UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. 14-2362

IN RE: DZHOKHAR TSARNAEV,
Petitioner

GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

The petitioner, Dzhokhar Tsarnaev, seeks a writ of mandamus to compel the district court to grant a change of venue in *United States v. Tsarnaev*, Criminal No. 13-10200-GAO, a case pending in the United States District Court for the District of Massachusetts (O'Toole, D.J.), with jury selection to begin on January 5, 2015, or, in the alternative, to hold an evidentiary hearing to resolve purported factual disputes related to the polling and other data supporting his two motions for a change of venue and to reconsider those motions following such hearing. Tsarnaev also requests a stay of jury empanelment and trial pending resolution of his petition. Tsarnaev claims that the nature and extent of purportedly prejudicial pretrial publicity about the April 2013 Boston Marathon bombings with which he is charged,

and public sentiment about the bombings and subsequent events, require the district court to presume that the prospective jury pool in the Eastern Division of the District of Massachusetts is so prejudiced against him that he cannot receive a fair and impartial jury trial here. In support of that claim, he contends that the government's expert disclosures reflect that the government intends to show at trial that "every member of the jury pool is, in effect, an *actual* victim of the charged offenses." [Pet. at 2, citing D.686 at 10]. This, he argues, makes this case similar to *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996), in which the district court moved the case to Colorado because the main federal courthouse in Oklahoma City had suffered significant damage from the bombing at issue, and both the government and the defendant agreed that the case should not be tried in the Western District of Oklahoma.

Tsarnaev's petition and accompanying motion should be denied. Tsarnaev has not satisfied the high standard required to justify the extraordinary remedy of mandamus: that is, he has not shown that he is clearly entitled to relief and that he will suffer irreparable harm without it. While there has been a great deal of media coverage in this case, Tsarnaev has not shown, as the district court found, that that coverage "has so inflamed and pervasively prejudiced the pool that a fair and

impartial jury cannot be empaneled in this District" of approximately five million people. [D.577 at 3, 6]. Moreover, the district court has put in place a procedure for thoroughly evaluating the potential jurors and identifying any possible prejudice through questionnaires and *voir dire* during jury selection, which should ensure that the jury hearing this case is fair and impartial -- and sits in the "State and district wherein the crime shall have been committed." U.S. Const., Amdt. 6.

RELEVANT FACTS

Dzhokhar Tsarnaev was arrested on April 21, 2013, in connection with the bombing of the Boston Marathon on April 15, 2013, and charged by indictment on June 27, 2013, with 30 terrorism- and weapons-related offenses, [D.6, 7, 58]. Those include causing the deaths of Krystle Marie Campbell, Lingzi Lu, and Martin Richard; causing injuries to scores of other participants and spectators; participating in the subsequent murder of MIT police officer Sean Collier; carjacking, kidnaping, and robbing a Cambridge resident on April 18, 2013; and participating in a shoot-out with law enforcement in Watertown, Massachusetts on April 18 and 19, 2013. .

At a status conference on September 23, 2013, the Court asked Tsarnaev's counsel if they planned to seek a change of venue; they replied, "We just haven't really thought about it." [D. 104, P. 19]. At a status conference on November 12,

2013, the district court ordered Tsarnaev to file any motion to change venue by February 28, 2014. [D.148]. The court granted Tsarnaev's motion to vacate that deadline in an electronic order on January 14, 2014, and on February 12, 2014, ordered that any change of venue motion be filed by June 18, 2014. [D.158, 172; see D.154, 157]. On June 11, 2014, Tsarnaev sought a further extension of time -- to August 3, 2014 -- to file his motion, which the court denied on June 13, 2014. [D.364, 368; see D.366 (government opposition)].

Tsarnaev filed a motion to change venue outside of the District of Massachusetts on June 18, 2014. [D.376]. He stated that his "preliminary review" of "still-to-be-finalized" venue survey data led him to conclude that prejudice must be presumed in the District of Massachusetts given the "overwhelming presumption of [his] guilt" in the district, the "[p]rejudgment as to the penalty that should be imposed," and the "extraordinarily high number of individuals in the potential jury pool who either attended or participated in the 2013 Boston Marathon, or personally know someone who did." [D.376 at 1]. In addition to presenting the results of his survey, Tsarnaev argued that the court could take judicial notice of the "intense and sustained [] media coverage," including the "Boston Strong" billboards and T-shirts, and the investigations and prosecutions of various individuals who knew Tsarnaev

and his brother Tamerlan. [D.376 at 7]. Tsarnaev sought additional time and funding to analyze the data in support of his motion, and to file a supplemental memorandum, contending that his defense expert's work was delayed by court approvals for funding and the one-year anniversary of the Boston Marathon. [D.376 at 2-4].

