

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA            )  
  )  
  v.            )  
  )  
DZHOKHAR TSARNAEV                 )

CRIMINAL NO. 13-10200-GAO

**MOTION FOR LEAVE TO REFERENCE AND/OR QUOTE  
CERTAIN MATERIALS IN PUBLIC FILINGS**

Defendant, Dzhokhar Tsarnaev, by and through counsel, pursuant to the Order of the First Circuit Court of Appeals, respectfully requests leave to reference information contained in and/or to use quotations from the following materials in pleadings and other documents filed on the public docket in both this Court and in the Court of Appeals:

- (1) juror questionnaires;
- (2) transcripts of publicly-conducted voir dire;
- (3) the aggregate number of jurors provisionally deemed “qualified” as of particular dates;
- (4) transcripts of the parties’ arguments and this Court’s decisions on individual juror qualifications.

Any such references or quotations would refer to individual jurors by randomly-assigned number only, without revealing other personal identifiers.

As grounds for this motion, and as set forth below, the presumptive right of public access to this information outweighs any countervailing basis to keep it under seal.

### **Background**

On February 3, 2015, the defendant filed a Second Petition for Writ of Mandamus in the United States Court of Appeals for the First Circuit, No. 15-1170. Pursuant to Fed. R. App. P. 21, defendant served this Court with a copy of the Second Petition at the time it was filed and understands that the government likewise served the Court with a copy of its Opposition. The Second Petition and Opposition were filed under seal in the Court of Appeals; a redacted copy of the Second Petition was subsequently filed on the First Circuit public docket.

On February 13, 2015, the defendant filed in the Court of Appeals a Motion to Unseal the unredacted version of his Second Petition for Mandamus and the government's Opposition. Defendant also requested leave to publicly refer to and/or quote analogous materials in subsequent First Circuit filings, and to discuss such information publicly at oral argument on February 19, 2015. A copy of this motion is attached hereto as Exhibit A.

Later in the day on February 13, the First Circuit issued the following order:

Petitioner has filed a motion to unseal the unredacted version of his Second Petition for Mandamus as well as the government's Opposition. The motion is denied without prejudice. As granting this motion would essentially result in this court unsealing materials which the district court has sealed, petitioner must first ask the district court to unseal these materials and obtain a ruling thereon from the district court, thereby providing the district court an opportunity to express its views on the matter. We request that the district court act promptly with respect to this matter. As we understand petitioner's motion, petitioner wishes to refer in his supplemental brief and at oral argument to the following: (1) information from sealed juror questionnaires (2) sealed portions of publicly conducted voir dire (3) the aggregate number of jurors the district court deemed qualified as of the dates of the filing of the Second Petition for Mandamus and the

government's Opposition (4) the parties' arguments and the district court decisions on individual juror qualifications. Petitioner stipulates that all references would be by juror number and would not disclose any personal identifiers. If the district court and this court do not rule further on petitioner's unsealing request prior to noon, February 17, 2015, when the supplemental briefs are due, then petitioner and the government should be prepared to file redacted supplemental briefs on the public docket and unredacted supplemental briefs under seal.

A copy of the Order is attached hereto as Exhibit B. Defendant files this motion pursuant to the First Circuit's Order.

### **Argument**

In *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013), the First Circuit reaffirmed that “materials on which a court relies in determining [ ] litigants’ substantive rights” are subject to a presumption of public access. *Id.* at 54. “When addressing a request to unseal, a court must carefully balance the presumptive public right of access against the competing interests that are at stake in a particular case . . . keeping in mind that only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access.” *Id.* at 59 (internal quotation marks and citations omitted). No compelling interests weigh against unsealing the specific categories of information at issue here.

**Juror questionnaires.** Anonymous references (identified only by randomly-assigned number) to juror questionnaire information does not in any way compromise the privacy interests of potential jurors or threaten the integrity of the proceedings. Indeed, relevant portions of written juror questionnaires have been freely described and/or quoted orally by the Court and the parties in the public voir dire proceedings on a daily basis.

