

Docket No. 16-6001

In The United States Court of Appeals
For The First Circuit

UNITED STATES,

Appellee,

v.

DZHOKHAR A. TSARNAEV,

Defendant – Appellant.

**APPELLANT TSARNAEV’S 60-DAY PROGRESS REPORT AND
ASSENTED-TO PROPOSAL FOR BRIEFING SCHEDULE**

Appellant, Dzhokhar Tsarnaev, by his counsel, in accordance with this Court’s Order dated January 24, 2017, hereby provides a report of counsel’s progress toward compiling a complete record of what occurred in the district court and reviewing that record, and proposes for the Court’s consideration, with the government’s consent, a merits briefing schedule of 12 months for Appellant’s Opening Brief, and 6 months for the government’s Answer Brief.

60-Day Progress Report

1. When this Court stayed the setting of a briefing schedule for 60 days, it directed that counsel for Appellant report on our progress in settling a complete

and accurate record of the proceedings below. Undersigned counsel have acted diligently to identify, obtain, and conduct an initial review of the district court record. However, the record is still incomplete.

2. That record is voluminous – even for a federal capital case. The record comprises 1732 docket entries (many of which are not available for counsel to view), over 10,000 pages of transcripts, and 1675 exhibits. Many of the proceedings and pleadings were filed under seal and remain under seal. Counsel for Appellant have worked with the district court clerk’s office and with counsel for the government to try to obtain a copy of each of the sealed orders and transcripts, as well as missing pleadings and exhibits. This process continues.

3. Over the last 30 days, we have identified additional previously untranscribed court proceedings that were not listed on the docket, and have ordered and received these transcripts.

4. We have also very recently identified at least one proceeding that appears not to have been transcribed, and may need to be reconstructed pursuant to Federal Rule of Appellate Procedure 10(c) so that “the record truly discloses what occurred in the district court.” Fed. R. App. P. 10(e)(1). The proceeding appears to concern communications between a seated juror and court personnel, which may be material to a claim regarding the violation of Mr. Tsarnaev’s Sixth Amendment

right to an impartial jury. We will continue to seek a transcription of this proceeding, and if none was made, we will proceed in accordance with Rule 10(c).

5. Counsel has not yet been able to compile or review a complete set of trial exhibits. The government introduced 681 physical exhibits at trial. The government has notified us that it does not have a complete set of photographs of these physical exhibits. The government is currently in the process of creating a spreadsheet to assist the parties in identifying which exhibits still need to be photographed. The parties will then arrange to photograph them so that a full set of exhibits is available as part of the appellate record.

6. The district court recently granted two motions filed by undersigned counsel seeking the preservation of records for appeal. The first was an assented-to motion requesting the preservation of all grand jury, petit jury, and Criminal Justice Act records. DE 1708. The second was an assented-to motion asking the district court to direct the government to submit to the clerk of the district court under seal an exact copy of all documents it provided to the district court for *in camera* review in connection with this case, and for the clerk of the district court to preserve that exact copy. DE 1709.

7. We are litigating access to numerous *ex parte* filings made by the government.

a. Counsel for Appellant learned for the first time on appeal that the government had proceeded *ex parte* 26 times before the district court. Through informal negotiations that led to voluntary disclosure by the government of some of these *ex parte* filings and proceedings, counsel for Appellant also learned that, during the proceedings below, without notice to the defense, the government had submitted classified information to the district court, apparently in connection with then-pending defense discovery motions. DEs 145-146, 574-576, 599, 600, and 601. On February 21, 2017, counsel for Appellant moved the district court for disclosure of both the classified and the unknown government *ex parte* proceedings and filings, or, in the alternative, for a log of the asserted grounds for continuing non-disclosure on appeal, to enable meaningful litigation. DE 1719.

b. On March 6, 2017, the government opposed the defense motion for disclosure, refusing to provide even the grounds for non-disclosure on appeal, and sought leave to support its opposition through the filing of additional secret material in the district court, DE 1722, which the district court granted on March 17, 2017. DE 1727.

c. The defense replied, arguing that it would violate due process to allow a death sentence to be reviewed based on secret evidence regarding which the defense could not meaningfully litigate disclosure. DE 1729.

d. Without knowing even the gist of these undisclosed government *ex parte* filings and proceedings, counsel for Appellant is unable to ascertain whether any of them may raise or impact issues for appeal.

e. On March 24, 2017, by electronic order, the district court denied counsel for Appellant's motion seeking disclosure of the government's *ex parte* proceedings and filings for use in the appeal, or, in the alternative, production of a log of the asserted grounds for non-disclosure so that Appellant could meaningfully litigate disclosure. The district court provided no explanation as to how the government had met its heavy burden to justify continuing non-disclosure on appeal. DE 1732. This Court has held that government *ex parte* proceedings are "presumptively doubtful, and the burden of justification is upon the government." *United States v. Claudio*, 44 F. 3d 10, 14 (1st Cir. 1995) (citing *United States v. Innamorati*, 996 F.2d 456, 487 (1st Cir. 1993)). We will soon be moving this Court pursuant to Rule 10 to supplement the record on appeal with these *ex parte* materials.

8. We will continue to diligently work to perfect the record.

Proposed Merits Briefing Schedule

9. In this Court's January 24, 2017, Order, it also directed that counsel for Appellant, after consultation with government counsel, propose a merits briefing schedule at the end of the 60-day stay.

10. The judgment in this case followed extensive pre-trial litigation and an extraordinarily complicated trial of a 30-count indictment, concerning conspiracy and use of a weapon of mass destruction at the Boston Marathon and subsequent events that occurred during one of the most publicized manhunts in the history of this jurisdiction, with four deceased victims and hundreds of injured survivors. The trial also included a lengthy penalty phase in which 61 witnesses testified on the issue of the appropriate sentence. The client is a young man who is incarcerated at the United States Penitentiary, Administrative Maximum Facility in Florence, Colorado, under Special Administrative Measures.

