

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

**JURY TRIAL - DAY TWENTY-FIVE**

**MOTION HEARING**

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts 02210  
Monday, March 2, 2015  
10:03 a.m.

Marcia G. Patrisso, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
One Courthouse Way, Room 3510  
Boston, Massachusetts 02210  
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

## 1 APPEARANCES:

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On Behalf of the Defendant

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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:03 a.m.)

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

For a motion hearing in the case of United States versus Dzhokhar Tsarnaev, 13-10200.

Would counsel identify yourselves for the record.

MR. WEINREB: Good morning, your Honor. William Weinreb for the United States.

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

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

MR. MELLIN: Good morning, your Honor. Steve Mellin for the United States.

THE COURT: Good morning.

MR. BRUCK: Good morning, your Honor. Appearing on behalf of the defendant is Judy Clarke, Miriam Conrad, Bill Fick and Tim Watkins.

THE COURT: Good morning.

So there are some in limine issues that we want to address that need to be addressed, as I understand it, or ought to be addressed before opening statements. This is not one, I guess, but it's a place to start.

1           There is a -- well, let me start with the  
2 government's -- the government has a motion regarding the  
3 exclusion of mitigating evidence in the guilt phase. Why don't  
4 we start with that. Mr. Chakravarty?

5           MR. CHAKRAVARTY: Good morning, your Honor.

6           Your Honor, the Federal Death Penalty Act makes clear  
7 about the bifurcated nature of death penalty cases. There is a  
8 liability phase which is a guilt -- the burden on the  
9 government is to prove beyond a reasonable doubt that the  
00:05 10 defendant has committed a crime, and the jury is narrowly  
11 focused on the issue of whether the defendant did, in fact,  
12 commit those crimes.

13           Only after that phase, as the jurors have been  
14 reminded throughout the voir dire process, does the issue of  
15 sentence -- what the appropriate punishment if somebody's found  
16 guilty of a capital offense -- take place. And it is  
17 throughout the history of the Federal Death Penalty Act,  
18 certainly in the last 20 years, that that second proceeding in  
19 which aggravating evidence and mitigating evidence is  
00:06 20 presented, is the forum in which any evidence of relative  
21 culpability or other mitigating factors related to  
22 sentencing -- where those issues are aired.

23           What the government is concerned about, and it's --  
24 the defense response to its motion in limine bears that concern  
25 out, is that the defense will intend to use the liability

1 phase, the guilt or innocence -- guilt or not guilt phase of  
2 the trial, to advance its theories of mitigation. And it's one  
3 thing to simply challenge the admissible evidence in a guilt  
4 phase of any trial, any criminal trial, by legitimate relevant  
5 and non-prejudicial evidence, but it is another thing entirely  
6 to advance an agenda, a didactic agenda, of the mitigation  
7 theory of the case during that initial liability phase.

8 The concerns are, number one, the legal concern.  
9 There is a reason for this bifurcation. The jury ought not  
00:07 10 move on and skip ahead to a penalty phase before a fair trial  
11 both for the government as well as for the defense is had with  
12 regards to the germane issues. And the germane issues in the  
13 liability phase are whether the elements of the indictment have  
14 been proven.

15 But the other is a pragmatic concern, your Honor.  
16 This jury is going to be instructed that they are not to not  
17 only move on, but they are to consider the evidence related to  
18 the elements of the offense. Motive is not an element of an  
19 offense but it is a concept, and evidence of motive feeds the  
00:08 20 circumstantial evidence which is nature -- necessary in every  
21 criminal case -- or many criminal cases I should say, to  
22 demonstrate somebody's intent. And so for that reason, the  
23 government will present motive testimony.

24 The defense's rejoinder to that is they ought to be  
25 able to present contrary testimony, whether it to be to the

1 defense's motive or other evidence in the case, which will  
2 further advance their mitigation case. And I think that goal  
3 is both clear as well as is inappropriate under our  
4 jurisprudence regarding criminal trials.

5 The sentencing factors ought not infect the jury's  
6 consideration. And you could imagine the circumstance where  
7 during cross-examination or in argument the defense suggests  
8 something to the jury which legally makes no difference with  
9 regards to liability, only makes a difference with regards to  
00:09 10 mitigation, and the jury is left trying to decipher what they  
11 should be considering with regards to the liability of the  
12 defendant. That's the situation that we're trying to avoid.

