

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, December 1, 2015
10:02 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 (The Court enters the courtroom at 10:02 a.m.)

4 THE CLERK: The United States District Court for the
5 District of Massachusetts. Court is in session. Be seated.

6 For a motion hearing in the case of *United States*
7 *versus Dzhokhar Tsarnaev*, 13-10200. Would counsel identify
8 yourselves for the record.

9 MR. WEINREB: Good morning, your Honor. William
00:16 10 Weinreb for the United States.

11 MR. CHAKRAVARTY: As well as Alope Chakravarty, your
12 Honor.

13 MS. PELLEGRINI: Good morning, your Honor. Nadine
14 Pellegrini for the United States.

15 THE COURT: Good morning.

16 MS. CLARKE: Judy Clarke, Miriam Conrad, Bill Fick and
17 Tim Watkins for Mr. Tsarnaev.

18 THE COURT: Good morning. We have a number of
19 motions -- or agenda items. I would like to start with the
00:16 20 motion for judgment of acquittal and/or a new trial.

21 As I indicated in the order setting the hearing, I'm
22 interested only in argument about the so-called *Johnson* issues.
23 There are two *Johnson* cases. And I think an orderly way to do
24 it would be to hear from you as the issues arise under the
25 statute; that is, first, with respect to the force clause and

1 perhaps the first *Johnson* case -- and I'll hear from both of
2 you -- and then we'll move to the so-called residual clause and
3 the second *Johnson* case, all right?

4 Mr. Fick.

5 MR. FICK: Thank you, your Honor.

6 So as the Court knows, 15 of the 30 counts of
7 conviction and three of the six counts resulting in a death
8 sentence for violation of Section 924(c) which penalizes the
9 use of a firearm during and in relation to an underlying or
00:17 10 predicate crime of violence -- and so before I really start
11 launching into the two pieces of the definition, the force
12 clause, so-called, and the residual clause, I just -- it's
13 important, I think, to keep in mind that the issue here -- the
14 legal question is not whether the particular conduct involved
15 in the underlying or predicate offense in this case was violent
16 in the common sense of the word, rather, the question is
17 whether the underlying or predicate statutes of conviction
18 categorically qualify as crimes of violence; that is, the
19 question is whether all of the conduct criminalized by the
00:18 20 underlying or predicate statutes necessarily entail the use of
21 violent force. And so that is the sort of focus, ultimately,
22 of the inquiry.

23 So as the Court invited to start with the force
24 clause, that clause of the armed career criminal -- I'm
25 sorry -- of 924(c) says that a crime of violence means an

1 offense that is a felony and has as an element the use,
2 attempted use or threatened use of physical force against the
3 person or property of another. And so the question is whether
4 categorically the underlying or predicate statutes of
5 conviction meet that definition in terms of the force clause.

6 So running through each of them in turn, the first
7 addressed in the papers is the convictions under Section 2332a,
8 use of a weapon of mass destruction. And there, as with all of
9 these statutes really, it's -- as we know in federal practice,
00:19 10 Congress has a tendency to write statutes rather broadly. They
11 cover a wide variety of criminal conduct. They can be deployed
12 creatively by prosecutors to cover a wide variety of criminal
13 conduct.

14 And with regard to the use of a weapon of mass
15 destruction statute, the important piece of information, so to
16 speak, to have in mind here is that in addition to activities
17 that qualify as the use of violent physical force, various
18 kinds of conduct that do not entail the use of violent physical
19 force are also actionable under that statute; for example, the
00:19 20 mere deployment of substances or objects that can cause injury
21 in a passive way.

22 And so there's actually a fairly well-developed body
23 of case law even before *Johnson* under the force clause across
24 the circuits. And I think it's very clear from these circuit
25 decisions that this kind of activity -- those kinds of -- that

1 kind of offense conduct, the mere passive deployment of a
2 substance or an object, would not qualify as the use of violent
3 physical force as required under both of the *Johnson* cases as
4 they operate together.

5 The Fourth Circuit case is called *Torres-Miguel*, the
6 second is -- the Second Circuit case is *Chrzanoski*, and the
7 Tenth Circuit is *Perez-Vargas*. They're sort of describing --
8 quoted extensively in the papers, and all of them sort of
9 contain very express language to say that various kinds of
00:20 10 conduct that the courts posit as being covered by the statutes
11 at issue there, including release of noxious substances,
12 putting down some kind of a barrier that might interfere with
13 the motion of a car, all of those kinds of activities are not
14 violent force, they are actionable under the statutes at issue
15 in those cases, and, therefore, those statutes are not
16 categorically crimes of violence. Similarly, here the 2332a
17 weapons of mass destruction statute criminalizes expressly
18 things like the passive release of chemicals; therefore, not
19 all of the conduct the statute prohibits or penalizes is a
00:21 20 crime of violence, categorically, therefore, the statute is not
21 a crime of violence and it cannot meet the force clause.

22 THE COURT: What do you mean by "the passive release"?

23 MR. FICK: Well, an action -- a physical action that
24 does not actually entail the use of -- or the imposition of
25 violent physical force. If you open a container that contains

1 a noxious chemical, that would or could violate the statute.
2 That could or would cause serious bodily injury or death. But
3 that is not violence in the way that both of the *Johnson* cases
4 together have described it and the way that the other circuits
5 in the cases that we cited have interpreted it.

6 What the government does in their opposition here is
7 to really sort of -- to sort of elide or sort of play a little
8 sort of switching of where the violence comes into play. I
9 think if I can find the language they use, the government
00:22 10 says -- "Use of physical force," the government says, "can
11 include use of matter or energy sufficient to cause pain or
12 injury even if there is no physical violence in deployment of
13 the matter or energy." And they sort of make up that statement
14 out of whole cloth.

15 That is inconsistent with the *Johnson I* opinion which
16 talks about the actual use of violent physical force, force
17 that can cause injury, and it conflates the principle of the
18 ability to cause injury with the use of violent force. In
19 other words, it's certainly correct that the ability to cause
00:22 20 injury is a necessary component of violent physical force under
21 *Johnson* and the language of the statute, but it is not alone
22 sufficient because many courts in the multiple sort of litany
23 of cases cited have held that various offenses which have the
24 causation, or the possible causation of physical injury as an
25 element, do not entail the use of violent force, do not meet

1 the force clause; and, therefore, cannot be predicate offenses
2 for the Armed Career Criminal Act, 924(c), the pertinent
3 guideline provision, et cetera. So that's the core of the
4 argument with regard to 2332a, the use of weapon of mass
5 destruction.

6 The second predicate offense at issue in this case is
7 Section 2332f, the bombing of a public place.

8 I'm sorry. If the Court had questions about the
9 first --

00:23 10 THE COURT: No, no, go ahead. Thank you.

11 MR. FICK: There -- again, there are sort of two
12 reasons or two categories of activity that the statute would
13 criminalize or penalize that are not force clause -- they don't
14 meet the force clause under the *Johnson* cases and the language
15 of the statute. The first such possible way of violating those
16 statutes are the mere delivery or placement of some kind of
17 explosive device. No violent physical force is employed.
18 There's not necessarily, to be convicted under the statute, any
19 requirement that there be an intention to employ the violent
00:24 20 physical force; you merely would have to intentionally place or
21 deliver the device. That would violate the statute. No
22 violent force is involved; therefore, it cannot categorically
23 be a crime of violence.

24 Similarly, a similar argument with regard to the
25 Subsection A applies here as well because the bombing of a

1 public place also includes the use of a lethal device
2 containing chemicals. So the same argument about the passive
3 deployment of chemicals or noxious substances would similarly
4 also apply here. To the extent that kind of conduct is covered
5 under the statute, again, doesn't entail violent force,
6 therefore, the statute covers conduct that is not violent
7 force, it is not categorically a crime of violence.

8 The third predicate at issue is 844(i), the malicious
9 destruction of property statute. And there are, I guess simply
00:25 10 put, two reasons there why the statute does not categorically
11 qualify as a crime of violence. The first is, again, the
12 passive deployment of, for example, fire is covered under that
13 statute. One can light a fire -- has the potential or the
14 actual -- it may actually cause harm or death, it has the
15 potential to do so, but the employment of fire, the deployment
16 of fire, is not in itself the employment of violent force.

17 The second reason why that statute cannot qualify as a
18 predicate is that -- the mens rea element, the mental state
19 element of malicious destruction of property includes not only
00:25 20 intentional acts but also reckless acts. And so there's,
21 again, a relatively large and well-settled body of case law
22 under the force clauses of the various violent felony
23 crime-of-violence definitions that says statutes that can be
24 violated by reckless means are not categorically crimes of
25 violence. And so again, for that second reason, 844(i) does

1 not qualify.