11. David Patton on behalf of Federal Defenders of New York and Gail K. Johnson were appointed by this Court on March 28, 2016, to represent Mr. Tsarnaev on appeal, without any prior familiarity with this case, and, over the past twelve months, have thoroughly reviewed the record. Clifford Gardner was appointed by this Court on March 22, 2017, and will need time to become familiar with the case so that he may effectively represent Mr. Tsarnaev on appeal.

12. In the course of our compilation and review of the record, counsel already have identified a large number of legal issues that must be considered and researched for possible inclusion in Mr. Tsarnaev’s merits brief. Many of the potential appellate claims identified to date pose complex and novel legal issues—including issues that have not been addressed previously in this Circuit or any of the Courts of Appeals. And the issues we have identified are case-specific, requiring careful review and analysis of the lengthy trial record. Because Mr. Tsarnaev has been sentenced to death, appellate counsel owe a 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 them for subsequent review.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.15.1(C) (rev. Feb. 2003).

13. The instant case is certainly among the most complex capital cases to ever arise in federal court. This Circuit has heard one prior federal death penalty appeal in the modern era: *United States v. Gary Sampson*, No. 04-10325. Mr. Sampson’s case, however, involved two murders resulting from carjackings, and the district court record was considerably smaller. Unlike Mr. Tsarnaev, Mr. Sampson pleaded guilty and, so, his case proceeded directly from jury selection to sentencing proceedings. Even on this smaller, simpler record, Mr. Sampson’s

counsel requested, and this Court granted, a total of 26 months between the notice of appeal being filed in the district court and the filing of the opening brief.

14. In an effort to propose a realistic briefing schedule, counsel for Appellant has consulted with Federal Capital Appellate Resource Counsel and looked at the briefing schedules set in other Circuits for other recent federal capital direct appeals. We found no other recent federal capital appeals that involved a terrorism charge that could be used as a comparison to this one. For those federal capital direct appeals that appear to us most comparable in complexity because they involve large records, and/or multiple criminal incidents and victims, the time from notice of appeal to the filing of the opening brief ranged from 34 to 75 monthss. *Compare, e.g., United States v. Alejandro Umana*, No. 10-6 (4th Cir.) (time between notice of appeal initial brief: 36 months, 26 days; 1 victim); *United States v. Rejon Taylor*, No. 09- 5517 (6th Cir.) (time between notice of appeal and initial brief: 54 months, 7 days; 1 victim); *United States v. Daniel Troya and Ricardo Sanchez*, No. 09-12716-P (11th Cir.) (time between notice of appeal and initial brief: 34 months, 14 days; 4 victims); *United States v. Iouri Mikhel and Jurijus Kadamovas*, Nos. 07-99008 & 07- 99009 (9th Cir.) (time between notice of appeal and initial brief: 75 months, 16 days; 5 victims); *United States v. Basham*, No. 05-05 (4th Cir.) (time between notice of appeal and initial brief: 38 months, 26

days; 1 victim); *United States v. Len Davis*, No. 05-31111 (5th Cir.) (time between notice of appeal and initial brief: 37 months, 3 days; 1 victim).

15. As this Court directed, counsel for Appellant consulted with counsel for the government regarding the briefing schedule. Based on counsel for Appellant's initial review of the record and the number and complexity of the legal issues already identified, it is our best estimate, at this juncture, that 18 months will be required to finish compiling the record (including litigating the disclosure of the government's *ex parte* proceedings and reconstructing any untranscribed proceedings), analyze possible issues, conduct necessary legal research, thoroughly review the record to evaluate the specific factual bases of each identified issue, and draft the opening brief.¹ We explained our reasoning to the government and sought their consent. Counsel for the government declined to consent, however, and proposed instead 12 months as adequate for Appellant to file his Opening Brief.

¹ An 18-month briefing schedule would represent a total time from notice of appeal (filed January 29, 2016) to the filing of Mr. Tsarnaev's opening brief of approximately 32 months. From our survey of the other federal capital direct appeals, it is clear that, based on any objective criterion (transcript pages; number of pleadings; number of incidents; number of victims; number of charges in the indictment), a briefing schedule of 18 months would be within, or below, the average time allowed for analogous cases.

16. In order to proceed by consent of the parties, where possible, and notwithstanding our own current estimate of the time it will take to perfect the appeal, counsel for Appellant accordingly requests that, at this juncture, the Court set an initial briefing schedule of 12 months for the Appellant's Opening Brief. We understand the Court's interest in advancing the case in a reasonably expeditious manner, and we have and will continue to act both with diligence and to meet our obligation, particularly critical in a capital case, to identify, analyze, and present all viable claims of error to this Court for review. If, despite our best efforts, 12 months proves to be inadequate, counsel for Appellant will seek an extension of time pursuant to Federal Rule of Appellate Procedure 26(b).

17. Counsel for the government seeks 6 months after the Opening Brief is filed to file its Answer brief; we have no objection to the government taking the time it needs.

For all these reasons, it is respectfully requested that the Court direct that Appellant's Opening Brief be filed in 12 months, and the government's Answer brief be filed 6 months later.

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys:

/s/ David Patton

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Certificate of Service

I certify that the attached Appellant Tsarnaev's 60-Day Progress Report And Request for Briefing Schedule was filed electronically through the ECF system for the U.S. Court of Appeals for the First Circuit, which will send electronic notice to counsel of record for all parties on this the 27th day of March 2017, including the following:

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