13 Further complicating that, if the defense introduces  
14 on cross-examination or in their case evidence of mitigation,  
15 it would place the government in an awkward posture of having  
16 to, frankly, invite error by introducing evidence of  
17 aggravation as aggravation evidence. And I think the point  
18 here is the touchstone of the liability phase has to be the  
19 defendant's culpability and the acts that relate to the  
00:10 20 defendant's culpability.

21 The defense, in their papers, have clearly made the  
22 point that they want to advance the theory of the  
23 coconspirator's culpability in the liability phase. And that  
24 simply -- that person's character, his actions outside of the  
25 context of the criminal conspiracy charged are simply not

1 relevant. And even if there was some marginal relevance on  
2 some of these facts, which the Court will assess as the trial  
3 proceeds, then the risk of prejudice and the confusion to the  
4 jury is so high that it would -- it should be -- under 403  
5 concerns it should not be admitted.

6 And the pragmatic concern that the jury will not be  
7 able to be sufficiently instructed either curatively or  
8 precautionarily with regards to how they are to assess  
9 mitigation evidence in the liability phase, your Honor, is  
00:11 10 ultimately the reason why there is no case that the  
11 government -- the government's searches have ever revealed this  
12 expansion of capital case law to bring in mitigation evidence  
13 into the liability phase of a capital case in order to help lay  
14 the groundwork for a penalty proceeding.

15 That, I submit to your Honor, is a strategic choice.  
16 And to the extent that we are going through with this liability  
17 phase trial, then it should stay clean and it should stay like  
18 every other criminal trial, not prejudging of somebody's -- of  
19 the sentencing consequences of somebody's conduct and it should  
00:11 20 stay focused on whether he actually committed the crimes.

21 Thank you, your Honor.

22 THE COURT: Mr. Bruck?

23 MR. BRUCK: Thank you, your Honor.

24 Well, since Mr. Chakravarty begins by invoking the  
25 history of the Federal Death Penalty Act, I think it's probably

1 worth observing that not only has no court ever granted a  
2 motion like this, but so far as we've been able to tell, since  
3 the passage of the Federal Death Penalty Act in 1994, no lawyer  
4 for the government has ever filed such a motion.

5 What the government is actually asking for is to  
6 sanitize the liability phase evidence of any fact which places  
7 any part of the defendant's side of the story into evidence so  
8 that the jury will have for six weeks or two months or however  
9 long it takes a completely distorted, one-sided and unrealistic  
00:12 10 picture of the defendant's culpability and of his role in this  
11 case.

12 This is a conspiracy case, and the notion that in a  
13 conspiracy prosecution the defense is not allowed to present  
14 through argument, evidence -- on cross-examination or perhaps  
15 even evidence information about the relationship between the  
16 two alleged conspirators is, to say the very least, a novel  
17 proposition. And it's not surprising that Mr. Chakravarty's  
18 been unable to find a single case standing for that  
19 prosecution.

00:13 20 Moreover, this notion that the government only will  
21 present its sentencing case at the sentencing phase is  
22 nonsense. Of the 12 statutory and non-statutory aggravating  
23 factors, all but 11 will probably be entirely proven by the  
24 government's evidence at the liability phase. That's -- the  
25 government has known forever that this case is all about

1 sentencing, that that's really what we're here about, and their  
2 liability phase will be aimed at the question of sentence. And  
3 every tactical judgment, every witness, every direct  
4 examination will be focused on increasing the jury's sense of  
5 the personal blameworthiness of the defendant. And now they  
6 say, Well, we can't respond to that. Taken literally -- and  
7 not literally, what they say is that we can't even mention to  
8 the jury that the defendant was 19 years old until it gets to  
9 the penalty phase.

00:14 10 The government's problem with respect to the death  
11 penalty, that they've also known since the very beginning of  
12 this case, is that the lead conspirator, the person who started  
13 this whole thing, and but for whom the Boston Marathon bombing  
14 would never have occurred, was the older brother who's dead,  
15 and the defendant is the teenaged younger brother. And that  
16 presents a logical issue, a problem for the government's  
17 request for the death penalty.

18 So their response is to file this unprecedented motion  
19 to present the defendant's liability in artificial isolation in  
00:15 20 the hopes that by the time we get to the penalty phase, as the  
21 government knows we will, in six weeks or two months or however  
22 long it takes, the jury's concept of Jahar Tsarnaev's  
23 individual personal blameworthiness and responsibility and role  
24 in the offense will be completely distorted and will have set  
25 in like concrete and it will be impossible, or very difficult,

1 for the defense by presenting the real facts of this story then  
2 to change the jury's mind.