2 The next category of predicate offenses at issue in
3 the case are the various conspiracy offenses to commit the
4 three underlying crimes I just talked about. For the very
5 reasons that the underlying crimes are not categorically crimes
6 of violence, conspiracies to commit those crimes are not
7 categorically crimes of violence.

8 In its papers, the government sort of falls back on
9 the use of the possibility of injury in its argument, and that
00:26 10 sort of devolves back into really the residual clause. So to
11 the extent that's an issue, that really, I think, weights -- I
12 think better falls under the residual clause argument. But the
13 bottom line is if the objects of the conspiracy are not crimes
14 of violence, the conspiracies themselves cannot be.

15 THE COURT: And vice versa?

16 MR. FICK: And vice versa, right.

17 The fourth predicate at issue here is the carjacking
18 statute. There the issue is that -- that statute can be
19 violated by mere intimidation, and intimidation can be
00:27 20 performed -- or can be deployed without either a threat of
21 violence or the actual use or threat of violence.

22 The examples in some of the cases that don't deal with
23 the federal carjacking statute but deal with, rather, various
24 analogous state cases talk about, for example, things such as,
25 you know, threatening to interfere with the transit of a

1 vehicle; again, potentially the use of poisons or toxic
2 substances. One could threaten to use all of those things as a
3 means of intimidating the driver of a vehicle, but those
4 things, those activities, are not -- do not involve the use of
5 violent physical force; therefore, categorically the statute
6 can be violated in non-violent ways and it cannot be
7 categorically deemed a crime of violence.

8 The final predicate at issue in this case are the
9 so-called Hobbs Act robbery -- I think it was -- well, yeah,
00:28 10 the Hobbs Act robbery count. I think there's just one count,
11 Count Twenty-Two. And that fails the categorical force clause
12 test for some of the same reasons that I talked about in terms
13 of the other statutes: Number one, it can be violated by
14 employment of intimidation. And for the same reasons discussed
15 with regard to the other statutes, that can be done without the
16 threat or use of violence.

17 In addition, the Hobbs Act can be violated by threats
18 to harm and intangible asset. For example, there are cases
19 under the Hobbs Act where various kinds of fraud or
00:28 20 economic-type activities that might affect the value of a
21 security or a company, those types of activities have been
22 deemed ways in which the Hobbs Act can be violated. There's
23 obviously no violence involved in those things. And so for
24 that reason there's -- again, it's a category of activity or a
25 class of activity made criminal under the statute that is not

1 categorically violent.

2 Under the Hobbs Act, the government does cite, I
3 think, one -- or maybe a handful of First Circuit cases from
4 prior years indicating that the Hobbs Act is a categorical
5 crime of violence. Those cases either predate the whole
6 *Leocal/Johnson* line of Supreme Court decisions that sort of
7 change the landscape here, or in the case of, I think, one of
8 them -- if I can recall the name -- I believe it's
9 *Morales-Machuca*, a 2008 case -- that's a case where the First
00:29 10 Circuit just sort of said, Well, a Hobbs Act robbery is a
11 924(c) predicate, citing an old case. You go back to the old
12 case, and the old case simply said, Well, in this case we had a
13 924(c) predicate alleged to be a Hobbs Act robbery. It was
14 never challenged. So, again, this is just a reflection of the
15 fact that prior to this (c) change in the law brought by the
16 Supreme Court with *Leocal*, *Johnson I*, *Johnson II*, everyone sort
17 of assumed, whether under the force clause or under the
18 residual clause, that a Hobbs Act robbery is categorically a
19 crime of violence.

00:30 20 Now that the Supreme Court, though, has clarified the
21 kind of analysis that has to be conducted and the way in which
22 that analysis is conducted and what "violent physical force"
23 means, you know, those cases really have no further weight to
24 the extent there was any analysis in them in the first place,
25 which there wasn't.

1 So I think that covers all of the actual predicates
2 that are at issue here. The sort of bottom line is that given
3 the number and weight of the 924(c) convictions in the case and
4 the jury's consideration of aggravating and mitigating factors,
5 the loss of those convictions would mean that a new penalty
6 trial should be held as to all counts.

7 THE COURT: Why does that follow?

8 MR. FICK: Well, half of all of the counts of
9 convictions --

00:30 10 THE COURT: It's simply a sentencing enhancement for
11 the term of years.

12 MR. FICK: Well, three of the six death penalty or
13 death verdicts in this cases came on 924(c) counts. Fifteen of
14 the 30 guilty verdicts in the case as a whole came on 924(c)
15 counts. So that's a weighty sort of -- a weighty piece of the
16 sort of aggregate of crimes of which the defendant was
17 committed, both in terms of non-death sentences and in terms of
18 death sentences. And at this point in time it's really
19 impossible to unpack what weight that might have had in the
00:31 20 jury's deliberations and their weighing of aggravating and
21 mitigating factors.

22 And to the extent half of the convictions in the case,
23 half of the death sentences in the case are called into
24 question, are really invalidated by *Johnson*, it really requires
25 a redo of the entire sentencing proceeding because, again, we

1 don't know how the number and nature of the convictions came
2 together in the jury's analysis of aggravating and mitigating
3 factors. There's sort of -- there's no case law directly on
4 point, obviously, because there's no sort of analogous
5 circumstance that I'm aware of in the cases, but there are some
6 sort of related cases that sort of use related principles or
7 rely on related principles cited in the papers to suggest that
8 where, you know, some counts of conviction are gone, you need
9 to look again at the whole package.

00:32 10 THE COURT: Let me ask you a question about something
11 that I haven't seen in the cases and see if you have a view on
12 it. The ACCA, the career offender guideline, some of the
13 immigration statutes that refer to prior convictions, all are
14 directed to prior convictions that are truly prior; that is to
15 say, historical. And the categorical approach was, at least in
16 part, developed as a matter of convenience and reliability, and
17 perhaps even *Apprendi* or *Alleyne* type issues.

18 Structurally, a 924(c) enhancement comes virtually
19 simultaneously with the conviction by the same jury of the
00:33 20 predicate offense. It's a different circumstance in a case
21 such as this, for example. We don't have to worry whether the
22 intimidation under the carjacking statute was by threatening to
23 post embarrassing pictures on the Internet or by holding a gun
24 to somebody's head because we know what the evidence was and we
25 know which crime the jury was thinking of.

1 Isn't that a different circumstance from 924(c) from
2 all the other cases?

3 MR. FICK: It's a different circumstance, but I would
4 suggest legally it's a distinction without a difference. I
5 think -- in a way what the Court is describing is a basis on
6 which one might argue that. Looking at this in the posture
7 we're in now, you might use a kind of as-applied analysis as
8 opposed to a categorical or a facial analysis of the
9 constitutionality of the statutes and the way all of that
00:33 10 works.

11 In *Johnson II*, in the second *Johnson* decision, Justice
12 Alito sort of suggests in his dissent that that's what the
13 court should have done. He sort of chides them for not doing
14 it. I mean, again, it was an ACCA case, not a 924(c). But the
15 court basically says, No, that isn't the question. The
16 question is: Was the statute as passed by Congress
17 constitutional? Is it being properly employed or deployed
18 here, and if it's not, you know, we can't let it stand, right?

19 And that is, I think -- even though there is sort of a
00:34 20 distinction in terms of the posture and what the jury found,
21 what this all sort of devolves back to is what laws that
22 Congress passed. And Congress passed laws, as the Supreme
23 Court has -- as the case law has sort of evolved out of those
24 laws or interpreting those laws over the years, the analysis is
25 categorical in nature.

1 And so the question is: Is a particular underlying
2 crime properly a predicate for a 924(c) -- not an enhancement,
3 really. I mean, you can call it an enhancement, but it really
4 is a separate crime. You know, there's a separate count in the
5 indictment for the 924(c) counts, it is a separate crime. And
6 so we're talking about the crimes as defined by Congress. And
7 whatever the particular facts in a situation might have been in
8 a case, I mean, that's not the way the law is written. That's
9 not the way Congress passed the law, that's not the way the
00:35 10 counts have interpreted the law.

11 And I think for the Court to sort of engraft that onto
12 this legal structure, sort of as we have it now, there's really
13 no basis to do that. It would be sort of a functional way, I
14 guess, to try and save the result, but I think it would be
15 unprincipled in the way the courts have consistently
16 interpreted and applied these statutes in the evolving sort of
17 train of cases that we've had.

18 THE COURT: Okay. We'll hear from the government on
19 this and then we'll come back to the second clause.

00:35 20 MR. WEINREB: Your Honor, on the first question of
21 whether the statutes in question are, in fact, crimes of
22 violence by force clause under the categorical approach, our
23 argument, simply stated -- we stated it in the brief, and I
24 won't belabor it -- *Johnson I* considered what "violent physical
25 force" means in the context of the ACCA, which is,

1 for purposes -- when it comes to the force clause is
2 essentially identical, you know, considering whether a
3 touching -- an offensive touching could amount to a crime of
4 violence. And the court said, "Physical in this context
5 'plainly refers to force exerted by and through concrete bodies
6 distinguishing physical force from, for example, intellectual
7 force or emotional force. And physical force means violent
8 force; that is, force capable of causing physical pain or
9 injury to another person." That's the definition of "physical
00:36 10 force."