The government opposed Tsarnaev's motion. [D.405]. It noted that Supreme Court precedent foreclosed a finding of presumed prejudice in this case. [D.405 at 3-10, citing, inter alia, *Skilling v. United States*, 561 U.S. 358 (2010)]. While acknowledging that press coverage of the Boston Marathon bombings had "undoubtedly been extensive," the government pointed out that this Court has said that "[e]xtensive knowledge in the community of either the crimes or the defendants is not sufficient, by itself, to render a trial constitutionally unfair." *United States v. Drougas*, 748 F.2d 8, at 29 (1st Cir. 1984). That is especially true where, as here, the coverage has been largely "factual, as opposed to inflammatory." *United States v. Misla-Aldarondo*, 478 F.3d 52, 58 (1st Cir. 2007).

On July 15, 2014, Tsarnaev moved for leave to file a reply brief and to supplement his motion with additional materials. [D.417]. The government opposed the motion the same day, but the court allowed it. [D.418 (government's

opposition); D.430(court order)]. On August 7, 2014, Tsarnaev filed his reply, along with 25 exhibits totaling over 9,500 pages. [D.461]. The exhibits included detailed information about the methodology and results of Tsarnaev's venue survey and revealed for the first time who had designed and conducted it. It also included thousands of pages of newspaper articles that purportedly related to Tsarnaev's case, a list of search terms used to select those articles, and a 37-page affidavit from the individual who designed and conducted the survey and performed the media analysis explaining his methodology, attesting to the accuracy and reliability of the results, and giving his opinion that it would be impossible to seat a fair and impartial jury anywhere in Massachusetts.

On August 14, 2014, the court authorized the government to file a surreply to address the wealth of new information in Tsarnaev's reply and supplemental materials. [D.814]. On August 25, 2014, the government filed a surreply in which it argued that the venue survey's methodology was flawed, that the results were unconvincing, that the search terms used to identify pertinent newspaper articles were overbroad, and that the pertinent articles were largely factual and not inflammatory.

On August 29, 2014, Tsarnaev moved for leave to file a response to the

government surreply. [D.417]. The government opposed the motion that same day, and the court granted the government's motion. [D.419 (government's opposition); D.527(court order)].

On September 24, 2014, the district court denied Tsarnaev's motion for a change of venue in an opinion and order. [G.Add.1-10]. The court first found that all four factors identified in *Skilling* as pertinent to whether a defendant had demonstrated a presumption of prejudice that required a venue transfer -- (1) the size and characteristics of the community in which the crime occurred and from which the jury would be drawn; (2) the quantity and nature of media coverage about the defendant and whether it contained "blatantly prejudicial information of the type readers or viewers could not necessarily be expected to shut from sight"; (3) the passage of time between the underlying crime and the trial and whether prejudicial media attention had decreased in that time; and (4) in hindsight, an evaluation of the trial outcome to consider whether the jury's conduct ultimately undermined any possible pretrial presumption of prejudice -- weighed against a change of venue here. [G.Add. __]; *see* 561 U.S. at 381-85. With respect to the size and characteristics of the jury pool, the court noted that the Eastern District of Massachusetts includes about five million people -- similar to the 4.5 million people

living in the Houston area in *Skilling* -- and that in addition to the City of Boston, the district contains small cities as well as suburban, rural, and coastal communities. [G.Add.3]. As in *Skilling*, the court observed that it "stretches the imagination to suggest that an impartial jury cannot be successfully selected from this large pool of potential jurors." [G.Add.3-4 (*citing United States v. Salameh*, No. 85 93 Cr. 0180 (KTD), WL364486, at *1 (S.D.N.Y. Sept. 15, 1993) (declining to transfer trial of defendant accused of the 1993 World Trade Center bombing out of the district where the bombing occurred in part because of the district's size and diversity)).