3 Mr. Chakravarty refers to motive, as well he might.  
4 The government doesn't have to prove motive. It's not an  
5 element of any of the 30 crimes alleged in the indictment. But  
6 the government chooses to go into motive, and that opens the  
7 door for us to respond. The government says the motive is  
8 extremist jihadi ideology, and we are entitled to respond by  
9 showing that a large part of the motive may well have been the  
00:16 10 defendant's domination by, love for, adoration of,  
11 submissiveness to, whatever, his older brother. That is fair  
12 game. If the government goes into it, we can go into it. And  
13 the idea that the Court should somehow police the evidence so  
14 as to allow the government to put every bit of their -- or  
15 almost every bit of their case on -- or almost every bit of  
16 their case on aggravation into the guilt phase, but the moment  
17 we try to respond, whether in argument or cross-examination or  
18 in any other way, the boom comes down, they object and we have  
19 to sit back down and pretend that there's nothing to be said,  
00:16 20 well, it's not surprising that no motion like this has ever  
21 been filed, let alone granted. And that's why Mr. Chakravarty  
22 can't find any case law on it. This would, to say the least,  
23 be breaking new ground, and it's ground that shouldn't be  
24 broken.

25 We also point out that we do know something about how

1 juries make decisions in capital cases and there are dangers to  
2 be navigated. The Capital Jury Project, after interviewing  
3 nearly a thousand jurors who actually sat on capital cases in  
4 11 states found that a great number of jurors make their  
5 decision about penalty during the guilt-phase evidence, during  
6 the evidence, before they've even heard guilt-phase  
7 instructions in closing argument, let alone the entire penalty  
8 phase.

9 Now, there may be nothing we can do about that  
00:17 10 problem. It seems to come with the territory. It's a very  
11 disturbing finding. But if there's one way we want to  
12 guarantee that it's going to happen in this case, it's to allow  
13 the government to present their full case to exaggerate and  
14 distort the defendant's personal culpability and role in this  
15 offense by eliding, pretending as though none of the other  
16 evidence exists, letting the jury hear that, deliberate on it,  
17 come back with a guilty verdict, and then -- if that's what  
18 they do, and that's what the government expects -- and then see  
19 if we can dig our way out of the hole by presenting the rest of  
00:18 20 the story sometime in late April or May. It is extremely  
21 unlikely that this problem of prejudgment can be prevented  
22 under those unnatural and unfair conditions.

23 This -- when I first got -- when we first received  
24 this motion we thought, well, maybe the government's filing  
25 this because they think that we're going to call, you know,

1 expert witnesses or social history witnesses or to present our  
2 full mitigation case at the penalty phase -- at the guilt  
3 phase. And we thought, Well, you know, maybe the motion's  
4 really moot. All we need to do is say we're not going to do  
5 that. But we come to find out that they actually want this to  
6 be a completely one-sided and distorted evidentiary  
7 presentation of a sort that has never occurred in any prior  
8 case, and we don't think this should be the first one.

9 Thank you.

00:19 10 THE COURT: Anything else?

11 MR. CHAKRAVARTY: No, your Honor.

12 THE COURT: Okay. Well, okay. I'll reserve it and  
13 let you know later today.

14 The defense raised some issues that I think we need to  
15 address partly in their so-called status report filed earlier  
16 and then also in some motions. I thought we might start with  
17 the defense -- this is Number 923, defense motion to bar  
18 spoliation of the so-called boat writings.

19 Mr. Fick?

00:20 20 MR. FICK: Yes, your Honor. So as the Court's aware,  
21 the government had proposed -- or informed the defense that it  
22 intended to cut out the panels and physical sections of the  
23 boat on which writings were found and sort of bring those  
24 panels into court to present them to the jury sort of as  
25 separate pieces of evidence apart from the boat itself, and we

1 objected to that and requested that the boat be preserved and  
2 that the boat be made available for the jury to view during the  
3 trial.

4 And it's kind of -- there's a funny inversion of the  
5 usual sort of logic in the arguments in these kind of issues.  
6 The government seems to care more about the content of the boat  
7 writings. They say the words are going to prove the  
8 defendant's motive and state of mind and such. Usually, of  
9 course, words can be proven by things like photographs,  
00:20 10 transcripts, testimony, but the government says, No, no that's  
11 not good enough. We need the actual boat itself so people will  
12 see it really was there and so they can hold it up close.