11 And a common sense reading of all of these statutes
12 shows that they do require categorically the use of physical
13 force. These are not statutes -- use of a weapon of mass
14 destruction against person or property, bombing a place of
15 public use and so on, these are not statutes that can be
16 committed through the use of intellectual force or emotional
17 force; they are statutes that prohibit the use of matter or
18 energy capable of causing physical injury or death to other
19 people.

00:37 20 The interpretation of the statute -- or really, the
21 reading, I should say, of *Johnson I* that the defense proposes,
22 makes no sense. It would lead to absurd results and can't
23 possibly be what Congress intended. It's hard to believe that
24 Congress meant a crime -- meant it to be a crime of violence if
25 you hurled a canister of poison gas at somebody and hit them in

1 the head with it before it poisons them, than if you just leave
2 it on the ground, leave open the top and walk away.

3 Under their view, booby-trapping a house by setting it
4 so that as you open the door a gun shoots in your face would
5 not be a crime of violence because all you did was place a gun
6 somewhere and tie a string to it to a doorknob; you didn't
7 actually hurl something. It makes no sense and there's no
8 cases that would suggest that you -- or there's certainly no
9 Supreme Court cases that would suggest that the use of violent
00:38 10 force does not include any application of force or energy that
11 causes -- or at least is capable of causing serious bodily
12 injury or death.

13 I'll address just one of the -- the only statute where
14 I think there's potentially any question about it would be the
15 Hobbs Act statute which talks about intimidation. First of
16 all, I should say both the Hobbs Act and carjacking, there are
17 numerous cases that have held that those are categorically
18 crimes of violence under the force clause, but to the extent
19 that those statutes permit a conviction based upon
00:39 20 intimidation, they are talking about intimidation through the
21 threat of physical force. It's not carjacking to take
22 somebody's car by dint of your superior intellect or by dint of
23 your charming personality or by any other way of intimidating
24 somebody other than threat of physical force. I don't think
25 you'll find a case that would contradict that proposition.

1 We disagree that even if these cases don't satisfy the
2 force clause or the residual clause and the residual clause is
3 out and, therefore, the 924(c) statutes -- convictions would
4 have to be vacated then a new penalty phase is needed.

5 Particularly in this case, all of the counts on which the jury
6 found that the defendant deserved the death penalty arose from
7 the same underlying conduct. They may have violated a number
8 of different statutes, but it is the same underlying conduct.

9 There is absolutely no reason to believe that if the
00:40 10 924(c) counts had not even been in the indictment in the first
11 place, the result would have been any different. And that's
12 particularly true in this case because the addition of the
13 924(c) counts did not open the door to any additional evidence
14 that would have not otherwise been admissible, and the defense
15 has not even claimed that that's the case. They simply talk
16 about some ineffable effect of having additional counts.

17 But the fact that the jury carefully distinguished/
18 parsed among the different death penalty counts, finding that
19 the defendant deserved the death penalty on some rather than
00:41 20 others, militates against the argument that the sheer number of
21 counts somehow overwhelmed them. And given in particular that
22 the conduct underlying the 924(c) counts under which the death
23 penalty was imposed essentially duplicated the conduct in the
24 other counts in which the death penalty was imposed, and that
25 the same is true for the non-death penalty 924(c) counts, in

1 each case the -- they were based on underlying crimes of
2 violence that were also charged in the indictment of which the
3 defendant was found guilty, there's no weight to that argument.

4 And then the third issue that the Court raised I think
5 is one that I gave some thought to as well. I begin by stating
6 that to the extent that there's any question as to whether
7 these statutes violate the force -- satisfy the force clause or
8 not despite the presence within the statutory text of multiple
9 means of committing them, that can be -- any doubt on that
00:42 10 score can be resolved by recourse of *Shepard*-approved documents
11 like the indictment, the jury instructions and the verdict
12 form. There's no need to find -- that, of course, does require
13 finding that the statutes are divisible, but it is not
14 necessary to find that the particular means of committing the
15 offense are elements in the *Apprendi* sense, meaning that they
16 actually creates separate crimes.

17 There's nothing in the courts' decision in *Descamps* or
18 any of the other cases that address divisibility to suggest
19 that for a means of committing a crime to be -- to meet the
00:43 20 elements test, that it must be an element in the sense that if
21 the -- an element in the sense that the jury must be unanimous
22 that the case was -- that the crime was committed in that
23 manner in a situation where multiple possible manners of
24 committing it were charged. Let my try to phrase that more
25 clearly.

1 In a situation with which -- it is necessary for a
2 crime to meet the elements test, it is necessary to find that
3 the *Shepard*-approved documents make it clear that the means in
4 which the crime was committed was by violent means and that the
5 jury unanimously concluded it was by violent means, but if the
6 charging documents and the jury instructions and the verdict
7 form all specify a particular means of committing the crime,
8 then it is clear that they were unanimous that it was committed
9 in that particular way. And the fact that had the crime been
00:44 10 charged differently, had multiple means been specified in the
11 indictment, some of which were violent and some of which were
12 not, and the fact that under those circumstances it would not
13 satisfy the elements test because under those circumstances you
14 could not be certain which manner the crime was committed in,
15 is irrelevant. In other words, it doesn't matter whether -- as
16 long as only one means is charged and that's a violent means,
17 it doesn't matter whether you label it an element or a means.
18 And *Descamps* actually makes that clear. Although they use the
19 word "element," they don't use it in the same way that they've
00:45 20 used it in other cases.

21 As for whether you need to limit yourself to
22 *Shepard*-approved documents in a situation where the conviction
23 occurs in the very case that is being -- that you wish -- the
24 convictions being challenged, I think that there is, I think, a
25 lot of good sense behind the conclusion that there is no need

1 to limit oneself to *Shepard*-approved documents. And if you
2 look at the cases that originated that, one of the reasons for
3 limiting it was the concern that there would be -- it was just
4 impractical to have to mine through all the different records
5 of different state courts in trying to look for -- trying to
6 divine exactly what it was that the jury necessarily had to
7 find in order to have convicted the person of the violent way
8 of committing the crime.

9 And it is true, as Mr. Fick says, that in -- is
00:46 10 it -- it was in *Descamps*, that Justice Alito did propose that
11 if you could determine that it was -- that the jury necessarily
12 convicted -- or the pleading document shows that the defendant
13 necessarily admitted that he committed the crime in a violent
14 way, that would be sufficient, and the majority did not adopt
15 that view. So there is reason to question whether the Supreme
16 Court would allow recourse to him even in the case in which the
17 crime was being tried itself. But it's not foreclosed by any
18 case that I'm aware of. I agree. I've never seen it. So I
19 think that is an alternative ground, but we would not offer it
00:47 20 as our only ground.

21 THE COURT: Okay.

22 MR. FICK: If I could just briefly address the
23 *Descamps* issue which was not part of my initial presentation.

24 So I think the discussion about *Shepard*-approved
25 documents and the whole *Descamps* case analysis is a bit of a

1 red herring here. What *Descamps* basically said was a statute
2 can be either divisible or indivisible. If a statute is
3 divisible, it has different elements. And if you have a
4 divisible statute where one elemental version of it is violent
5 and one elemental version of it is non-violent, then you can do
6 a modified categorical approach, you can get your *Shepard*
7 documents to figure out what version of the offense the
8 defendant committed.

9 But a divisible statute with different elements is not
00:48 10 what we have going on here. The court in *Descamps* and in the
11 progeny of *Descamps* has clearly distinguished statutes where
12 there are multiple versions of different elements from statutes
13 that are unitary but have multiple ways to commit it. And so
14 the government has not argued in its papers, and I don't think
15 I heard them saying here, that any of the particular predicate
16 statutes in this case are divisible.

17 And, in fact, if you go through all the defense
18 arguments about why they are not categorically crimes of
19 violence, they all sort of boil down to essentially the
00:48 20 different ways that the statutes can be committed, the breadth
21 of the statute, and the fact that many of the ways of possible
22 commission of the statutes [*sic*] are not inherently violent.

23 And so this is not a situation where you would ever be
24 resorting to *Shepard*-approved documents. The government has
25 not argued these statutes are divisible. And under *Descamps*

1 and its progeny, they're not. So that whole sort of line of
2 analysis, I would suggest, is really just a red herring.

