

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 MOTION FOR
EXTENSION OF TIME TO FILE OPENING BRIEF

Appellant, Dzhokhar Tsarnaev, by his counsel, hereby moves this Court, pursuant to Federal Rules of Appellate Procedure 26(b) and 31, to extend the August 20, 2018 deadline for filing his opening brief in this federal death-penalty appeal by 90 days, to November 18, 2018. This is the first extension Mr. Tsarnaev has sought since the Court set a briefing schedule in this case. *See* Order dated 8/11/2017. The Government does not object to this request for an extension of time.

Counsel have been working diligently on Mr. Tsarnaev's appeal and have made considerable progress toward completing the brief. From the work already completed, counsel know that the brief will present a significant number of issues,

several of which are factually and legally complex matters of first impression. But, because of the extraordinary challenges this case poses, we still have time-consuming work to do. In addition, also as detailed below, despite extensive efforts beginning immediately upon their appointment, counsel, through the course of drafting the brief, have become aware that this complicated record on appeal is still incomplete, and, therefore, have had to devote considerable time to record-completion efforts. Counsel have at all times acted diligently, and will continue to do so, but many of the gaps in the record became clear only after we had the opportunity to research and develop our appellate arguments. Therefore, record-related efforts will continue to occupy our time in the near future. In support of the motion, Mr. Tsarnaev's counsel further state as follows:

Briefing of Appellate Issues

1. The Court is well aware of the size, complexity, and gravity of Mr. Tsarnaev's case. The judgment—the 1,479th docket entry in the record—followed extensive pre-trial litigation and a 61-day trial. The 74-page indictment included 30-counts arising from the use of a weapon of mass destruction at the Boston Marathon, three separate subsequent incidents, and one of the most publicized manhunts in the history of this jurisdiction, with four deceased victims and hundreds of injured survivors. Mr. Tsarnaev was found guilty of each of these 30 counts. The trial also included a lengthy penalty phase in which 61 witnesses

testified. Even relative to other federal capital appeals and terrorism appeals across the country, the record here is voluminous. The record comprises 1,738 docket entries, 1,675 exhibits and over 10,000 pages of transcripts. Many of these were originally filed under seal and not available on PACER to counsel.

2. From the time of their appointment, counsel have worked to complete and review the record, identify appellate issues, and research and draft them for the brief. Those tasks have proven challenging and time-consuming, owing to not only the sizeable record but also the heightened responsibilities of capital counsel. After careful review of the available record, preliminary research, and discussion, counsel identified approximately 30 appellate claims to consider raising in Mr. Tsarnaev's brief, many of which raised novel questions of first impression, and required intensive analysis of the factual record. Each potential issue had to be weighed carefully, because of the special ethical duty of counsel in a death-penalty case, especially a direct appeal in which the claims that can be raised are not limited as in a habeas appeal, not to omit "arguably meritorious" issues. American Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1(C) (rev. Feb. 2003). See also id., Commentary ("'Winnowing' issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed

later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.”). Only after extensive legal research and thorough review of the facts were counsel able to reject some of those claims.

3. Counsel have completed drafts of a substantial portion of the remaining claims, including issues concerning venue, multiple errors in the selection of the death-qualified jury, the admission of evidence obtained through the use of Mr. Tsarnaev’s involuntary confession, the lawfulness of certain counts of conviction under 18 U.S.C. § 924(c), the exclusion of relevant mitigation material, improper prosecutorial arguments, and the admission of victim impact evidence from survivors. But, despite continuous effort, a number of issues identified and determined to be sufficiently weighty for inclusion remain to be drafted. Counsel have begun work on these claims, but are not finished with the drafting and editing process. Many of the issues Mr. Tsarnaev intends to present involve matters of first impression in this Circuit. Those issues are particularly time-consuming to brief, as they demand that counsel address not just applicable Circuit precedent, but also a range of decisional law in other jurisdictions, as well as legislative history, policy considerations, and secondary sources. In addition, once the brief is fully drafted, counsel will need to travel to Florence, Colorado,

where Mr. Tsarnaev is incarcerated, to review the brief with Mr. Tsarnaev prior to its filing.

4. Counsel will also need to prepare the addendum and the record appendix, a time-consuming process in a case like this where the appendix will necessarily run to tens of thousands of pages notwithstanding our intention to comply with this Circuit's Local Rule barring the inclusion of unnecessary material. And that process cannot be completed until the remaining record matters and litigation, described below, have concluded.

Record Issues

5. From the time of their appointment, counsel for Appellant have devoted considerable time and effort to compiling a complete record. Many proceedings remained untranscribed, and, even as recently as two months ago, additional untranscribed proceedings in the District Court were still being discovered. Because not all items filed under seal are visible to counsel on PACER, counsel had to review each docket number with the government and the Clerk of Court to account for every item. During that process, counsel learned for the first time that there had been numerous government *ex parte* proceedings and pleadings, and filed motions in the District Court and this Court seeking disclosure of those materials. In the course of drafting the opening brief, counsel have discovered additional record issues that need to be resolved before the brief and

appendix can be completed so that both sides can litigate this issue based on the “entire record in the case.” 18 U.S.C. § 3595(b). What follows comprises the outstanding record issues and the steps counsel have taken and will have to take in the near future to resolve them:

5.a. In granting the government’s motion to preclude any evidence at the penalty phase of Tamerlan Tsarnaev’s involvement in a brutal triple homicide and robbery in 2011, the District Court reviewed and relied upon *in camera ex parte* materials submitted by the government. In order to fully litigate this preclusion issue in the opening brief, counsel needs access to these materials. On June 29, 2018, Appellant filed a motion with this Court seeking disclosure of these *in camera ex parte* materials. That motion is pending.