The court next found that, while media coverage of the case has been extensive, "'[p]rominence does not necessarily produce prejudice, and juror impartiality does not require ignorance.'" [G.Add.4 (quoting *Skilling*, 561 U.S. at 360-61 (emphasis in original))]. The underlying events and the case had received national media attention, the court noted, and "[i]t is doubtful whether a jury could be selected anywhere in the country whose members were wholly unaware of the Marathon bombings." [G.Add.4]. The court also found that the polling and other materials submitted in support of Tsarnaev's motion did not persuasively show that the media coverage had contained blatantly prejudicial information that prospective jurors could not necessarily be expected to ignore. [G.Add.4]. The court agreed

with the government that many of the search terms used in the newspaper analysis were overinclusive, and the venue survey had a low rate of response (3%), resulting in a small sample that was not representative of the demographic distribution of people in the Eastern District. [G.Add.4]. In addition, the court noted, some of the results in that survey were at odds with Tsarnaev's position, including the fact that almost all individuals who answered the survey questions, regardless of their city and state of residence, were familiar with the Marathon bombings, and the majority of them, regardless of where they lived, believed that Tsarnaev was "probably" or "definitely" guilty. [G.Add.4-5].

Turning next to the passage of time, the court noted that unlike cases in which trial swiftly followed a widely-reported crime, more than 18 months had already passed since the Marathon bombings and, in that time, while "media coverage has continued," the "'decibel level of media attention [has] diminished somewhat.'" [G.Add.5 (quoting *Skilling*, 561 U.S. at 361)]. Nor, the court found, did the defendant's submissions show otherwise. [G.Add.5].

Although acknowledging that it was not possible to evaluate the jury's verdict for impartiality at this point in the proceedings, the court stated that its recent experience with high-profile criminal cases in the Eastern District of Massachusetts

suggested that a fair and impartial jury could be empaneled as, in each of those cases, the jurors returned mixed verdicts, indicating a "careful evaluation of the trial evidence despite widespread media coverage." [G.Add.5 (citing Jury Verdict, *United States v. O'Brien*, Cr. No. 12-40026-WGY (July 24, 2014) (ECF No. 579); Jury Verdict, *United States v. Tazhayakov*, Cr. No. 13-10238-DPW (July 21, 2014) (ECF No. 334); Jury Verdict, *United States v. Bulger*, Cr. No. 99-10371-DJC (Aug. 12, 2013) (ECF No. 1304); Jury Verdict, *United States v. DiMasi*, Cr. No. 09-10166-MLW (June 15, 2011) (ECF No. 597))].

The court also found Tsarnaev's reliance on the district court's decision in *McVeigh* misplaced because, notwithstanding some similarities, in that case the main federal courthouse itself had suffered physical damage from the Oklahoma City bombing and both parties had agreed that the case should not be tried in the district where the crime occurred; the only issue was to which other district the trial should be moved. [G.Add.6 n.3]. The court also found distinguishable three other cases upon which Tsarnaev relied -- *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Estes v. Texas*, 381 U.S. 532 (1965) -- because they were nearly 50 years old, both the judicial and media environments had changed substantially during that time, and none of the extreme circumstances at

issue in those cases were present here. [G.Add.5-6].

The court therefore found that Tsarnaev had not shown that this was the rare and extreme case for which a presumption of prejudice was warranted:

> Although the media coverage in this case has been extensive, at this stage the defendant has failed to show that it has so inflamed and pervasively prejudiced the pool that a fair and impartial jury cannot be empaneled in this District. A thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection.

[G.Add.6].

More than two months later, on December 1, 2014 – approximately four weeks before the scheduled trial date -- Tsarnaev filed a second motion for change of venue accompanied by a 16-page memorandum and 629 pages of exhibits (again consisting mainly of newspaper articles) [D.684, 686]. He argued that "continuing prejudicial publicity and leaks" had increased the need for a change of venue since the filing of his first motion. [D.686, P. 2]. He also repeated several of the arguments made in his first motion to change venue, including the arguments that social science research proves jurors become hardened in their views over time, *id.* at 5-8, that the district court's venue analysis in *McVeigh* "is more appropriate to the facts of this case" than the Supreme Court's venue analysis in *Skilling*, *id.* at

8-12, that the results of his venue survey demonstrate the need for a change of venue, *id.* at 13, and that jury questionnaires and individual voir dire are an inadequate means to address pretrial publicity, *id.* at 13-15.