13 Oddly enough, that serves the effect of taking the  
14 words out of their context. The context in which the writings  
15 were made is really the key piece that's going to allow the  
16 jury -- or potentially allow the jury to evaluate what was the  
17 defendant's state of mind, what was he thinking, what was his  
18 motive, under what conditions and circumstances were those  
19 writings made?

00:21 20 The boat -- we see no reason why the boat could not be  
21 brought to the courthouse, or alternatively, why the jury could  
22 not be brought to the warehouse or some other warehouse where  
23 the boat is stored. The defense has viewed the boat by taking  
24 a few steps up a step ladder or going up on a hydraulic lift.  
25 It's visible. To the extent anyone has trouble seeing the

1 writing from a few feet away, well, then certainly we have the  
2 photographs and the transcripts and such.

3 But the bottom line is that the evidence here is the  
4 boat. It's movable. And it's very powerful. It really  
5 provides the context. And to the extent anything more than the  
6 words is necessary, the boat should be left in integral whole  
7 and the jury should be able to see it. I mean, it's really  
8 quite striking. There's no substitute for being able to see  
9 it. You can imagine Mr. Tsarnaev lying in that boat, much as  
00:22 10 one might lie in a crypt, while making those writings. And the  
11 jury should be able to see that in its entirety.

12 THE COURT: Can you do both? In other words, as I  
13 understand it, the proposal is to cut out a section to make it  
14 portable and be able to be brought to the courtroom, but could  
15 be repositioned or the rest of the boat could also be seen  
16 without the piece? I mean, why is it all or nothing, I guess  
17 is the question?

18 MR. FICK: I think the other piece of this is I think  
19 it's actually prejudicial for the jury to see the writings just  
00:22 20 on cutout panels, because then you have something that's more  
21 tactile, more immediate, more, I guess you might want to say  
22 real, than simply a photograph or a transcript or testimony  
23 about the writings, but it's divorced from the context. And so  
24 that then has the effect of isolating the jury on these panels  
25 and losing the effect of what the context is, so --

1 THE COURT: Right. But what I'm asking is why  
2 couldn't you then also do the context? In other words, the  
3 government wanted to show it as a piece, then the defense could  
4 ask to have the jury brought -- I mean, I don't know why  
5 it's --

6 MR. FICK: But I guess lingering --

7 THE COURT: -- either/or I guess.

8 MR. FICK: At the end of the case we would be left  
9 with -- under that scenario, we would be left with the panels  
00:23 10 cut out of the boat, and that could go back to the jury room  
11 and sort of have this lingering, constant presence in the case  
12 that would be sort of a tunnel vision in which we would lose  
13 the context.

14 And the other issue is it's not -- given the way the  
15 writings are positioned in the boat, I worry about the  
16 logistical cleanliness, so to speak, and the ability to  
17 reconstruct or replace the writings back in the boat after  
18 they've been cut out. You know, it seems to me to the  
19 extent -- being able to remember, refer to, look back at the  
00:24 20 writings, to the extent that's important, photographs,  
21 transcripts, testimony, that does that job, but to see the  
22 actual evidence, there's a real risk of distortions if any  
23 piece of the actual evidence is ripped from its context and  
24 left as something that continues to have a life in the case.

25 And so the boat should be viewed as the boat, is our

1 position, and that to do otherwise would be prejudicial.

2 THE COURT: Okay. Mr. Weinreb?

3 MR. WEINREB: Your Honor, this is essentially a motion  
4 for review, and the Court should deny it for two reasons.

5 Courts have a lot of discretion when it comes to granting or  
6 denying a motion for review, and the two main factors that the  
7 Court should consider is whether the defendant can establish  
8 whatever it wants to establish and other means from the view;  
9 for example, from photographs, through diagrams, through other  
00:24 10 things; and secondly, just how practical it would be to  
11 actually conduct the view -- or how impractical it would be.

12 In this case, this boat was much photographed,  
13 videotaped, diagramed at the very moment that it was  
14 discovered, that the evidence was discovered. It was  
15 photographed at night, during the daytime. It was photographed  
16 from every angle. It was photographed with the tarp on, with  
17 the tarp off, from the inside, from the outside. And all of  
18 that has been provided to the defense. Everything they want to  
19 establish about the context, as they put it, in which this  
00:25 20 writing was made is available to them, and they can do without  
21 the necessity for a view.