3 With regard to the issue of additional -- or of the
4 sort of number of counts and what happens if the 924(c) counts
5 all go away, the government here seems to be arguing sort of
6 directly contrary to the way that it argued in its earlier
7 motion to dismiss that the defense filed in this case about how
8 all -- the sort of multiplicity, or the sheer volume of counts
9 in this case are duplicative and essentially prejudicial.

00:49 10 In that litigation about the motion to dismiss, the
11 government went to great lengths to point out how the statutes
12 are different, why they have different elements, why it made
13 sense to have all of these multiple ways in the case to charge
14 essentially the same underlying course of conduct. The
15 government essentially now wants to have it both ways. They
16 want to back away from the arguments they made before and sort
17 of avoid having to face the consequences of its choice to
18 charge the underlying conduct in this case 30 different ways to
19 get the death penalty as many different ways as it can.

00:49 20 That's sort of the pitfall of the way Congress has
21 written many statutes over the years and 924(c) in particular.
22 The statutes are incredibly broad, and that breadth, in light
23 of the current Supreme Court decisions, means that the 924(c)
24 convictions can't stand. And in light of that, the whole
25 penalty question ought to be reconsidered.

1 THE COURT: Why don't you stay on your feet.

2 MR. WEINREB: Actually, your Honor, can I say --

3 THE COURT: Oh, all right. Okay. Go ahead.

4 MR. WEINREB: Just another word on *Descamps* just so
5 our position is clear. We do argue that all of these statutes
6 are divisible to the extent that they enumerate alternative
7 means of committing the offense. *Descamps* calls for -- in
8 determining whether a statute is divisible, *Descamps* calls for
9 a textual analysis, not a so-called elements analysis.

00:50 10 It is not necessary under *Descamps* to determine -- to
11 find that a statute, in effect, defines two entirely separate
12 crimes, or three or four entirely different crimes; it's enough
13 to find that it defines one crime, but textually enumerates
14 different ways of committing it. And if one of those ways of
15 committing it is identified, and that is the one that is
16 alleged in the indictment and on which the jury is instructed
17 that it must be unanimous, then that is sufficient under
18 *Descamps* to satisfy the categorical analysis. In other words,
19 you're not looking at what the underlying conduct was; you
00:51 20 simply have recourse to these *Shepard*-approved documents.

21 There was no -- nothing in *Descamps* that says that
22 a -- and nothing in the First Circuit, by the way, or in many
23 other circuits that have actually head-on addressed this issue
24 and the weight of *Descamps*, that says that a statute must
25 actually define entirely separate crimes and you combine them

1 in a single statute for it to be divisible.

2 The only indivisible statute is the one that textually
3 simply defines one crime. Let's say there's a crime to assault
4 another person. But if the crime -- that would be an
5 indivisible statute. And even though it's possible to assault
6 somebody by punching them or by offensively touching them,
7 there's nothing to have recourse to, because the indictment is
8 never going to do more than allege assault. But if it says it
9 shall be a crime to assault somebody by punching them, kicking
00:52 10 them, or offensively touching them, and the indictment
11 specifically alleges assault by kicking, then that is a
12 divisible -- a division of the statute that is -- that
13 satisfies the so-called elements test under *Descamps* and which
14 makes it susceptible of a categorical comparison.

15 MR. FICK: I would just point out that *Descamps* is
16 completely absent from the government's papers. To the extent
17 the Court thinks this is important to develop, it's
18 complicated, there are a lot of cases, and we could file a
19 supplemental brief on the matter.

00:52 20 I think the bottom line though, is, the government is
21 wrong in its analysis of *Descamps* and its progeny. What that
22 collection of cases say is that a statute is divisible if it's
23 got different elements and different crimes which are violent
24 or non-violent. If it's simply the means that are different,
25 if there are different means, that does not make a statute

1 divisible. And there's ample, sort of, progeny of *Descamps*
2 that set it out that way.

3 THE COURT: Okay.

4 MR. FICK: So I guess moving on to the residual
5 clause, so what *Johnson* ultimately decided was that the
6 residual clause of a very similarly worded statute to 924(c),
7 which is the Armed Career Criminal statute, it found that the
8 residual clause was unconstitutionally vague. And the residual
9 clause of the ACCA is quite similar to the residual clause of
00:53 10 the 924(c) although they're not identical.

11 The ACCA residual clause describes -- defines as the
12 second category of violent felony as, quote, burglary, arson or
13 extortion involves the use of explosives or otherwise involves
14 conduct that presents a serious potential risk of physical
15 injury to another. The wording of 924(c) is a little bit
16 different, talking about a crime that by its nature involves a
17 substantial risk that physical force against the person or
18 property of another may be used in committing the offense. So
19 similar kinds of principles, slightly different language.

00:54 20 The solicitor general of the United States, however,
21 and the courts that have looked at this so far have unanimously
22 said that the analysis -- vagueness analysis of *Johnson*
23 vis-à-vis the Armed Career Criminal Act applies with equal
24 force to 924(c). The solicitor general said that itself in the
25 government's brief in *Johnson II* with reference to 18 U.S.C.

1 Section 16(b), which is identical to the residual clause
2 language in 924(c). So the government, the representative of
3 the United States, in *Johnson* said, you know, if the Court goes
4 this way with this analysis, not only are we going to lose the
5 ACCA, we're going to lose Section 16(b) which is identical in
6 language to 924(c).

7 Further, there are beginning to be courts that have
8 found that *Johnson* applies with equal analysis to -- with equal
9 force to 924(c). The most prominent, perhaps, is the *Dimaya*
00:55 10 case out of the Ninth Circuit. I think the First Circuit court
11 so found, and that is cited in the papers.

12 And, you know, essentially the government here in
13 trying to beat back this argument sort of tries to raise little
14 distinctions without a difference between the language of the
15 two statutes. The first argument the government makes
16 essentially is that, Well, one difference between the two
17 residual clauses is that in 924(c) there are a few
18 enumerated -- there are a few enumerated offenses, extortion,
19 use of explosives. It's not just talking about the risk of use
00:55 20 of force or risk of injury. So that makes it different.

21 But that really is a distinction without a difference.
22 That if anything cuts against the government's argument
23 suggests that the Armed Career Criminal Act, which actually had
24 more specificity to it, but nevertheless was found to be
25 unconstitutionally vague, if that's vague, then a statute -- a

1 residual clause that has no enumerated offenses is all the more
2 vague.

3 The ultimate kind of analysis the Supreme Court
4 employed in *Johnson* was to say what the residual clause
5 requires is to figure out what the average or the common or the
6 usual case of a particular predicate offense might entail. And
7 the court sort of scratched its head and thought about this and
8 said, What are you supposed to do? Are you supposed to use
9 Google? Are you supposed to do some kind of statistical
00:56 10 analysis of difference cases? And ultimately, the decision of
11 the court, Justice Scalia's opinion, was to sort of throw up
12 its hands and say, No, that is unprincipled. It's unlawful.
13 It's vague. It's, therefore, unconstitutional. And the effort
14 to suggest that 924(c) is different in any meaningful way, I
15 would suggest, is simply -- it's sophistry.

16 MR. WEINREB: Your Honor, the differences between the
17 definition of violent crime and the ACCA's residual clause and
18 the 924(c)'s residual clause which Mr. Fick characterizes as a
19 distinction without a difference figured prominently in *Johnson*
00:57 20 *II* in the Supreme Court's opinion.

21 The Supreme Court has long been vexed by the residual
22 clause in the ACCA for three primary reasons: One was the one
23 Mr. Fick just mentioned. It requires the -- it requires
24 considering what the prototypical version of the crime is. And
25 we do concede that that's also true when it comes to 924(c).

1 924(c) says that a crime -- under the residual clause, that
2 it's a crime of violence if it's a crime that by its nature
3 involves the use of physical force. And it's true that "by its
4 nature" arguably is somewhat narrower than what is required
5 under the ACCA, but it's a similar kind of analysis.

6 But there were two other features of the ACCA's
7 definition of violent crime under the residual clause that
8 posed a lot of difficulties for the court; in fact, fractured
9 its decisions on the meaning of it in case after case, and that
00:58 10 was the introductory list of crimes that appears in the
11 residual clause. It says, you know, among them, burglary and
12 robbery and others. And the court said that the -- that
13 preamble, that sort of list of crimes, meant that in judging
14 whether an ACCA crime was, in fact, inherently a violent crime
15 under the residual clause meant it had to pose a commensurate
16 risk of injury to the listed crimes. And the problem's that
17 the listed crimes seem to have very little to do with each
18 other when it came to risk of harm.

19 And the court could not figure out how to reconcile
00:59 20 that incongruity, couldn't figure out how to take this list,
21 say we're supposed to compare, you know, the prototypical
22 version of crime A with this list of other crimes and ask
23 whether it's the same likelihood of risk and the same magnitude
24 of risk because those crimes don't seem to bear any
25 relationship to each other when it comes to that. 924(c)

1 doesn't suffer from that. That's true and proper.

