office has handled many complex, demanding, and high-profile federal criminal cases at trial, on appeal in the Second Circuit, before the Supreme Court, and in habeas proceedings. Those include cases involving crimes characterized as “terrorism” and charges based on the same statutes under which Mr. Tsarnaev was convicted. Mr. Patton and several attorneys in his offices are members in good standing of the First Circuit bar. Although they are not experienced First Circuit practitioners, they are qualified for appointment under 18 U.S.C. § 3599(d) (“the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation”).

11. Assignment of Mr. Patton and his office to the appeal would not only ensure high-quality representation for Mr. Tsarnaev, but would be fiscally

prudent, since he and his office would not bill the Court for the time it devotes to the appeal, and his office would pay for its expenditures on the case.⁵

12. As with the Federal Public Defender's Office at the trial level, the attorneys Mr. Patton would assign to Mr. Tsarnaev's appeal would not be "learned" in federal death-penalty law. Thus, just as the district court recognized the need for two capital expert CJA counsel to be appointed alongside the defender's office for the trial, this Court should ensure that there are two "learned" counsel to work alongside the Federal Defender office on the appeal.

13. Because of the general unavailability of the death penalty in most of the districts in this circuit, and the dearth of federal capital cases in this Circuit, there are no local counsel "learned" in federal death-penalty law and available for assignment to this appeal. Both at the trial stage of this case, and in the only prior federal capital direct appeal to this Circuit in the modern era, *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007), "learned" counsel were brought in from outside the Circuit.

14. We request that Gail Johnson, Esq., be appointed as one of those counsel on appeal. She is a partner at the law firm of Johnson, Brennan & Klein in Boulder, Colorado, is a longstanding member of the Ninth and Tenth Circuit

⁵ As in the district court, "learned" counsel would, of course, submit vouchers to this Court and be compensated through CJA funds.

bars, and has recently become a member of the First Circuit bar. She has substantial experience representing defendants facing the death penalty – including in federal trial-level cases– and in state capital appeals in Colorado and California. She has served on the faculty at two training conferences that the Administrative Office of the United States Courts recently sponsored for attorneys handling federal capital cases. A member of the CJA panels for the District of Colorado and the Tenth Circuit, she also has extensive experience in federal court representing non-capital criminal defendants at trial and on appeal. She received her J.D. from Yale Law School, served as an E. Barrett Prettyman Fellow with the Georgetown Criminal Justice Clinic, and clerked for a Justice on the Colorado Supreme Court. (A copy of her CV is attached to this motion.)

15. Thus, Ms. Johnson qualifies for appointment to Mr. Tsarnaev’s appeal, as capially “learned” counsel under 18 U.S.C. § 3005 and under 18 U.S.C. § 3599(d).

16. Moreover, Ms. Johnson’s location in Colorado would help provide Mr. Tsarnaev with high-quality and cost-effective representation. At ADX, Mr. Tsarnaev is kept in extreme solitary confinement, as one of the few federal inmates under “Special Administrative Measures” (SAMs). The SAMs severely limit his ability to communicate with others, with narrow exceptions made for counsel and a few immediate relatives.

17. Such “years on end of near-total isolation” are known to “exact a terrible price.” *Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). In any capital case, counsel must not only “maintain close contact with the client regarding litigation developments,” but also “monitor the client’s mental, physical and emotional condition for effects on the client’s legal position,” which they can do only through in-person visits with the client. A.B.A. Guideline 10.15(E)(1)-(2).

18. For counsel based in the Northeast, travel to ADX in Florence, Colorado, is time-consuming and costly. The prison is more than a two-hour drive from the nearest major airport, in Denver. Having at least one attorney on the appellate team whose office is within driving distance of Mr. Tsarnaev will facilitate more sustained and frequent client visits, while saving money. Moreover, Ms. Johnson has previous experience representing clients who are ADX inmates and in addressing the related administrative and legal issues.

19. Finally, we request that the Court temporarily continue the assignment of Mr. Tsarnaev’s second “learned” trial counsel, Judy Clarke, Esq., to enable her to transfer Mr. Tsarnaev’s representation to appellate counsel. That transition will require some time, given the scope and complexity of the case. We anticipate that, when that process is completed, a motion will be filed to substitute a capitally “learned” appellate attorney for Ms. Clarke.

20. All of Mr. Tsarnaev’s trial attorneys support this motion, believing that Mr. Tsarnaev’s interests – and the interests of justice and judicial economy - would best be served by the proposed substitution. *See Martel*, 132 S. Ct. at 1284 (“interest of justice” standard applies to substitution motions under Section 3599). They have discussed this request with Mr. Tsarnaev, who consents to it.

21. In arriving at the proposed substitution, trial counsel have closely consulted with the Federal Capital Appellate Resource Counsel, Barry Fisher, who is charged by the Administrative Office of the United States Courts with helping federal courts identify qualified counsel for federal capital appeals.⁶ Mr. Fisher too supports this motion and the requested appellate assignments. He also agrees that the scope, complexity, and novelty of this particular federal death-penalty appeal will require at least three assigned counsel, including two capitally “learned” counsel.

22. For all these reasons, Defendant-Appellant Dzhokhar Tsarnaev respectfully requests that the Court (A) grant this motion; (B) substitute, as counsel on appeal, David Patton and the Federal Defenders of New York, and Gail Johnson, Esq., of Boulder, Colorado, for trial counsel Miriam Conrad and

⁶ *See* Guide to Judiciary Policy, Vol. 7, Pt. A, App. 6A, pp.94 & n.2, 98-101 (urging courts to consult with Appellate Resource Counsel on capital appointments, and recognizing that such consultation is “instrumental” to ensuring “high quality representation”).

the Federal Public Defender Office for the Districts of Massachusetts, New Hampshire, and Rhode Island, and David Bruck, Esq.; and (C) temporarily continue the CJA appointment of his remaining trial counsel, Judy Clarke, Esq., on this appeal.

Respectfully submitted,

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by his attorneys:

/s/ Miriam Conrad

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants, including all counsel of record, as identified on the Notice of Electronic Filing on February 17, 2016.

/s/ Miriam Conrad