22 The government isn't in the same position as the  
23 defense, though, when it comes to presenting it. I mean, it's  
24 true. We have photographs of writing that we could produce in  
25 court. But we have a heavy burden in this case. We have to

1 prove the defendant's guilt beyond a reasonable doubt, and this  
2 writing is an important part of that.

3 And as we mention in our motion, there have  
4 been -- there have been suggestions made in the media and  
5 elsewhere that the writing wasn't actually there, that it's  
6 implausible, that it actually got written, how did he write it,  
7 was it written in blood? There's all these misconceptions, and  
8 we want to, and I believe we're entitled to, show the jury the  
9 actual evidence so they believe the actual evidence exists.

00:26 10 That's a basic task of the government and a basic right the  
11 government has because of the burden it bears.

12 As for the impracticality of the view, this is a very  
13 large boat. I'm not sure it could be brought to the  
14 courthouse. And I don't think it makes any sense to make the  
15 jurors go out and view it in any event. It's not easy to see  
16 this writing in the boat. It's a little difficult to read  
17 unless you're quite up close to it, and we don't want the  
18 jurors to be getting into the boat and being right up close to  
19 it.

00:26 20 The boat it filled with dried blood, with broken  
21 glass, with all sorts of debris. It's not easy to get into,  
22 it's not easy to get out of. It's not really sanitary. It  
23 could take them awhile to read it, and they'll have to each  
24 take turns doing it. We're worried that they're not going to  
25 take the time to do it because they're not going to want to

1 inconvenience their fellow jurors. Many of them may not even  
2 want to do it. And as I say, the images -- the circumstances  
3 under which it was written will be every bit as evident from  
4 all the photographic and video evidence and so on as it would  
5 be from actually seeing it.

6 In addition, this idea that there's some context to  
7 the way in which the note was written that must be shown to the  
8 jury, it still to this day really has never been articulated by  
9 the defense. What exactly is the context? I mean, there will  
00:27 10 be testimony that the defendant had been hiding in this boat  
11 all the time that the search for him was going on in Watertown,  
12 and that he wrote the note at that point. You'll see pictures  
13 of the boat with the tarp on it. It will be clear to the jury  
14 that he was hiding out in a boat in a backyard in Watertown  
15 with a tarp over it all the time when this happened.

16 I think that it is fair to say that what the defense  
17 really wants the jury to see is a boat riddled with bullet  
18 holes because that perhaps will create some sympathy for the  
19 defendant. But to the extent that that's what they want,  
00:28 20 they'll have every opportunity to do it if they want to show  
21 some pictures of the boat. In fact, the note itself has bullet  
22 holes right through it and it has blood dripping on it. So to  
23 the extent they want to have an image of the note that will  
24 convey to the jury -- in fact, to the extent that they want to  
25 convey the context to the jury at all, it's all right there in

1 the piece that we're proposing to bring into court. I think we  
2 attached some pictures to it, to our opposition to their  
3 motion. I think it makes quite clear that everything that they  
4 might want to say about that note -- or everything they might  
5 want to develop can be done without the need for a very  
6 impractical view of the boat.

7 THE COURT: Okay. I'll reserve this as well. I may  
8 want to take a view myself before it's an issue.

9 In the status report I think several matters to be  
00:29 10 discussed -- one is the defense objection to the clip of  
11 the -- what's called the April 18th law enforcement video.

12 MR. BRUCK: Yes, your Honor. Thank you.

13 The issue here is really quite narrow. Obviously, the  
14 fact that the defendant's and his brother's pictures were  
15 publicized, released to the news media on the afternoon of  
16 April 18th, is relevant. And there's not any question about  
17 that. The question is whether that fact, which could be proven  
18 in any one of a number of ways, should be accompanied by what  
19 amounts almost to a closing argument, a lawyer's argument, a  
00:30 20 very dramatic press conference by Special Agent in Charge Rick  
21 Deloria in which he did several things.

22 Now, again, I want to make clear that we are not -- we  
23 are also not the least bit critical of anything Mr. Deloria  
24 said or did at this press conference. Our point is simply that  
25 it is not evidence in a criminal trial for the reasons that we

1 set out in our motion.