There is no basis to keep under seal questionnaire information that already has been discussed publicly and no reason to restrict discussion of other questionnaire responses that may not have yet emerged in public voir dire to date but that have relevance to court pleadings.

**Transcripts of publicly-conducted voir dire.** While transcripts of individual voir dire have not yet been made public, the vast majority of the questioning is being conducted in the presence of media “pool” members and transmitted to the public and other members of the media in a separate room via live audio and video feed. Information from these proceedings, including direct quotations of questions and answers, is being reported contemporaneously in great detail and compiled by various media. *See, e.g., The Dzhokhar Tsarnaev Jury Pool* (on-line spreadsheet, with ongoing updates, listing every juror questioned individually and linking to contemporaneous media Twitter accounts of individual voir dire questions and answers for each juror), THE BOSTON GLOBE ONLINE, <available at <http://www.bostonglobe.com/metro/2015/02/11/the-potential-jurors-dzhokhar-tsarnaev-trial/spC2IAyCqUNPQouAJlwWEI/story.html>>. There is no basis to keep under seal information that is already part of the public record.

**Aggregate number of jurors provisionally deemed “qualified” as of particular dates.** In its Order denying a third-party motion on February 13, 2015, this Court disclosed that 54 jurors have been provisionally qualified to date. *See* DE 1031. There is no basis to restrict release of the same information as of other dates in the voir dire process, past or future.

**Transcripts of the parties' arguments and this Court's decisions on individual juror qualifications.** The district court has instructed potential jurors in the clearest and sternest terms not to read, watch, or listen to any media reports about this case. Jurors are presumed to follow these instructions and the potential jurors questioned to date have assured the Court they have done so. The risk that public disclosure of arguments and rulings on cause challenges might influence future prospective juror interviews is remote.

**Conclusion**

For the foregoing reasons, the defendant's motion should be granted.

Respectfully submitted,

DZHOKHAR TSARNAEV  
by his attorneys

/s/ William W. Fick

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**Certificate of Service**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 14, 2015.

*/s/ William W. Fick*

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 15-1170

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In re  
DZHOKHAR TSARNAEV,  
Petitioner

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**MOTION TO UNSEAL DOCUMENTS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and the Rules of this Court, petitioner, Dzhokhar Tsarnaev, requests that the unredacted version of his Second Petition for Mandamus and the government’s Opposition be unsealed. The sealed materials reference and/or quote, without the disclosure of personal identifiers, information from the written juror questionnaires and portions of publicly conducted voir dire. The sealed materials also reveal the aggregate number of jurors that the district court has deemed “qualified” in voir dire as of the date of filing.

Petitioner further requests leave to reference and/or quote such materials and information publicly in his supplemental brief. In addition, petitioner requests leave to quote and/or reference the parties’ arguments and the district court’s decisions on individual juror qualifications (again, without disclosure of personal identifiers).

In support of this motion, petitioner states the following:

1. On February 12, 2015, this Court entered an Order scheduling oral argument in this case and ordering the parties “to refrain from disclosing or discussing at the hearing any of the sealed materials in this case.”

2. As the concurring judge recognized, the portion of the Order addressing the disclosure or discussion of sealed materials will preclude discussion of “facts directly at the heart of the issue presented.”

3. In *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013), this Court reaffirmed that “materials on which a court relies in determining [ ] litigants’ substantive rights” are subject to a presumption of public access. *Id.* at 54.

“When addressing a request to unseal, a court must carefully balance the presumptive public right of access against the competing interests that are at stake in a particular case . . . keeping in mind that only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access.” *Id.* at 59 (internal quotation marks and citations omitted). No compelling interests weigh against unsealing here.