2 In addition, the Court was troubled by the fact that
3 the only way that certain crimes -- certain crimes on that list
4 could be deemed sort of inherently violent as if one looked at
5 what might happen in the aftermath of them, not during the
6 commission of them, but at some later time what they might
7 result in. That also is not -- that problem is not present in
8 924(c).

9 In essence, 924(c) is a narrower, less complicated,
01:00 10 more straightforward version of "crime of violence." It's
11 therefore not -- it would not be appropriate for courts to
12 invalidate 924(c) on the authority of *Johnson II*. That's
13 something that should be left for the Supreme Court to do. No
14 court has -- in the First Circuit -- neither the Supreme Court
15 nor the First Circuit has held that 924(c) -- its residual
16 clause suffers from the same problems that the ACCA's residual
17 clause suffers from.

18 And despite what Mr. Fick may say about the solicitor
19 general's argument in *Johnson II*, although it's true that the
01:00 20 solicitor general pointed out that invalidating the ACCA would
21 put 924(c)'s residual clause in jeopardy as well, it is the
22 position of the United States and this Court and every other
23 court in the nation that 924(c)'s residual clause does not
24 suffer from the same problems that the court identified in
25 *Johnson II*, at least to the -- to such an extent that it would

1 require the same response.

2 THE COURT: All right. Anything else on that issue?

3 MR. FICK: I would just rest on the papers. I think
4 they --

5 THE COURT: Yeah. All right. Let's move to the next
6 motion, which is the defense motion for an order to maintain
7 protection of privileged and confidential defense information.

8 I'm not -- having read the papers on this, I'm not
9 entirely sure what the controversy is.

01:01 10 MS. CONRAD: Well, there are two aspects to the
11 controversy, your Honor. And I would say that -- candidly,
12 that one is more immediate than the other, perhaps. The two
13 aspects are, one, what the procedure is going forward; but the
14 second is, the government's stated desire to retroactively
15 obtain -- undo the protections that were either ordered by this
16 Court or were agreed to by the government in order to obtain
17 information in the possession of the firewalled AUSA. And it
18 seems to me that, frankly, there is simply no valid argument
19 that the government has offered or could offer that would
01:02 20 justify that.

21 The Court ordered that -- essentially -- and the
22 government concedes this -- that an agent separate and apart
23 from the government team, prosecution team, be used to monitor
24 what this Court determined were legal visits with the
25 defendant's sisters and a member of the defense team. The

1 government, again at the direction of the Court, agreed to have
2 a firewalled AUSA, the direction of the Court, from a different
3 district, who would have contact with that person. And that
4 person was to have no contact with the prosecution team. The
5 purpose of that was to protect the confidentiality of legally
6 privileged and work-product privilege involved in the
7 preparation of the defense case and meetings among members of
8 the defense team and the defendant.

9 The government now says, Well, now we want -- if any
01:03 10 of that information is in the firewalled prosecutor's file, we
11 have a right to get it. And the attorney-client privilege
12 under Massachusetts law survives past the death of the client,
13 as held in *In Re Grand Jury* which was the Charles Stewart case
14 which I cited in the papers. And in *United States versus*
15 *Mastroianni*, the First Circuit held that it was improper and it
16 was error for the government to debrief an informant who had
17 attended joint defense meetings.

18 So for the government to say, Well, it was privileged
19 then but -- or this Court held that it was privileged then, but
01:04 20 now if it happens to be in the file of the firewalled
21 prosecutor, we get to look at it, is simply nonsensical.
22 There's no argument that there's been waiver, there's no
23 argument that there has been any violation of the SAMs. So
24 that's with respect to the sisters' visits.

25 Going forward on that issue, as soon as there was a

1 verdict in this case the BOP declined to permit a member of the
2 defense team to be present during visits with his sister
3 because they were no longer categorized as preparation of
4 mitigation evidence for the trial because the trial was over.
5 We do not, have not challenged that. We do not at this time
6 challenge that without prejudice to the possibility that for
7 some reason in the future appellate counsel or habeas counsel
8 might have a need to raise that issue. But with respect to
9 what this Court already ordered and what information the
01:05 10 firewalled AUSA gained as a result of our reliance on that
11 order, it seems to me it's -- there's completely no valid
12 argument for disclosure to the government.

13 If the Court is going to somehow countenance that, I
14 think we should be given an opportunity to review that file and
15 seek further protection before it is disclosed. But I don't
16 see a basis -- the government hasn't raised any argument as far
17 as needing access to that. Their only argument, in fact, with
18 respect to need about any of these issues is to say the time
19 has come for us to administer the SAMs and, therefore, we need
01:06 20 all the information the firewalled AUSA had.

21 Why? There's no allegation, there's no argument that
22 anything that occurred before was somehow ineffective, that
23 there were any even hints of the violation of the SAMs. This
24 is simply a matter of the government wanting to gain access to
25 information that was part of the defense preparation of this

1 case.

2 There is always the possibility of a retrial, there is
3 always a possibility of a successful appeal or habeas petition,
4 and the government wants to have this information for use
5 should that occur. And it should not be permitted to do that.
6 And I would cite in particular, as cited in our cases, the
7 Ninth Circuit -- in our memos, rather, the Ninth Circuit case
8 of *Bittaker v. Woodford* [sic] which prohibited use in
9 subsequent proceedings of information that was provided to the
01:07 10 prosecution as a result of waiver. And there is no allegation
11 of waiver here.

12 Now, with respect to the agreement that was reached --
13 and that agreement, first of all, we submit as described in our
14 papers, is a valid contract. It's a valid contract under
15 Restatement of Contract, it's a valid contract because of
16 detrimental reliance, it's a valid contract because it was made
17 in the shadow of litigation. And for the government to say,
18 Oh, well, you know, that was just something we agreed to but we
19 don't have to continue to abide by it, calls into question all
01:07 20 the kinds of agreements and contracts that prosecutors and
21 litigants routinely enter into.

22 To say, Oh, it doesn't matter, it was just something
23 we voluntarily agreed to, first of all, it's not true because
24 it agreed to those things in the shadow of litigation about the
25 SAMs and their restrictions and in the shadow of this Court's

1 rulings and request for proposals from the government. And
2 it's not true because it's legally not true. Restatement of
3 contract says stipulations in litigation are binding contracts
4 even without consideration.

5 But that agreement did two main things: One was it
6 established a firewalled AUSA who would review any materials
7 the defense wanted to present to the defendant during its
8 privileged meetings if an issue arose with BOP; and second of
9 all, it said that the firewalled AUSA would approve visitors.
01:08 10 And third, as sort of a subsidiary of the second, it said that
11 if before the government could access logs of visitors for
12 Mr. Tsarnaev, the defense would have an opportunity to redact
13 names of experts.

14 So the government now wants to say going forward that
15 agreement is invalid and retroactively it gets to see all that.
16 Again, on the going-forward part, I think here there is a more
17 compelling need to maintain the status quo of the firewalled
18 prosecutor because unlike what the government pretends, the
19 litigation in this case is far from over. There will be an
01:09 20 appeal. There will be a habeas petition. The statute
21 essentially requires appointment of counsel for 2255 purposes
22 after an unsuccessful appeal.

23 The government -- and I think it's telling that the
24 government first tried to undo this memorandum -- this
25 agreement while the case was still on trial. The government

1 sent an email in May while the defense was still presenting its
2 case saying, We're withdrawing from this agreement. There's
3 nothing that permitted them to do that. There's no changed
4 circumstances. There's no waiver, there's no -- there's still
5 active litigation.

6 With respect to experts, appellate counsel, habeas
7 counsel may very well have a need at some point to have an
8 expert meet with Mr. Tsarnaev; for example, for evaluation of
9 competency and the like. The prosecution team has no need and
01:10 10 no right to either be the ones to decide whether that meeting
11 can take place or to have access to that information. By the
12 same token, appellate counsel, habeas counsel, will no doubt
13 have legal meetings with Mr. Tsarnaev at which they will
14 present or review with him materials such as draft briefs,
15 draft memoranda, exhibits from the trial, and the prosecution
16 should not have the right to judge what documents can be
17 reviewed with Mr. Tsarnaev, what experts can meet with
18 Mr. Tsarnaev.

19 But more important, perhaps, retroactively the
01:11 20 government now apparently wants to know what defense experts
21 met with Mr. Tsarnaev, what documents were shown to
22 Mr. Tsarnaev. Again, all of this is part of the work-product
23 privilege. All of this is part of the defense representation
24 of Mr. Tsarnaev. There is absolutely nothing in the agreement
25 that -- or in this Court's rulings that contemplated that at

1 some point the information that was provided to the firewalled
2 AUSA in reliance on the protections afforded by the agreement
3 would later be revealed. In fact, what the agreement said was
4 that no information regarding such requests shall be disclosed
5 to the prosecution team. It doesn't say in parentheses "until
6 after the verdict." That's the language: No information shall
7 be disclosed to the prosecution team.