2 The press conference was a -- was a dramatic, and I  
3 think it's fair to say emotional, appeal to the public for  
4 support and help. It began by trying to -- by extolling, I  
5 think quite properly, the effort that law enforcement had made  
6 during the days between the bombing and April 18th, praising  
7 the work of the FBI and of local and state law enforcement, and  
8 assuring the public that everything that could humanly be done  
9 by law enforcement had been done prior to this stage. Then it  
00:31 10 was what you could fairly describe as a patriotic appeal to the  
11 public to do its duty in order to bring the suspects to  
12 justice. And the phrase "bring to justice" is repeated several  
13 times during the -- during the press conference.

14 That's why we say that the emotional, prejudicial  
15 effect of this really outweighs the nonexistent marginal  
16 utility of using the actual press conference, rather -- tape of  
17 the press conference, rather than the fact of its release.  
18 There are a couple of other things I think that need to be kept  
19 in mind about this. This is the same special agent in charge,  
00:32 20 Rick Deloria, who appeared very, very shortly after his  
21 retirement from the FBI, in both the *60 Minutes* program that  
22 was aired a little while before the first anniversary of the  
23 bombing and in the *National Geographic* reenactment, docudrama,  
24 I guess.

25 In both cases, Agent Deloria made a very emotional

1 presentation. In the *60 Minutes* piece, he described his first  
2 glimpse of the defendant in court at his arraignment, perhaps  
3 unaware that he was looking at a man whose -- half of whose  
4 face was paralyzed from bullet wounds and described him as  
5 smirking and said that his appearance was despicable. This was  
6 broadcast to a national audience.

7 He also described videotape of the defendant  
8 deliberately placing the backpack right behind the child victim  
9 in this case, videotape which quite literally does not actually  
00:33 10 exist. There is videotape from which one can infer various  
11 things, and you can put your own interpretation on it, but what  
12 he described is something which doesn't exist, but during the  
13 voir dire examination you heard jurors say they had seen it.  
14 What they had seen was Agent Deloria describing that.

15 So, you know, you usually think that any given piece  
16 of pretrial publicity is not really going to resonate a year or  
17 a year and a half later when the jurors come into court, but  
18 this did. This does. And the Court expressed concern about  
19 Mr. Deloria's performance on these two unauthorized  
00:34 20 appearances. The government said, Well, we can't do anything  
21 about it because he doesn't work for the government anymore,  
22 and the Court let it be known, you know, that that was not to  
23 occur again. And the Court asked the government whether  
24 Mr. Deloria would be a witness. And you were immediately and  
25 promptly and unequivocally informed that he would not be, and

1 now here he is.

2 Now, I realize he's not a witness, he's simply -- not  
3 a witness in the sense that he can't be cross-examined, but he  
4 will be appearing. The government says the risk of harm is  
5 speculative. There's nothing speculative about the fear that  
6 jurors who saw those programs will see this clip and remember  
7 the feelings that were stirred up in them by Mr. DeLoria's  
8 appearance on the *60 Minutes* show and the *National Geographic*  
9 show -- an appearance, by the way, that was not only  
00:35 10 characterized by the things that I've described but also by  
11 tearing up. This was pretty intense stuff.

12 Mr. Deloria's a very impressive man with very  
13 impressive law enforcement credentials and very impressive  
14 performance in this whole story, and we don't take any of that  
15 away from him. But if you could ever point to a piece of  
16 evidence that is calculated to increase passion and prejudice  
17 while contributing nothing of additional value to the state's  
18 case, it would be the actual videotape of this press  
19 conference.

00:35 20 Let the government prove it however they want. The  
21 important thing is that Agent Deloria says at the press  
22 conference, Within seconds these pictures will be broadcast  
23 over the Internet and through the mass media around the world  
24 and throughout the country. That's what happened. That is the  
25 operative fact. That's the point that the government is

1 entitled to prove. But they shouldn't do it by the actual  
2 videotape of this press conference.

3 THE COURT: Okay.

4 MR. CHAKRAVARTY: Your Honor, that is the point that  
5 the government is offering evidence of, the suspects who were  
6 being sought and the gravity of the offenses and the scope of  
7 the manhunt for them. And the defense's suggestion as to what  
8 that effect will have on the jurors by having a historical  
9 videotape documenting what happened at that time I suggest is  
00:36 10 entirely speculative, not based in real reactions and real  
11 information that we've gleaned from jurors, but rather, based  
12 on this cult of personality that the defense is building around  
13 is Mr. Deloria and other witnesses -- other individuals who  
14 happen to be witnesses, unlike Mr. Deloria, in the case.