The government opposed Tsarnaev's second motion on December 22, 2014. [D.796]. The government argued that "Tsarnaev's survey of post-July 2014 news articles – again selected on the basis of overbroad search terms -- shows exactly what the first survey showed: most of the articles have little or nothing to do with this case, and the ones that do are largely factual and objective in nature." [*Id.* at 2]. As for the remainder of Tsarnaev's motion, the government pointed out that Tsarnaev had merely recycled arguments from his first motion to change venue while ignoring the very deficiencies in those arguments that had caused the district court to reject them. [*Id.* at 2-4].

ARGUMENT

Although this Court has the power to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, "[t]he remedy of mandamus is a drastic one . . . to be invoked only in extraordinary situations," *Kerr v. United States Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 402 (1976). The standards for issuance of the writ are high: a petitioner "must satisfy 'the burden of showing that [his] right to issuance of the writ is clear and indisputable,'" "must show 'irreparable harm' if relief is not granted, and "must demonstrate that, on balance, the equities favor issuance of the writ." *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (citations and internal quotation marks omitted); *see In re Cargill,* 66 F.3d 1256, 1260 (1st Cir. 1995). Mandamus is a "discretionary writ," so that "even where the merits clearly favor the petitioner, relief may be withheld for lack of irreparable injury or based on a balance of equities." *In re Martinez-Catala,* 129 F.3d 213, 217 (1st Cir. 1997); *see In re Cargill*, 66 F.3d at 1260 (describing a writ of mandamus as an exceptional remedy that "is to be granted only in the exercise of sound discretion," citing *Whitehouse v. Illinois Cent. R. Co.*, 349 U.S. 366, 373 (1955)). As this Court said in *In re Martinez-Catala*, "mandamus requires a case not merely close to the line but clearly over it." *Id.* at 221. Writs of mandamus disrupt the mechanics of the

judicial system by accelerating appellate intervention and fostering piecemeal review, and thus should "be used stintingly and brought to bear only in extraordinary situations." *In re Cargill*, 66 F.3d at 1259. Mandamus is "strong medicine, and should neither be prescribed casually nor dispensed freely." *Id.*

As an initial matter, this Court has never squarely decided whether mandamus review is available for an order denying a change of venue pursuant to Fed. R. Crim. P. 21(a). *See In re Kouri-Perez*, 134 F.3d 361 (1st Cir. 1996) (assuming without deciding that an order denying change of venue would be subject to mandamus review, citing *In re Balsimo*, 68 F.3d 185, 186 (7th Cir. 1995) (concluding that orders denying change of venue are subject to mandamus review, even if efforts to challenge such orders are almost certain to fail)). The Court need not decide that issue here, however, because Tsarnaev has not satisfied the standard for issuance of a writ of mandamus.

I. Tsarnaev Has Failed To Show A Clear Entitlement To Relief.

First, Tsarnaev has not demonstrated that he is clearly entitled to relief from the district court's refusal to grant a change of venue. This is not a case involving actual prejudice; jury selection has not yet begun. Rather, Tsarnaev's argument is that the facts require the court to presume that "so great a prejudice against the

defendant exists" in the Eastern Division "that the defendant cannot obtain a fair and impartial trial there." *See* Fed. R. Crim. P. 21(a). In *Skilling*, after examining its prior cases, the Supreme Court set forth four factors it had found pertinent in determining whether the defendant had demonstrated a presumption of prejudice that required a transfer of venue: (1) the size and characteristics of the community in which the crime occurred; (2) the quantity and kind of media coverage, including whether the news stories, even if "not kind" to the defendant, contained any "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight," such as seen in *Rideau*; (3) the amount of time between the underlying events and the trial and whether the "decibel level of media attention diminished somewhat" during that time; and (4) "of prime significance" where a trial has already occurred, an evaluation of the trial outcome to consider whether the jury's conduct undermined any possible pretrial presumption of prejudice. 561 U.S. at 381-385; [*see* D.577].