5.b. Over 60 transcripts (including the entirety of the *voir dire* proceedings) and numerous pleadings remain under seal.¹ Counsel for Appellant and the government have just finished reviewing all of these to determine which should now be unsealed. Unless additional unsealing occurs prior to the filing of the opening brief, counsel will have to file two different briefs, one redacted and one unredacted and under seal, and two different versions of the Appendix and

¹ Trial counsel for Mr. Tsarnaev and the government undertook an initial unsealing effort in the District Court that involved sealed pleadings and orders, but not transcripts. DE 1626; DE 1627; DE 1697; DE 1698; DE 1700.

Addendum, likewise one redacted and one unredacted and under seal. See 1st Cir. R. 11.0. Counsel for the parties have largely agreed on which of these transcripts and pleadings should be unsealed, and, on July 13, 2018, filed a joint motion for unsealing in the District Court. See DE 1737. That motion is still pending. Counsel for Appellant also anticipates filing a motion to unseal a small number of pleadings on which the parties did not reach agreement within the next two weeks.

5.c. All of the juror questionnaires remain under seal and are not docketed. Counsel for the parties have agreed that the questionnaires of the seated jurors should be unsealed, with certain redactions, and that unsealing is one of the requests in the joint motion pending before the District Court. However, counsel for the parties disagree regarding whether the questionnaires for the jurors who were not seated should be unsealed. On July 16, 2018, counsel for Appellant filed a motion in the District Court to unseal these questionnaires, pursuant to Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984). See DE 1738. This unsealing issue will need to be resolved before the filing of the opening brief, since counsel for Appellant need to cite answers in each of the juror questionnaires in order to fully present the venue issue and others.

5.d. In the course of working on the opening brief, counsel for Appellant also have identified a number of items missing from the record. For example, there is no final exhibit or witness list on the docket. A number of

pleadings and exhibits that were filed and discussed in court were never formally docketed. At least one sealed Order was never formally docketed. Counsel for the parties are still uncertain as to what three missing docket numbers pertain to. Counsel for Appellant and counsel for the government have been conferring about these problems with the record, and have cooperated with the shared aim of ensuring the parties and this Court have a complete record. Counsel for the parties are working to compile accurate information as to each item and to reach a stipulation to supplement the record, pursuant to Fed. R. App. P. 10(e)(2)(A). If counsel cannot reach full agreement, Appellant will file a motion for completion of the record, pursuant to Rule 10, as soon as the parties' discussions have concluded. These items relate to issues that will be briefed by counsel, and, thus it is important that they are part of the record on appeal.

6. Once the disclosure litigation, unsealing litigation, and record supplementation are completed, counsel will have to compile the appendix and coordinate citations in the brief with the completed appendix.

Comparable Cases

7. The requested extension of time is consistent with, or less than, what has been approved in other recent comparable federal capital cases with large

records but fewer incidents.² The requested date would represent a total of 1,025 days between the notice of appeal (filed January 29, 2016) and the filing of Mr. Tsarnaev's opening brief. Compare, e.g., United States v. Alejandro Umana, No. 10-6 (4th Circuit) (time between notice of appeal and filing of initial brief: 1,122 days; 1 incident, 1 victim); United States v. Rejon Taylor, No. 09- 5517 (6th Circuit) (time between notice of appeal and initial brief: 1,650 days; 1 incident, 1 victim); United States v. Daniel Troya and Ricardo Sanchez, No. 09-12716-P (11th Circuit) (time between notice of appeal and filing of initial brief: 1,049 days; 2 defendants, 1 incident, 4 victims); United States v. Hager, No. 08-04 (4th Circuit) (time between notice of appeal and filing of initial brief: 1,550 days; 1 incident, 1 victim); United States v. Len Davis, No. 05-31111 (5th Circuit) (time between notice of appeal and filing of initial brief: 1,131 days, 1 incident, 1 victim).

² The average time to file the opening brief from the date of the notice of appeal for the last 20 federal capital direct appeals, including cases with much smaller records and single victims, is 912.4 days. This Circuit has heard one prior federal death penalty direct appeal in the modern era: United States v. Gary Sampson, No. 04-10325. Mr. Sampson's case, however, was less complex and the district court record was considerably smaller. Mr. Sampson was charged with two murders resulting from carjackings. Because there was no guilt phase, Mr. Sampson's case proceeded directly from jury selection to sentencing proceedings. Even on this smaller, simpler record, Sampson's counsel requested, and this Court granted, 792 days between the notice of appeal and the filing of appellant's opening brief.

Conclusion

8. Undersigned counsel will continue to work diligently and to make it the highest priority to complete Mr. Tsarnaev's brief promptly. However, given their special ethical responsibilities in a federal death-penalty appeal, only the second such appeal in this Circuit; the extraordinary size and complexity of the record and the novel appellate issues it has generated; the unusual challenges counsel have confronted in perfecting the appeal; and counsel's other responsibilities, the requested additional time is necessary both in order to provide Mr. Tsarnaev with effective representation on appeal and to serve the Court's interest in receiving the most thorough possible briefing in this important case. Although counsel are devoting all available time to this matter, it is not possible for us to complete the necessary work by the current August 20, 2018 deadline. Mr. Tsarnaev's attorneys are hopeful, however, that by continuing our intensive efforts, we can compile the record and finish the brief in the time requested.

9. We have consulted with counsel for the government regarding this proposed briefing schedule. The government has no objection to a 90-day extension, but has asked that counsel for Appellant inform the Court that the government will object to any further requests for extension of the briefing schedule.

For these reasons, Mr. Tsarnaev respectfully requests that the Court grant this motion and extend the deadline for the opening brief in this matter by 90 days, to November 18, 2018.

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 Motion for Extension of Time to File Opening Brief 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 18th day of July 2018, including the following:

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