8 And the proposal with respect to -- I just want to
9 backtrack for a second on this -- of the sisters' visits, the
01:12 10 proposal as described to this Court by the government regarding
11 those visits were that the government's agents, quote, will not
12 provide any information to the government, that is, unless
13 there's a reasonable and articulable suspicion that the SAMs
14 has been violated.

15 The government's summary to this Court in August of
16 2014, that's docket entry 448, was that the firewalled AUSA may
17 never at any time become a member of the government team. But
18 yet the government now says, But we get his file. Those two
19 things are completely inconsistent. Their summary further went
01:13 20 on to say, The writings of the firewalled AUSA will be kept in
21 a secure place to which no one on the prosecution team has
22 access. Again, it doesn't say in parentheses "until after the
23 verdict."

24 And the government says, Well, Mr. Tsarnaev should be
25 treated like any other defendant serving a sentence. Well,

1 first of all, he's not, because he has a SAMs which allows the
2 government to have veto power, essentially, over what he's
3 shown, whom he communicates with and what experts visit with
4 him. So that puts him in a very small group of people.

5 Second of all, he's not simply serving a sentence; he
6 is awaiting execution. And under the statutory scheme, he is
7 entitled to certain legal representation, including as any
8 other defendant appellate counsel, but also habeas counsel. So
9 to pretend that he is somehow treated like every other
01:14 10 defendant is simply fantasy. Other defendants do not have an
11 agent sitting in on family visits. Other agents do not have
12 BOP and prosecutors reviewing what their defense lawyers bring
13 in. There are far more restrictions on Mr. Tsarnaev than on
14 other defendants.

15 These measures were put in place to make sure that the
16 prosecution did not unduly interfere with the defense function.
17 The defense function is alive and well in this case and the
18 government should no more have the ability to interfere with it
19 going forward than it has to obtain information that it
01:15 20 promised it would not access, looking retrospectively.

21 MR. WEINREB: Your Honor, starting with the
22 retrospective part of the motion, the government is not
23 interested in seeing any attorney-client privileged or
24 work-product doctrine that might be in the firewalled
25 attorney's file. We're requesting the file in the belief that

1 there is no privileged or work product protected information in
2 it. There's no reason to believe there is and the defense has
3 not identified anything that's even likely to be in there that
4 would be privileged.

5 THE COURT: Well, is that because of your view that
6 the presence of the sisters prevented the privilege from
7 attaching?

8 MR. WEINREB: Yes. The Court --

9 THE COURT: Is there any other reason or is that the
01:16 10 sole reason?

11 MR. WEINREB: There's a second reason.

12 So the only other thing that might conceivably fall
13 within the work-product protection would be there was a proviso
14 in the agreement that if BOP in its sort of -- the normal
15 review it does -- every time the -- defense attorneys are
16 allowed to bring items in to show to inmates, documents, pieces
17 of evidence, computer material and other things. And BOP,
18 wholly apart from the existence of SAMs, always
19 reviews -- takes a look through that to make sure that there's
01:17 20 no obvious contraband in there, everything from, you know,
21 literally a file to pornography or something like that.

22 At one point very early on in the case BOP came across
23 a photograph that it felt was not something appropriate to be
24 brought in, was not appropriate to be defense material, and
25 they brought it to our attention as a possible violation of

1 their own rules and of the SAMs. Based on that, the defense
2 wanted a firewalled attorney in place in case that ever
3 happened again so that the item would be shown to the
4 firewalled attorney, not to us. However, there's no evidence
5 that it did ever happen again and presumably if it
6 had happened -- definitely if it had happened again the defense
7 would know about it because that was part of the agreement in
8 the contract, and if they knew about it, they would have
9 alleged that it happened in their papers and we would be
01:17 10 talking about it here today. So we're pretty confident that it
11 never happened again.

12 So therefore, there is no reason to believe that there
13 is anything in there that is privileged or work-product
14 protected. Indeed, that was never the purpose of this whole
15 agreement. The purpose of the agreement was to keep certain
16 defense information confidential but only because the Court had
17 set dates for its progressive disclosure and we wanted to honor
18 those dates by setting up a system where we wouldn't get access
19 to it prematurely under the Court's scheduling order. That was
01:18 20 really the only reason that we entered into this agreement at
21 all.

22 Our view that the -- with respect to the conversations
23 with the sisters, as the Court will recall, the way that that
24 issue arose was that the defense was concerned that the sisters
25 were not being able to engage in candid conversations with the

1 defendant, and vice versa, because of the intimidating presence
2 of an overhearing agent. And so the Court -- we argued that
3 the sisters could not be there otherwise because it was a
4 so-called mixed social and legal visit, which BOP does not
5 permit, again, not under the SAMs but just under their own
6 regulations. They don't allow mixed visits. And the Court
7 held that for purposes of that provision, they would be
8 deemed -- they would still be deemed to be a defense visit.

9 But that did didn't make them part of the defense team
01:19 10 such that everything said to them or in their presence was
11 attorney-client privileged. There's nothing in the record to
12 reflect that the Court went that far and there would be no
13 reason for the Court to go that far. And they simply --
14 they're not lawyers, they weren't paralegals. Normally, family
15 members don't jut get to be part of the defense team because
16 they want to be. The purpose of that was simply, again, to
17 permit the candid conversations which, if there were additional
18 meetings with the sisters we don't even know, they took place
19 under the circumstances that the Court had created. So again,
01:20 20 there's absolutely no reason to believe there's anything in
21 there that is privileged or work protected.

22 We gave some thought to the prospect of simply saying,
23 Okay. The files should be reviewed by the defense team and
24 they could mark anything that they believe was protected;
25 however, we also don't know if there are notes in the files or

1 conversations between the firewall attorney and other people in
2 DOJ that really are not anything that the defense would
3 ordinarily be entitled to see and so on. So we think that if
4 the Court is inclined to do any kind of review of the file
5 itself, that it be done by the Court in camera. If the Court
6 after that still has questions, it can -- at that point it
7 could also ask the parties either together, ex parte or
8 whatever the Court wanted to do to review it. But we don't
9 think that's necessary. The defense has not alleged or created
01:21 10 any reason to believe that there's anything in there that would
11 violate the attorney-client privilege or the work-product
12 exception. The Court could also make an inquiry of the
13 firewall counsel and ask firewall counsel of his opinion if
14 there's anything in there that is privileged or protected.
15 We'd have no objection to that.

16 As for the prospective operation -- and by the way,
17 the claim was made that we have no need for that material.
18 There's no good reason for us to have it. And that's simply
19 not the case. We are responsible, meaning the prosecution
01:21 20 team, for administering the SAMs going forward. And in order
21 to do that, we need to know what's happened. We need
22 to know -- people were visiting the defendant, such as Sister
23 Helen, for example, who were not, according to the defense,
24 expert witnesses, members of the defense team or any other --
25 had any other right to visit him. They weren't people who as

1 far as we know were cleared under the SAMs or had any basis for
2 being there.

3 So that's the kind of -- again, we have no idea how
4 many other people like that there are. Let's say the defense
5 now wants somebody to visit him. We won't even know whether
6 there's been problems with that person in the past or not. And
7 unless the firewall attorney is to remain in place in
8 perpetuity administering these SAMs, we need to know what's
9 happened in the past in order to intelligently administer these
01:22 10 restrictions going forward into the future; otherwise, we might
11 be making representations that we don't even know are true or
12 not with respect to particular individuals.

13 Now, as for prospective enforcement of the agreement,
14 there is absolutely no legal ground for that whatsoever. And
15 even if you accept that the -- all of the defense's argument
16 that this is a contract -- a binding contract that should be,
17 you know, interpreted under principles of contract law, for one
18 thing, nothing in the contract says that either party can't
19 terminate it at will; secondly, there's been an obvious change
01:23 20 of circumstances.

21 The contract was written during a time when the
22 defendant was preparing his defense and was in pretrial
23 detention. Now the defendant has been convicted, he's serving
24 a sentence at another prison. So changed circumstances alone
25 would be a basis for termination of the contract.

1 But beyond that, we -- I won't belabor again the
2 arguments in the motion, but in summary, we don't believe the
3 Court any longer has authority to enforce restrictions or -- I
4 shouldn't say "any longer." These are voluntary measures that
5 we took here. There's no basis, in our view, for them to be
6 made legally binding in a court order, don't believe that the
7 Court at this point has authority to tell BOP how to manage
8 these matters, at least absent some kind of very specified need
9 on the part of the defendants that would prevent the exercise
01:24 10 of Sixth Amendment rights. And if the defense -- if the Court
11 believes that that may not, in fact, be the case and wants
12 briefing on it, then let the defense file a motion seeking an
13 order like this. And we'll oppose it and the Court can see
14 what the legal arguments are on either side.