15 But what the defense is ignoring is it was this press  
16 conference that was broadcast and to which the defendant  
17 responded to. He went back to Cambridge after this broadcast  
18 was sent out, he got with his brother, and then he went and --  
19 knowing the scope of the manhunt, knowing the extent to which  
00:37 20 law enforcement and the community was being asked to look for  
21 him that resulted in Sean Collier's death and then the events  
22 in Watertown. And it's the effect on that listener that is the  
23 reason why the government is offering this.

24 Now, could this video be sanitized? Could there be  
25 stills? Could there be a description of the press conference?

1 Of course there can be. But that's not what the defense has  
2 tried to broker here; instead, they've been asking for a  
3 wholesale exclusion of the video and theoretically everything  
4 that goes along with it. The government is more than willing  
5 to provide a sanitized version, perhaps one without the,  
6 frankly unemotional testimony of FBI special agent in charge,  
7 which makes the point that there was a manhunt, that there were  
8 particular images released, and that that was broadcast  
9 nationwide, worldwide, and one of the consumers of that was the  
00:38 10 defendant.

11 MR. BRUCK: If I may, your Honor, it sounds like we  
12 have an agreement. I had not realized that the government was  
13 prepared to do that. And I think if we get together, we can  
14 probably solve this problem.

15 THE COURT: Well, maybe it's worth exploring. We'll  
16 hold off on it and see what progress you make. Let me just add  
17 I think it's a good idea.

18 (Laughter.)

19 THE COURT: There's a motion regarding -- from the  
00:38 20 defense to preclude the government from offering victim witness  
21 impact statements, which I'm not really clear on. I don't know  
22 why that would occur, I guess.

23 MR. BRUCK: I think after hearing from the government  
24 that may not really be a problem, so I think that perhaps is  
25 best handled by discussion and see -- we were --

1 THE COURT: Can we regard that as withdrawn for the  
2 time being and --

3 MR. BRUCK: Withdrawn without prejudice? Yes.

4 THE COURT: Yes.

5 MR. BRUCK: Thank you.

6 THE COURT: Then I guess the next thing would be some  
7 of the photographs. These were raised at various places in the  
8 status report, I think, the autopsy photographs and other  
9 graphic images, I guess.

00:39 10 MS. CONRAD: Yes. Thank you, your Honor. Your Honor,  
11 the government obviously will be offering -- and has the right  
12 to offer -- the images of the carnage that these bombings  
13 inflicted. The question is how much and the scope of what that  
14 means. I think perhaps some of that with respect to the  
15 portion regarding to the -- related to the aftermath of the  
16 bombing itself on Boylston Street is best addressed by viewing  
17 or listening to the individual tapes. I don't know if the  
18 Court's had an opportunity --

19 THE COURT: I haven't yet but I will.

00:40 20 MS. CONRAD: I think probably it's better to just rest  
21 on that rather than go through it in detail.

22 With respect to the autopsy photos, your Honor, these  
23 are highly sensitive, highly disturbing images, multiple  
24 images, of the victims. And right now I'm talking about the  
25 bombing victims. The images of Officer Collier are completely

1 different. They show the actual wounds, and we understand that  
2 they may have some relevance.

3 But the other autopsy photographs of the three victims  
4 of the bombings are largely full-body images of the naked  
5 bodies of the victims. They are horrific. They are  
6 disturbing. They do not go to any disputed question of fact in  
7 this case. And even if the Court agrees with the parties that  
8 they should not be made available to the public in any form  
9 after they're admitted, their actual admission makes it more  
00:41 10 likely that at some point they will be viewed by the public  
11 causing even greater emotional distress for the grieving  
12 families of the victims.

13 They're just -- the cause of death is not at issue,  
14 your Honor. These images show much more than simply the cause  
15 of death, and we submit that they are unnecessary and would  
16 cause too much emotional distress to the families and to the  
17 jurors, frankly.

18 Thank you.

19 MS. PELLEGRINI: Your Honor, I challenge anyone to  
00:42 20 find an autopsy photo that isn't graphic and disturbing,  
21 particularly when it is of several young people, but regardless  
22 of the fact that there -- Ms. Conrad said there is no  
23 question -- we still have the burden. The defendant has  
24 entered a plea of not guilty to all of the counts, and the  
25 government has the burden of proving that there was a weapon of

1 mass destruction that caused the death of these three people.