The Court in *Skilling* concluded that no presumption of prejudice had arising in that case and, therefore, that the district court had not erred in declining to order a change of venue. *Id.* at 385. As discussed above, the Court based that conclusion on the fact that the potential jury pool of 4.5 million people in the Houston area was

a "large, diverse pool"; that media coverage had not contained any "blatantly prejudicial information" that potential jurors could not reasonably be expected to ignore ("No evidence of the smoking-gun variety invited prejudgment of his culpability."); that the media attention had diminished somewhat during the four years between Enron's bankruptcy and the defendant's trial – even though the press had reported that a co-defendant had pleaded guilty only a few weeks before trial, leading Skilling to renew his change of venue motion based in part on the argument that the guilty plea had further tainted the jury pool; and that the jury had acquitted Skilling on nine counts, undermining any supposition of juror bias. *Id.* at 381-385.

As the district court found, much about this case is similar to *Skilling* and no presumption of prejudice has arisen. The Eastern Division of the District of Massachusetts's population of five million is slightly larger than the Houston area, and thus, "the suggestion that 12 impartial jurors could not be impanelled is hard to sustain." *Id.* at 382; [*see* D.577 at 3]. As with Houston, the Eastern Division's "size and diversity" will dilute the media's impact. *See Skilling,* 561 U.S. at 384. Although the district court found that media coverage in this case has been "extensive" [D.577 at 4], "prominence does not necessarily produce prejudice, and juror *impartiality* does not require *ignorance*." *Skilling*, 561 U.S. at 381 (emphasis in

original); *see Drougas*, 748 F.2d at 29 (stating that "[e]xtensive knowledge in the community of either the crimes or the defendants is not sufficient, by itself, to render a trial constitutionally unfair."). Juror exposure to news accounts of the crime does not "alone presumptively deprive[] the defendant of due process." *Skilling*, 561 U.S. at 380, quoting *Murphy v. Florida*, 421 U.S. 794, 798-799 (1975). Prejudice may not be presumed from pretrial publicity or negative community sentiment except under circumstances similar to those in *Rideau, Estes*, and *Sheppard, see Skilling*, 561 U.S. at 382-384 -- that is, where "inflammatory pretrial publicity so permeated the community . . . that the publicity in essence displaced the judicial process." *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998). That is not the case here, where the media coverage has been largely "factual, as opposed to inflammatory." *United States v. Misla-Aldarondo*, 478 F.3d 52, 58 (1st Cir. 2007).

Pretrial publicity in this case has included several news stories that referred to the carjacking victim's statement that Tsarnaev's brother took credit for the Marathon bombing and the murder of MIT police office Sean Collier, Tsarnaev's writings in the boat in Watertown, and Tsarnaev's admission of guilt when interviewed by the police. But all three of these items have been public since April

or May of 2013, more than 18 months ago. Moreover, Tsarnaev's writings in the boat were made public in the indictment and will be part of the evidence in this case. The carjacking victim's statement about Tamerlan Tsarnaev's comment is not a confession in the traditional sense, and certainly not the kind of "dramatically staged" variety that troubled the Court in *Rideau*. *See Skilling*, 561 U.S. at 382-383.

Tsarnaev's polling and analysis of newspaper articles also does not help him. As the district court found, they, too, are insufficient to establish a presumption of prejudice, given the over-inclusiveness of the search terms, the small response rate of the poll, and the fact that some of the results are at odds with Tsarnaev's position that members of the Eastern Division jury pool are much more likely than residences of other districts to have formed opinions about Tsarnaev's guilt, among other things. [*See* D.577 at 4-5; *see also* D.512 (government's sur-reply in response to Tsarnaev's polling and news analysis)].

As to the *Skilling* Court's third factor, the passage of time from crime to trial, it has been more than 20 months since the crimes at issue here took place, hardly a period that could be characterized as "swift." *See Skilling*, 561 U.S. at 383. Media coverage has continued during that time, and the media have reported on the

criminal cases of others associated in some way with Tsarnaev, such as Azamat Tazhayakov, Robel Phillopos, and Stephen Silva. But those criminal cases have not involved charges of involvement in, or foreknowledge of, the Boston Marathon bombing, or the murder of Officer Sean Collier, or the carjacking, or the events in Watertown. Moreover, the media coverage of these criminal cases has, again, been factual and neither inflammatory nor blatantly prejudicial. "[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155-156 (1879).