15 These arguments about contract law and that we should
16 be held to this bargaining going forward indefinitely into the
17 future are not the right way to address the issue of what the
18 defendant actually needs to protect his constitutional rights
19 in prison. People in prison -- he's not the only one. The
01:24 20 defendant is not the only one who may be pursuing an appeal in
21 prison, who may be pursuing a 2255 in prison. There are
22 probably thousands, tens of thousands of people like that.

23 Many of them argue that their rights are being
24 violated in one way or another, and there are very well
25 established mechanisms for addressing claims of constitutional

1 rights' violations while in prison. This is not the
2 appropriate way to do it, especially given the circumstances
3 under which this agreement was made which was -- although the
4 defense said it was in the shadow of litigation of the SAMs, I
5 think we've pretty much documented very well in our motion that
6 the defense litigated and litigated about the SAMs, the Court
7 ruled again and again about them, and there were no -- there
8 was no pending litigation that was settled through this
9 contract. There was no litigation at all at the time.

01:25 10 So we certainly believe that this agreement is not
11 enforceable going forward, and we also believe that the defense
12 simply has not made a case that there's any reason why we
13 should be denied access to information that we need to do our
14 jobs going forward.

15 MS. CONRAD: Your Honor, first of all, I feel a little
16 bit like Alice going through the looking glass here where the
17 government says this is not the way it should be done, that we
18 should come to the Court and ask for protection when there's an
19 existing agreement and an existing order and the government
01:26 20 twice unilaterally tries to withdraw from it. The government
21 should have gone to the Court and said, We want to have this
22 modified. That's usually how you address a court order. You
23 don't just send an email to counsel saying, We're not abiding
24 by this anymore.

25 So second of all, for the government to say this was

1 not in the shadow of litigation, I count multiple docket
2 entries, the first October 2, 2013, the defense challenged the
3 SAMs, sought to vacate it; February 20, 2014, the defense filed
4 a supplemental proposal -- proposing a taint team for the
5 sisters' visits and for review of the materials. February 26th
6 the government opposed that. So that was the shadow of
7 litigation to which I referred. In our reply, docket entry
8 210, March 5th, we proposed a taint team. The government
9 refused.

01:27 10 At the April 6, 2014, hearing, the Court ruled that
11 the sisters with the visits -- and I'm going to read the exact
12 language so there doesn't have to be any confusion. "I would
13 suggest, and I think it is a pretty limited circumstance," et
14 cetera -- "so I would be inclined to do one of two things. One
15 is, which I think is simpler, is to simply regard it as a legal
16 visit" -- this is at page 12, "and therefore, exempt from the
17 monitoring." So I don't know how that's not a ruling that it's
18 a legal visit. "And I don't really think that the safety
19 security issue looms very large on the facts as I can
01:28 20 appreciate them on what I have."

21 And then the Court went on to say, you know, if you
22 think there's an important issue of security that has to be
23 addressed through a taint officer, then make a proposal. And
24 that's when the government made the proposal to have a
25 taint -- a firewalled agent and a firewalled prosecutor.

1 So that was directly as a result of this Court's
2 ruling. There is absolutely nothing to suggest that the visits
3 with the sisters are not legal visits, which is what the Court
4 ruled, or at a minimum, work product. Because the whole reason
5 to do this was in preparation for the defense. If the
6 government wanted to come to our offices and rummage through
7 our trial preparation and say, Well, the trial's over so it's
8 no longer privileged, that's just wrong.

9 THE COURT: Do you have a position on whether an in
01:28 10 camera review of the materials might be done?

11 MS. CONRAD: Well, our position on the in camera
12 review -- although we wouldn't object to the in camera review,
13 we would object to any relief subsequent to the in camera
14 review, so I'm not sure what the point of it would be because
15 these materials were made available to the firewalled agent and
16 the firewalled AUSA pursuant to an agreement that is
17 enforceable and pursuant to this Court's orders.

18 For the government to say that the information, for
19 example, about authorizing visits by experts only pertained to
01:29 20 a timing issue is just completely wrong. In any criminal case
21 there are experts who may meet with the defendant who are never
22 noticed and who were never called to trial. The government
23 doesn't get to know about them. The government doesn't get to
24 know about them before trial, during trial, after trial, on
25 appeal or on habeas. That is work product. That is the core

1 of work product.

2 Now the government wants to know what, if any, experts
3 visited Mr. Tsarnaev who weren't called to trial. That's what
4 they're trying to find out. And for them to say, Well, we're
5 responsible is sort of an ipse dixit argument. They're simply
6 saying, We're responsible because we want to be responsible.
7 Why isn't the prosecutor who's responsible -- or the government
8 agent who's responsible, somebody in Colorado where
9 Mr. Tsarnaev is incarcerated? Wouldn't that make more sense?
01:30 10 The government is setting up the condition precedent to make
11 the argument that this is necessary without ever justifying why
12 that's a condition precedent in this case.

13 THE COURT: Okay. I understand the --

14 MS. CONRAD: Can I just say one more thing about --

15 THE COURT: If it's new.

16 MS. CONRAD: It is new.

17 Mr. Weinreb said, Well, we haven't shown that there's
18 anything privileged in that. We don't know if there's anything
19 privileged in the file. They don't know that because it's in a
01:31 20 firewalled file. We don't tell the government what our
21 communications were with the firewalled agent. That's the
22 whole nature of the firewalled communication.

23 And I don't really know where Mr. Weinreb 's coming up
24 with saying that Sister Helen Prejean was not cleared under the
25 SAMs. She wouldn't have been allowed to set foot in Devens if

1 she hadn't been cleared under the SAMs.

2 THE COURT: All right. I'll reserve the matter.

3 Now let me turn to the issue of restitution. There's
4 been a supplement to the PSR provided by the probation office
5 basically forwarding materials that came from both sides. I
6 think it was addressed before but I understand that the defense
7 has made an *Apprendi*-based argument about it that I believe is
8 foreclosed by First Circuit law. The issue is preserved, but
9 in accordance with existing precedent, I conclude that the
01:32 10 factfinding, to the extent it occurs and is properly
11 denominated as such, does not implicate the *Apprendi* rule.

12 I don't know whether Mr. Chakravarty is handling this.
13 You're the one that -- or Mr. Weinreb. I don't care. Either
14 one. You wrote the letter.

15 MR. CHAKRAVARTY: I wrote the letter.

16 THE COURT: I'm not entirely clear what the
17 exhibits -- what the attachments are. Maybe you can clarify
18 that. Particularly B and C. I understand A.

19 MR. CHAKRAVARTY: Your Honor, we submitted three
01:32 20 categories of restitution figures. One was the extensive
21 report and supporting materials for Dr. Thomas Barocci who did
22 essentially an extrapolation of costs to a small subset of the
23 victims, largely, the victims who were the families of
24 decedents and amputees.

25 The second category were those expenses which were

1 submitted to our office pursuant to our provisional canvassing
2 for victims to report eligible expenses under the restitution
3 statute on a form that we submitted to them and they could
4 submit it to -- any supporting materials or simply statements
5 about what they believed were their costs incurred, or
6 prospective costs incurred. They would put it on the form and
7 give it to us. We then tabulated -- instead of giving you --
8 we happened to give you each of the underlying forms that they
9 provided, I have them with me. But instead, we tabulated those
01:33 10 on a spreadsheet which broke down per category of expense that
11 they had submitted to us.

12 And then the third component of our submission was
13 those expenses which were incurred or submitted to the
14 Massachusetts Victim Compensation Fund administered by the
15 State Attorney General's Office during the pendency of the
16 proceedings and had received payment from the Attorney
17 General's Office. Those figures were also submitted for those
18 expenses which were determined to be eligible expenses under
19 the federal restitution statute. So not including pain and
01:34 20 suffering, for example, which is not an eligible expense. That
21 is the third category.

22 For that category, because of the privacy concerns, we
23 listed the victim by number as opposed to name, although it was
24 provided to counsel, and were the Court to order a restitution
25 judgment per individual, then we can further separate that list

1 out. For everyone who submitted for eligible expenses to the
2 Attorney General's Office, we can spell that out so that we
3 have a comprehensive list of every victim that we submitted on
4 either three of these categories the amount that they have
5 submitted to us which, as far as we know, is not in dispute as
6 to what they are entitled to under the restitution statute.

7 THE COURT: Well, that's what I can't figure out from
8 the exhibits. What's the relationship of B to C? Does C
9 include some of B or all of B or none of B?

