UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA,	
V.	
DZHOKHAR TSARNAEV	

CRIMINAL NO. 13-10200-GAO

RESPONSE TO GOVERNMENT'S MOTION FOR SUPPLEMENTAL PROTECTIVE ORDER

Defendant, Dzhokhar Tsarnaev, through counsel, respectfully responds to the government's Motion for Supplemental Protective Order (D.E. 225), in which it seeks to condition compliance with its legal obligation to produce autopsy photos upon a special restriction barring defense counsel from showing to the defendant all such photos that the government does not intend to introduce at trial. The government's request for restrictions beyond the protective order already in place is unwarranted and publicly aggravates the very sensitivities and interests in dignity and privacy that the government purportedly seeks to protect.

To be clear:

- Autopsy reports and photographs are routinely produced to defense counsel in homicide prosecutions. Defense counsel have a professional obligation to review such materials. Disclosure of autopsy materials is required as part of Rule 16 automatic discovery, which is to be provided within 28 days of arraignment.
- In a telephone conversation on February 13, government counsel stated that the prosecution intended to introduce some unidentified number of autopsy photographs into evidence at trial.¹ Government counsel further stated that copies of autopsy photos would only be produced to defense counsel on the condition they not be shown to the defendant. The defense responded by letter that same day, acknowledging the government's position but reiterating the request for all autopsy materials pursuant to the government's Rule 16 obligations, without precondition. See Exhibit A.

¹ It is not at all clear that any public display of such photographs by the prosecution at trial will be even remotely necessary, or that they would be admissible under Rule 403.

• In their collective experience, defense counsel are unaware of any case in which access to autopsy photographs has been conditioned on advance agreement not to review them with their client. Nor has the government cited any case in which a court restricted a defendant from viewing autopsy photographs.² The existing protective order already imposes stringent protections for materials identified as sensitive. Decisions about what discovery materials must be shown to the defendant in order to prepare the defense should be left to the sound discretion of defense counsel.

For the foregoing reasons, the government's motion should be denied.

Respectfully submitted,

DZHOKHAR TSARNAEV By his attorneys

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²The government's child-pornography analogy, while attention-grabbing, is misplaced because such images are, themselves, illegal contraband. In such cases, unlike here, the defendant's possession of the photographs is itself the very crime of which he stands accused.

CERTIFICATE OF SERVICE

I, Timothy G. Watkins, 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) on March 28, 2014.

/s/ Timothy G. Watkins

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February 13, 2014

Aloke Chakravarty Nadine Pellegrini William Weinreb Assistant U.S. Attorneys United States Courthouse 1 Courthouse Way, Suite 9200 Boston, Massachusetts 02210 *Via email*

Re: United States v. Dzhokhar Tsarnaev Criminal No. 13-10200- GAO

Dear Counsel:

We received your cover letter of February 12, 2014 which indicates that one encrypted disk with bates number range DT-0030962 through DT-0031950 containing the autopsy reports for Krystle Marie Campbell, Lingzi Lu, Martin Richard and Sean Collier was enclosed. Your letter also indicated we would receive a password separately via email. As you know, we were able to figure out the password from earlier passwords we have received, but would appreciate in the future if you would send the correct password by email contemporaneously with the disks when delivered.

You note that these discovery documents are considered "sensitive" under the protective order. At the same time you decline production of copies of the autopsy photographs due to their "sensitive nature." In a conversation with me this morning, Nadine Pellegrini both confirmed the likelihood of the government's desire to introduce some of these photographs at trial, and your resistance to providing copies to us if we planned to show them to our client.

The protective order addresses the handling of "sensitive" discovery and, appropriately, does not preclude our client's access to it. Rule 16(a)(1)(E) and (F) are clear that the defense is entitled to both inspect and copy photographs and the results of any physical or mental examination. We do not believe that making the photos available

only for inspection satisfies Rule 16. Given the shortened time frame under which we are working and a targeted November 2014 trial date, please consider this letter our continuing request for immediate production of color copies of the photographs.

Sincerely,

Mirian Conrad

Timothy Watkins William Fick Judy Clarke

Counsel for Dzhokhar Tsarnaev