In his petition for a writ of mandamus, as in his second motion to change venue, filed after the district court's decision, Tsarnaev expanded his description of the presumed prejudice by arguing that he understands the government's presentation of the evidence will demonstrate that the victims of the Marathon bombing and the subsequent events in Cambridge and Watertown are not just those killed or injured, or their families, friends, and acquaintances, but everyone in the Eastern Division of the District of Massachusetts who saw the Marathon, who lived

in the communities affected by the bombing and subsequent events, who knew someone who went to the Marathon or saw it on television, who worked at the hospitals, who was asked to shelter in place during the search for Tsarnaev, or who was exposed in some way to the events of the week of April 15, 2013 -- that is, that there is "nearly universal local victimization" in the Eastern Division and "every prospective local juror is an actual victim." [Pet. at 18-21]. Tsarnaev bases this contention on an expert witness disclosure the government made regarding Dr. Jonathan Comer, a pediatric psychologist and professor of pediatric psychology who is expected to testify in the sentencing phase of the trial (if there is one). [*See* Pet. at 20-21, citing D.686 at 10-11 (filed under seal)].

Contrary to Tsarnaev's claim, Dr. Comer will not testify that "every member of the jury pool is, in effect, an *actual* victim of the charged offenses." [Pet. at 2 (emphasis in original)]. Rather, as the government's disclosure letter makes plain, Dr. Comer will first describe generally the impact of terrorism and catastrophic events on children, and will then present the findings of his work related to the impact of the Boston Marathon and Watertown events, including a survey that found a significant increase in likely PTSD symptoms among school-aged children in several communities who were exposed to the events of April 15-19, 2013. In other

words, Dr. Comer will testify that a sample of children who were exposed to the events of April 15-19, 2013 exhibited a statistically significant increase in PTSD symptoms compared to those who were not. Nothing in the record suggests Dr. Comer will testify that every school-aged child was in fact exposed to the events of April 15, 2013, or that every such child will likely suffer from PTSD. Accordingly, it is a mischaracterization of the record for Tsarnaev to cite Dr. Comer's expected testimony as a government "proffer" that "every member of the jury pool" is an "actual victim of the charged offenses." Dr. Comer will not even testify that all school-aged children -- who in any event do not typically sit on juries -- were victims of the charged offenses. Thus, Dr. Comer's expected testimony does not support Tsarnaev's claim that everyone within a 50-mile radius of Boston and beyond is a victim of the Marathon bombings and their aftermath, creating a presumption of prejudice that would necessitate a change of venue.

The district court has fashioned elaborate procedures to ensure the selection of fair and impartial jurors. Each potential juror will be required to complete, under oath, a questionnaire drafted jointly by the parties that contains approximately 100 questions. The questionnaire includes half a dozen questions about pretrial publicity, including questions that require potential jurors to identify their primary

news source, which types of news sources they utilize and how often, how much media coverage they have seen about this case, any online research they may have done about this case, and whether any of what they have seen or read in the news media, or have learned or already know about the case from any source, has caused them to form an opinion about Tsarnaev's guilt, innocence, or the appropriate punishment if he is found guilty. The parties may move to strike potential jurors for cause based on their questionnaire answers alone. Every potential juror who is not struck for cause will then be questioned individually by the district court with input from the parties, who may request follow-up on particular questionnaire answers. Additional strikes for cause may be made during this process. At the close of voir dire, each party will have the opportunity to exercise 20 peremptory challenges – substantially more than in a non-capital case. These are precisely the kinds of measures that the Skilling Court held were "well suited" to screen potential jurors for possible prejudice. *See Skilling*, 561 U.S. at 384.

II. Tsarnaev Has Not Shown Irreparable Injury.

Second, Tsarnaev's petition should be denied because he has not shown that he will suffer irreparable harm from the district court's denial of his motion to change venue. The jury has not yet been selected, so it is mere speculation to

suggest that proceeding with trial in the Eastern Division of the District of Massachusetts will make it impossible to impanel a jury elsewhere should this case result in a conviction and then be overturned. Nor is there any danger of damage to the judicial system itself. The district court has crafted a thorough jury selection procedure that is designed to ferret out prejudice. Further, Tsarnaev's suggestion that among the five million residents of the Eastern Division of the District the district court cannot find 12 or 16 or 18 who have not been prejudiced by pretrial publicity is not only unfair and highly speculative, it is itself damaging to the judicial system.

