

# Prosecute Tsarnaev again? Really?

By Nancy Gertner



Nothing about the intention of District Attorney Marian T. Ryan to prosecute Boston Marathon bomber Dzhokhar Tsarnaev for murder in Middlesex County after he has received a death sentence in federal court makes sense.

It doesn't make sense as a matter of law, or even good prosecution policy. It makes sense only as a political calculation, grandstanding for the electorate, precisely what a professional DA's office should not do.

According to press reports, Ryan justifies the state prosecution because the federal case will be appealed. Let's follow the logic: If that appeal is successful, so the argument would go, the Middlesex prosecution would be the backstop. Of course, if Tsarnaev were convicted in Middlesex County, there also would be an appeal — indeed, an automatic appeal to the Supreme Judicial Court in life imprisonment cases. The notion that while the federal prosecution is vulnerable on appeal Middlesex would manage an error-free trial defies logic.

In fact, some of the most serious issues in the federal appeal of Tsarnaev also will be present in any Middlesex trial. Just one example: However difficult the

federal jury selection was, the state selection — after nearly four months of saturation trial coverage — will be far, far more difficult. At least the federal court had a pool of jurors from all the counties of eastern Massachusetts; Middlesex is restricted to the county pool.

Even if the federal conviction were reversed, the most likely outcome would be life imprisonment, the only punishment for which Tsarnaev is also vulnerable in Middlesex County. Since Tsarnaev admitted to his participation in the bombing, the only contested issue is whether he is to receive the federal death penalty rather than life imprisonment.

But the most significant problem is a legal one. A subsequent prosecution offends sound federal and state policy. A state prosecution following a federal one arguably based on the same offense is not a constitutional violation, at least under current U.S. Supreme Court law. It is not double jeopardy because the Supreme Court held that crimes against different sovereigns, state and federal, can be prosecuted separately.

To be sure, the Supreme Court's opinion has been widely criticized, particularly where federal criminal law has grown so dramatically as to overlap with state law in many areas. And there are exceptions to the dual sovereignty principles, although rarely applied and less than clear, such as when one sovereign colludes with another to get a second bite at the apple just because the first prosecutor didn't get the sentence he or

she wanted the first time around.

If the press reports are correct, DA Ryan has admitted that that's her goal here: If the federal case were overturned, Middlesex would try again.

But constitutional or not, federal government has adopted a policy against a federal prosecution following a state one, except in narrow circumstances. (The civil rights prosecution of the officers involved in the Rodney King beating following the officer's state acquittal is one such example.) Federal prosecutors who wish to bring a federal prosecution following a state prosecution based on the same conduct must obtain approval from an assistant attorney general after showing that the prior prosecution left a substantial federal interest unvindicated.

And in the reverse situation — a state prosecution following a federal one, as here — SJC precedent enshrines a similar common sense policy. Mob boss Genaro Angiulo, for example, could be prosecuted for state conspiracy to commit murder following a conviction for conspiracy to commit murder in aid of racketeering only because punishment for the state offense was more severe than the federal one. Here, the state penalty — life imprisonment — is not remotely more severe than the federal — death.

So why the expense, the effort, the resources to do this when surely there is other crime in Middlesex County to be prosecuted? Be assured, this is a political calculation, not a legal one. **MLV**

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