01:35 10 MR. CHAKRAVARTY: So it should not include any of -- B
11 should not include any of C. But we -- in order to -- and the
12 B --

13 THE COURT: And vice versa; that is, B isn't included
14 in C?

15 MR. CHAKRAVARTY: Correct. Now, that being said, it
16 was not done scientifically in terms of an audit. We relied on
17 self-reporting of victims to say whether they had received
18 funds from the Victim Compensation --

19 THE COURT: Let me ask you specific -- if you have it
01:35 20 there, would you look at B? It's actually Line No. 3 but it's
21 the first name. And then in the far right column it indicates
22 there was a payment from the Mass. Victims Fund.

23 MR. CHAKRAVARTY: Correct.

24 THE COURT: Now, is that also in C? I can't tell
25 because there are no names in C.

1 MR. CHAKRAVARTY: Right. It should not be, your
2 Honor. We subtracted from the total -- sorry. Whatever the
3 figure is -- I can't -- I didn't match up to see whether the
4 figure, which is 25,000 here, whether exactly that figure is
5 also reflected. This is what I meant by not having it audited
6 to determine if that is an accurate self-reporting of how much
7 they were compensated, but the fact that that person was
8 compensated is on C.

9 THE COURT: So there is an entry on C that corresponds
01:36 10 to the person identified as the first person in B. So what use
11 is to be made --

12 MR. CHAKRAVARTY: So what I did, your Honor, is when
13 we got done with this, based on the self-reporting on Category
14 B -- I simply subtracted so that we would avoid this
15 duplication issue, subtracted from the B submission any
16 self-reported victim compensation for C so that we could
17 combine them all without having to --

18 THE COURT: Well, how do we get to a final number?

19 MR. CHAKRAVARTY: So the government's proposal is to
01:37 20 add each of the categories, from the first submission, second
21 submission, third submission. As long as the self-reporting
22 was accurate on B, then there should be no double-counting with
23 Category C, and the same holds true for Category --

24 THE COURT: Well, at the very least, even if you're
25 going to do that, if you're going to somehow -- I'm not

1 sure -- let me come at it from maybe a backwards point of view.
2 C represents payments that the people listed received, in fact,
3 from the Mass. fund?

4 MR. CHAKRAVARTY: Correct.

5 THE COURT: That's the state fund. Are those
6 appropriated funds?

7 MR. CHAKRAVARTY: They are appropriated. There may
8 have been a special supplemental --

9 THE COURT: But it's distinct from something like the
01:38 10 One Fund, which were charitable contributions by individuals?

11 MR. CHAKRAVARTY: Correct. Correct.

12 THE COURT: Does the government -- does the
13 Commonwealth make a claim to those monies?

14 MR. CHAKRAVARTY: They haven't asked for reimbursement
15 but they are --

16 THE COURT: As I understand it, under (j)(1) of the
17 statute, they'd be entitled to it?

18 MR. CHAKRAVARTY: Correct.

19 THE COURT: And is that what you're asking?

01:38 20 MR. CHAKRAVARTY: Correct.

21 THE COURT: And those amounts similarly would not go
22 to the identified people because they've already received the
23 money.

24 MR. CHAKRAVARTY: Correct.

25 THE COURT: So in terms of a restitution order for the

1 victims, apart from the Commonwealth, only A and B are
2 pertinent?

3 MR. CHAKRAVARTY: That's correct. And that's why we
4 thought simply put the number -- identifying the victim by
5 number on Category C, which was sufficient for this exercise,
6 because all of those monies would go to the Attorney General's
7 Office, unless the Court felt that she should be subrogated by
8 first going to the victims, which is not the government's
9 position.

01:39 10 THE COURT: So the final tally could be -- this is a
11 page from Dr. Barucci (ph) -- Barocci -- is the 17 persons
12 injured, amputees, and then the four deceased. To that list
13 you would add the people identified in Attachment B?

14 MR. CHAKRAVARTY: Correct.

15 THE COURT: And at what sum? This is the fifth column
16 over?

17 MR. CHAKRAVARTY: It's the fifth column over, and it
18 would be the sum total of that.

19 THE COURT: So that the total number of -- just let me
01:40 20 just do the math here. There's 36 people listed there and
21 there's 21 listed in the summary in A, so we're talking about
22 57 recipients?

23 MR. CHAKRAVARTY: That sounds correct. That's
24 considering that there are many more in the Category C, but the
25 sole recipient of any of those subordinated claims would be to

1 the Attorney General's Office.

2 THE COURT: Does the defense have anything on the
3 computation issues?

4 MS. CLARKE: No, your Honor.

5 THE COURT: Well, what I would like the government to
6 do, then, is prepare a single summary, spreadsheet, chart that
7 can be attached to the amended judgment which adds the amount.
8 I can state now that I would -- there being no opposition to
9 the calculations -- combine the chart produced by Dr. Barocci
01:40 10 at page 12 of his report with the Exhibit B, and that would be
11 the order of restitution. The order would be made -- and I
12 guess, again, if there's no objection, Exhibit C could be
13 included as -- since the subrogation chart for the
14 Massachusetts fund -- I'm not sure, actually, that's necessary
15 to be part of the judgment. So I think we could do that
16 separate. So if we simply incorporate the -- as the 58th
17 recipient the Commonwealth, then the total sum I think would be
18 sufficient for attachment to the judgment.

19 The Bureau of Prisons will be charged with the
01:41 20 assessment and collection of restitution in accordance with the
21 Inmate Financial Responsibility Program that is administered by
22 the Bureau of Prisons unless otherwise specifically ordered if
23 some issue should arise.

24 I will say that the -- it's my understanding that
25 under the program there is a minimum assessment of \$25 per

1 quarter, and that will be the default for at least the
2 commencement of the collection. That also is adjustable
3 depending on the financial circumstances of the defendant. If
4 his income may rise or fall some adjustment under the program
5 would be appropriate, but we will leave it to the bureau's
6 program, as I say, subject to whatever necessary supervision
7 might be -- might arise if there are issues.

8 So I'd like -- I don't want to be unreasonable, but I
9 would like it as soon as possible so we could finish the
01:43 10 amended judgment.

11 Okay. Anything else on restitution from anybody?

12 MS. CLARKE: No, your Honor.

13 THE COURT: Okay. There's one final matter. We
14 have -- our capable clerk's office has been working on the
15 unsealing of sealed entries, and you will be able to obtain
16 today, each of you, a thumb drive with the documents that you
17 respectively have submitted under seal. We'd ask you to review
18 those and indicate to us which may -- you agree now can be
19 unsealed. And there will be a lot of them that were protective
01:44 20 of the process in some way that the passage of time has now
21 made unnecessary for them to remain under seal.

22 There will be other things that probably will continue
23 to -- particularly ex parte filings, I suspect, will likely
24 remain under seal. But anyway, review the list of your own
25 documents and tell us which you think can be unsealed. And

1 confer with each other and agree on a joint list to be
2 unsealed.

3 To the extent there may be controversies, somebody
4 thinks something should be unsealed and the other side thinks
5 it shouldn't be, we would like a list of that as well and we
6 can make some judgments about those.

7 MS. CLARKE: I think, your Honor, that there were ex
8 parte filings I believe by both parties, so those are the only
9 documents both of us won't get. We'll get our ex parte and
01:44 10 they'll get their ex parte.

11 THE COURT: I think that's right.

12 MS. CLARKE: But we'll both get the documents that
13 were served on each other.

14 THE COURT: I don't think so at the first cut. I
15 think this is a first cut.

16 MS. CLARKE: We're getting what we filed under seal
17 and they're getting what they filed under seal?

18 THE COURT: Yes. This is a convenience because you
19 can't look at them online. So -- I'd understood that one of
01:45 20 the problems was that people weren't exactly sure what sealed
21 Item No. 788 was.

22 MS. CLARKE: That's correct.

23 THE COURT: And this will tell you that if it's your
24 document, and you'll get to see it. And then it will take the
25 next step. But you're right. I think what we'll do is see

1 what's left after you've agreed to unseal your own sealed
2 filings.

3 MS. CLARKE: So it will take us a little while to
4 figure out what we've both seen from these separate thumb
5 drives and what's ex parte?

6 THE COURT: Well, what you'll be able to do is look at
7 your thumb drive and say, We no longer believe the following
8 items need to be sealed, and you would prepare a list. And
9 then I guess we'll have to have a sharing of that. We'll
01:46 10 figure that out.

11 MS. CLARKE: I'm just suggesting --

12 THE COURT: For the time being it's just your own
13 documents that are being --

14 MS. CLARKE: It just may take us a little while trying
15 to come up with the list, that's all.

16 THE COURT: Right. We are anxious on behalf of a lot
17 of people to unseal as much as we can.

18 Okay. I think that concludes the business. We'll be
19 in recess.

01:46 20 THE CLERK: All rise for the Court.

21 (The Court exits the courtroom at 11:32 a.m.)

22 THE CLERK: Court will be in recess.

23 (The proceedings adjourned at 11:32 a.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

Date: 12/4/15