III. The Balance of Equities Weighs Against The Requested Relief.

Finally, Tsarnaev has not shown that the balance of equities favors granting the extraordinary remedy of mandamus relief and a change of venue. In fact, Tsarnaev has not made any argument regarding the balance of equities, and has thus waived it. *See United States v. Zannino*, 895 F.2d 1 (1st Cir. 1990).

In any event, the balance of equities does not weigh in favor of Tsarnaev, but against him. The Boston Marathon bombing and related events during the week of April 15, 2013 affected several hundred victims, including both those allegedly killed and injured by Tsarnaev and his brother Tamerlan, and their families.

Moving the trial out of the Eastern Division would create an enormous hardship for those victims and their families, depriving many, if not most of them, of any ability to see the trial. The Sixth Amendment to the Constitution guarantees a criminal defendant the right to trial "by an impartial jury of the States and district wherein the crime shall have been committed." U.S. Const., amdmt. VI. But there is also a public right of access to court proceedings, and while that right belongs to the public at large, to deprive those most directly affected by the events at issue in this case would undermine the judicial system.

IV. Tsarnaev Is Not Entitled To An Evidentiary Hearing.

Finally, Tsarnaev seeks in the alternative a remand for an evidentiary hearing. Whether to grant a hearing is a decision entrusted to the discretion of the district court and not one for which mandamus review is appropriate here.

The district court did not abuse its discretion by foregoing a hearing on the motion because there was no need for one. *See United States v. Staula*, 80 F.3d 596, 603 (1st Cir.1996) ("The district court has considerable discretion in determining the need for, and the utility of, evidentiary hearings, and we will reverse the court's denial of an evidentiary hearing in respect to a motion in a criminal case only for manifest abuse of that discretion."); *United States v. Wilcox*, 631 F.3d 740,

747 (5th Cir. 2011) (holding that decision whether to conduct hearing on venue motion is discretionary); *United States v. Peters*, 791 F.2d 1270, 1295 (7th Cir. 1986) (same). Tsarnaev based his motion primarily on the results of a telephonic public-opinion poll and an analysis of articles from the Boston Globe. He attached to his motion a description of the poll and how it was conducted, along with the results, and copies of all of the newspapers articles he had analyzed, along with the search terms used to find them. The government did not dispute any of these materials; it merely argued that the defense had mischaracterized their significance. Thus, the government did not allege that Tsarnaev had conducted his poll differently from how he said he had, or had misreported the results, or had added, altered, or omitted newspaper articles, or had misreported search terms; it simply argued that the poll methodology was flawed, that the results were unconvincing, and that the search terms were overbroad, and that the newspaper articles were largely factual and not inflammatory. [G.Add. at 4-5]. Under the circumstances, the district court's decision that no hearing was needed was hardly a "manifest abuse" of discretion. *Staula*, 80 F.3d at 603. The court here found sufficient evidence in the record to deny Tsarnaev's motions for a change of venue, and did so after consideration of all of the materials filed. It determined that a hearing was

unnecessary and that decision should be upheld.

CONCLUSION

For these reasons, the government respectfully requests that the Court deny the petition for a writ of mandamus.

Respectfully submitted,

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Certificate of Service

I, William Weinreb, Assistant U.S. Attorney, hereby certify that on January 1, 2015, I electronically served a copy of the foregoing document on the following registered participants of the CM/ECF system: Miriam Conrad, Esq., William W. Fick, Esq., Timothy Watkins, Esq.

I also certify that on January 1, 2015, I served a copy of the foregoing document on the following Counsel of record who are not registered participants of the CM/ECF system:

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I further certify that pursuant to Fed. R. App. Proc. 21(a)(1), I served a copy of the foregoing document on the district court by email pdf on January 1, 2015.

/s/ William D. Weinreb
WILLIAM D. WEINREB
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
September 24, 2014

O'TOOLE, D.J.

This Opinion and Order resolves several pending motions.

I. Defendant's Motion for Change of Venue

The defendant has moved, pursuant to Federal Rule of Criminal Procedure 21 and the Fifth, Sixth, and Eighth Amendments to the United States Constitution, to transfer his trial to a place outside of the District of Massachusetts. He asserts that pretrial publicity and public sentiment require the Court to presume that the pool of prospective jurors in this District is so prejudiced against him that an impartial trial jury is virtually impossible.