2 Our photos show the nature and extent of those  
3 injuries. Full body is required because they are injured  
4 everywhere on their body. There are huge gaping wounds, that  
5 is true, but there's also burns, scrapes, shrapnel embedded in  
6 ears, fingers, the back. And these are going to be used to  
7 corroborate the findings of the medical examiners. And that's  
8 important because we're going to show both the manner and cause  
9 of death by this.

00:43 10 The fact that they are graphic, we took steps to limit  
11 the number of photos, but they are -- and we have taken steps  
12 to block out the private areas of the bodies to try to limit  
13 that aspect of it as much as we can. To the extent that it is  
14 upsetting to the victims, it's upsetting that their loved ones  
15 died. They are aware that the government is seeking to use the  
16 autopsy photos, they were aware of our prior request to not  
17 have the defendant view them, and we talked about them -- to  
18 them at that time of using the photos during the course of the  
19 trial.

00:43 20 But they are important to the government's case. And  
21 they have been chosen carefully and in a very limited way that  
22 is not overly emotional. They are not gruesome or graphic just  
23 simply to be gruesome and graphic, but they're gruesome because  
24 they show the death of three young people by what we claim is a  
25 bomb.

1 THE COURT: All right.

2 MS. CONRAD: Your Honor, I neglected to mention that  
3 one option would be if there's specific aspects of the photos  
4 that the government wishes to show, because I think that the  
5 full-bodied photos do not show, for example, some of the  
6 specific things that Ms. Pellegrini referred to. Perhaps they  
7 could be cropped in such a way that would make them less  
8 disturbing and more relevant, if there is any relevance.

9 THE COURT: Okay. I'll reserve this one as well.

00:44 10 We have some other evidence-related motions? I guess  
11 because we have been -- at least until the jury is sworn been  
12 careful about discussing the evidence. I guess I thought we  
13 might discuss those in an in camera session. I'm thinking of  
14 *Daubert* motions right now and perhaps some others.

15 So with that caution, are there any other matters now  
16 that -- of this nature, in limine, preopening, that you think  
17 we need to talk about?

18 MR. BRUCK: Not from the defense, your Honor.

19 MR. WEINREB: No, your Honor.

00:45 20 THE COURT: Okay. And I thought we would have a  
21 session this afternoon at 2:30 to talk about some of these  
22 things in camera. That would also include a final discussion  
23 of the mechanics of the peremptory challenge exercise which  
24 we'll do this afternoon and other jury-related issues.

25 Let me just ask a couple of trial management related

1 issues. Is the government's order of witnesses the same now as  
2 it was when it was disclosed a few weeks ago for the first  
3 couple of weeks?

4 MR. MELLIN: Your Honor, I think essentially that's  
5 correct. There have been a few witnesses -- one or two that  
6 have been removed and one or two that we've moved their  
7 location in the lineup based on their availability.

8 THE COURT: Okay. Could you make sure both the  
9 defense and I get the revised list --

00:46 10 MR. MELLIN: Yes.

11 THE COURT: -- which I assume would also call for some  
12 revision of the matching exhibits?

13 MR. MELLIN: Correct.

14 THE COURT: Okay. If we could get that.

15 And going forward, we've had this two-week -- we  
16 settled on this two-week period. I would like that as a  
17 rolling obligation for the government so that as you get into  
18 the second week, another second week comes into view; in other  
19 words, at the end of the first week, we'll hear about the third  
00:47 20 week, and so on, so that people can have a look ahead.

21 The government furnished us a copy of the government's  
22 witness list. A hard copy. If it's possible, we would like an  
23 electronic copy of that just so that we could search it. And I  
24 don't know that we have an exhibit list from the defense.

25 MS. CLARKE: We provided one -- we can make sure you

1 have an electronic copy.

2 THE COURT: Thank you.

3 So we'll have our in camera session this afternoon.  
4 We'll also reconvene tomorrow morning at ten for the exercise  
5 of peremptory challenges and the selection of the final jury.

6 Anything else today?

7 MS. CLARKE: No, thank you, your Honor.

8 THE COURT: Or this morning, I should say. There is  
9 today.

00:48 10 Thank you. We'll be in recess.

11 THE CLERK: All rise for the Court.

12 (The Court exits the courtroom at 10:47 a.m.)

13 THE CLERK: Court will be in recess.

14 (The proceedings adjourned at 10:47 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: 9/8/15