4. The sealed materials at issue here include the unredacted Second Petition for Mandamus and the government’s Opposition to that Petition. Insofar as those documents contain and discuss statements from juror questionnaires, which were identified using randomly assigned numbers that the public and media



cannot link to individual names or other identifying information, petitioner submits that the continued sealing of such information is unwarranted. Petitioner initially sought to seal that discussion in his Second Petition to this Court only because his Third Motion for Change of Venue in the district court, which also contained such discussion and which was initially filed on the public docket, had been ordered sealed by the trial judge. Petitioner did not believe then, and does not believe now, that the juror questionnaire information disclosed in the Second Petition compromises the privacy interests of potential jurors or threatens the integrity of the proceedings. Indeed, relevant portions of written juror questionnaires frequently are referenced and/or quoted orally in the public voir dire proceedings.

5. The Second Petition contains references to voir dire questioning and the government's Opposition focuses on voir dire as a curative remedy for local prejudice. While the transcripts of the voir dire have not yet been made public, the vast majority of the questioning is being conducted in the presence of media "pool" members and transmitted to the public and other members of the media in a separate room via live audio and video feed. Information from these proceedings is being reported contemporaneously in great detail and compiled by various media. *See, e.g., The Dzhokhar Tsarnaev Jury Pool* (on-line spreadsheet, with ongoing updates, listing every juror questioned individually and linking to contemporaneous media Twitter accounts of individual voir dire questions and

answers for each juror), THE BOSTON GLOBE ONLINE, <available at <http://www.bostonglobe.com/metro/2015/02/11/the-potential-jurors-dzhokhar-tsarnaev-trial/spC2IAyCqUNPQouAJlwWEI/story.html>>. To the extent the discussions in the Second Petition and the government’s Opposition reference or quote portions of the publicly conducted voir dire, petitioner submits there is no need for continued sealing.

6. Public references to and quotations of additional information not already made public in voir dire — *e.g.*, the aggregate number of “cleared” jurors, arguments and decisions on “cause” strikes — will not threaten the integrity of the proceedings. The district court has instructed potential jurors in the clearest and sternest terms not to read, watch, or listen to any media reports about this case. Jurors are presumed to follow these instructions and the potential jurors questioned to date have assured the Court they have done so.

7. Discussion of information disclosed in the anonymous juror questionnaires is an essential component of petitioner’s contention that he has established a presumption of prejudice precluding a fair trial by an impartial jury in the District of Massachusetts. Discussion of public portions of the voir dire will be part of his supplemental briefing responding to the government’s Opposition. To the extent he is unable to disclose or discuss that information publicly, he will be unable to present a cogent argument to this Court.

Respectfully submitted,

DZHOKHAR TSARNAEV

by his attorneys,

/s/ Judith Mizner

Judith Mizner (1st Cir. No. 11056 )

William W. Fick (1st Cir. No. 82686)

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**CERTIFICATE OF SERVICE**

I, Judith Mizner, hereby certify that this document filed through the ECF system will be sent to the registered participants, including counsel of record William Weinreb, Alope Chakravarty, Nadine Pellegrini, Steve Mellin, and Dina Chaitowitz, as identified on the Notice of Electronic Filing on February 13, 2015.

/s/ Judith Mizner

# United States Court of Appeals For the First Circuit

No. 15-1170

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IN RE: DZHOKHAR TSARNAEV

Petitioner

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Before

Lynch, Chief Judge,  
Torruella and Howard, Circuit Judges.

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## ORDER OF COURT

Entered: February 13, 2015

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If the district court and this court do not rule further on petitioner's unsealing request prior to noon, February 17, 2015, when the supplemental briefs are due, then petitioner and the government should be prepared to file redacted supplemental briefs on the public docket and unredacted supplemental briefs under seal.

By the Court:

/s/ Margaret Carter, Clerk

cc: Honorable George A. O'Toole  
Robert Farrell, Clerk of Court  
Miriam Conrad  
David I. Bruck  
Judith H. Mizner  
Timothy G. Watkins  
William W. Fick  
Judy Clarke  
William D. Weinreb  
Dina Michael Chaitowitz  
Aloke Shankar Chakravarty  
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Jonathan M. Albano  
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