

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 ASSENTED-TO MOTION
TO CONTINUE THE STAY OF THE BRIEFING SCHEDULE
FOR AN ADDITIONAL 60 DAYS**

Appellant, Dzhokhar Tsarnaev, by his counsel, and pursuant to Fed. R. App. P. 26(b), hereby moves this Court to continue the stay of the briefing schedule for an additional 60 days in order to allow a full record of the proceedings below to be compiled and initially reviewed by counsel for Appellant. On September 16, 2016, this Court ordered that briefing be stayed for a period of 120 days, during which time Appellant was to file a status report every 30 days, and at the end of which period Appellant was to propose a merits briefing schedule. Despite undersigned counsel’s diligent efforts, described below, the record remains incomplete.

Accordingly, counsel for Appellant seek an additional 60 days to compile and initially review the full record.

Undersigned Counsel Have Made Diligent Efforts To Compile A Complete Record on Appeal.

1. Since the entry of the Court's Order, as reflected in Appellant's status reports, counsel for Appellant have worked diligently for hundreds of hours to compile a complete record on appeal.

2. This amount of time has been required because of both the unusual size of the record and the complex manner in which it was docketed. The approximately 105 court days—including 25 days for jury selection, 19 days of the guilt-innocence trial, and 16 days for the sentencing trial—span over 10,000 pages of transcripts. The parties introduced, or marked for identification, over 1,600 exhibits. The publicly available docket currently comprises 1,706 entries. There are 139 docket entry numbers that are skipped entirely on PACER. Additionally,

over 600 documents remain under seal and unavailable on PACER. Counsel for Appellant have painstakingly identified what each docket number relates to.

3. The government also does not yet have a complete record on appeal. Indeed, the government has asked counsel for Appellant to share its findings on 144 docket entries; we have agreed to do so.

4. Since September 16, 2016, counsel for Appellant have also continued to organize, index, and review the trial team's voluminous files, comprising 54 boxes of paper materials and approximately 26.5 TB of data. Undersigned counsel, other than Ms. Clarke, have no prior familiarity with the record.

Despite These Efforts, The Record Remains Incomplete.

5. Despite these efforts and the continuing assistance of the district court clerk's office in understanding the unusual docket, counsel for Appellant have not yet been able to compile a full record of the original papers and exhibits filed in the district court for appeal.

6. Since the notice of appeal was filed, counsel for Appellant have learned that there were approximately 27 government ex parte filings and proceedings in the district court. Counsel for Appellant have no knowledge of the nature of these ex parte proceedings initiated by the prosecution. This Circuit has held that ex parte communications between the prosecution and the trial court are "presumptively doubtful" and that the government bears the burden of justifying

such a filing. *United States v. Claudio*, 44 F.3d 10, 15 (1st Cir. 1995); *see also* *United States v. Napue*, 834 F.2d 1311, 1316 (7th Cir. 1987) (“[E]x parte communications between the trial court and the prosecution in a criminal case are to be greatly discouraged and should be permitted only in very limited circumstances.”).

On July 29, 2016, counsel for Appellant made a formal request to government counsel for disclosure of these ex parte filings and proceedings so that we could ascertain if these filings and proceedings raise or bear on any issues for appeal. We additionally asked that, as to any ex parte filings and proceedings that the government was not willing to disclose, the government provide for each such filing or proceeding the nature of the document or hearing and the asserted basis for non-disclosure, so that counsel for Appellant could determine whether to move the district court for disclosure. On November 10, 2016, government counsel stated that the government intends to file a motion in the district court requesting permission to disclose approximately 15 to 19 of these 27 ex parte filings and proceedings, but that it intends to resist disclosing on appeal the remaining ex parte filings and proceedings. As of today, however, the government has neither filed that motion, nor provided the purported basis for nondisclosure regarding these ex

parte filings and proceedings. The requested 60 days should permit sufficient time for the parties to litigate defense access to these pleadings and proceedings.

7. In addition, we have discovered that there are 20 sealed orders that Appellant does not yet have a copy of. We have filed a formal motion in the district court seeking a copy of these orders.

8. We have asked government counsel for a copy of government trial exhibit #772-A. The government has informed us that it does not have a copy of this exhibit. The clerk's office has sought to assist us in finding a copy of this exhibit, but has informed counsel that no screen capture of this government exhibit exists on court computers. Accordingly, this exhibit may need to be recreated.

9. We have asked the government to provide photographs of its over 680 physical exhibits for review and use in the appeal. The government has informed counsel for Appellant that it is uncertain whether it possesses photographs of its physical exhibits.

10. At the time of our initial request for a 120-day stay of the briefing schedule, we had hoped and expected that we would be in a position at the end of that period to have conducted an initial review of a complete record and therefore be able to propose a merits briefing schedule. However, without knowledge of

even the nature of the government's ex parte filings and proceedings below, we cannot assess what issues for appeal those proceedings might raise, and what further litigation in the district court may be necessary to compile a complete record on appeal. For these reasons, it appears prudent to respectfully ask that this Court continue the stay of the briefing schedule for a further 60 days, to permit counsel to finish compiling the record on appeal, complete our initial review of the full record, and propose to this Court a merits briefing schedule based upon that review.

11. To keep the Court fully informed, if this Court grants this motion, counsel for Appellant will, as previously, file a status report at the 30-day mark while the stay is in place.

12. Undersigned counsel have conferred with counsel for Appellee, Elizabeth Collery, who stated that the government consents to this motion.

Accordingly, for these reasons, we respectfully request that the Court grant this motion and continue the stay of the briefing schedule for an additional 60 days so that counsel for Appellant may compile and review a full record of the proceedings below.

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys:



David Patton, Esq.
Court of Appeals # 1173507
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417-8700
DAVID_PATTON@FD.ORG

Gail K. Johnson, Esq.
Court of Appeals # 1173144
Johnson, Brennan & Klein, PLLC
1470 Walnut Street, Suite 101
Boulder, CO 80302
(303) 444-1885
GJOHNSON@JBK-LAW.COM

Judy Clarke, Esq.
Court of Appeals # 1166489
CLARKE & RICE, APC
1010 Second Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484
JUDYCLARKE@JCSRLAW.NET

CERTIFICATE OF SERVICE

I certify that the attached Appellant Tsarnaev's Assented-To Motion to Continue the Stay of the Briefing Schedule for an Additional 60 Days 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 9th day of January 2017, including the following:

Elizabeth D. Collery, Esq.
U.S. Department of Justice, Crim. Div., App. Sec.
950 Pennsylvania Ave. NW, Suite 1264
Washington, DC 20530
liza.collery@usdoj.gov

/s/ David Patton
David Patton, Esq.
Court of Appeals # 1173507
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417-8700
DAVID_PATTON@FD.ORG