In two provisions, the Constitution of the United States addresses where criminal trials are to be held. Article III provides that the trial of a criminal case "shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment to the Constitution guarantees a criminal defendant the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." Id. amend. VI. Due process requires, however, that the Constitution's "place-of-trial prescriptions . . . do not impede

transfer . . . to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial." Skilling v. United States, 561 U.S. 358, 378 (2010).[1]

In Skilling v. United States, the Supreme Court recently analyzed in depth the circumstances under which a presumption of prejudice would arise and warrant or command a change of venue, making clear that prejudice is only to be presumed in the most extreme cases. In that case, the defendant was a former Chief Executive Officer of Enron Corporation, a large Houston-headquartered corporation that "crashed into bankruptcy" as the result of the fraudulent conduct of the company's executives. Id. at 367. After the defendant was charged in federal court in Houston, he sought to move his case to another district based on widespread pretrial publicity and what was characterized as a general attitude of hostility toward him in the Houston area. The district court found that the defendant had not satisfied his burden of showing that prejudice should be presumed and declined to change the trial venue.

The Supreme Court agreed with the district court's conclusion. It addressed four factors it regarded as pertinent to whether the defendant had demonstrated a presumption of prejudice that required a venue transfer: 1) the size and characteristics of the community in which the crime occurred and from which the jury would be drawn; 2) the quantity and nature of media coverage about the defendant and whether it contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the passage of time

[1] The Federal Rules of Criminal Procedure mirror these principles. Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."); Fed. R. Crim. P. 21(a) (requiring transfer if the court is satisfied that "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there").

between the underlying events and the trial and whether prejudicial media attention had decreased in that time; and (4) in hindsight, an evaluation of the trial outcome to consider whether the jury's conduct ultimately undermined any possible pretrial presumption of prejudice. Id. at 381-85.

The Court found that the potential jury pool—4.5 million people living in the Houston area—was a "large, diverse pool," making "the suggestion that 12 impartial individuals could not be empaneled . . . hard to sustain." Id. at 382. With respect to media coverage, "although news stories about [the defendant] were not kind, they contained no confession or other blatantly prejudicial information" of the type that readers or viewers could not reasonably be expected to ignore. Id. at 382-83. The Court also noted that the "decibel level of media attention diminished somewhat" in the time between Enron's bankruptcy and the defendant's trial. Id. at 383. Finally, after trial the jury acquitted the defendant of nine counts, indicating careful consideration of the evidence and undermining any presumption of juror bias.[2] Id. at 383-84. The Court, finding that no presumption of prejudice arose, went on to conclude that the district court had not erred in declining to order a venue change. Id. at 385 ("Persuaded that no presumption arose, we conclude that the District Court, in declining to order a venue change, did not exceed constitutional limitations.") (footnotes omitted).

There is much about this case that is similar to Skilling. First, the Eastern Division of the District of Massachusetts includes about five million people. The division includes Boston, one of the largest cities in the country, but it also contains smaller cities as well as suburban, rural, and coastal communities. As the Court observed in Skilling, it stretches the imagination to suggest that an impartial jury cannot be successfully selected from this large pool of potential

[2] Similarly, previous Enron-related prosecutions in Houston "yielded no overwhelming victory for the Government." Id. at 361.

jurors. See also United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993) (declining to transfer trial of defendant accused of the 1993 World Trade Center bombing out of the district due in part to the district's size and diversity).

Media coverage of this case, as both sides acknowledge, has been extensive. But "prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance." Skilling, 51 U.S. at 360-61 (emphasis in original). Indeed, the underlying events and the case itself have received national media attention. It is doubtful whether a jury could be selected anywhere in the country whose members were wholly unaware of the Marathon bombings. The Constitution does not oblige them to be. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961).

The defendant relies almost exclusively on a telephonic poll and an analysis of newspaper articles to support his argument that venue must be transferred due to the impact of pretrial publicity. I have reviewed the materials submitted. For substantially the same reasons articulated in the government's sur-reply, those results do not persuasively show that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore. For instance, regarding the newspaper analysis, I agree with the government that many of the search terms are overinclusive (e.g., "Boston Marathon" or "Marathon" or "Boylston Street"), hitting on news articles that are completely or generally unrelated to the Marathon bombings. Regarding the poll, the response rate was very low (3%), and that small sample is not representative of the demographic distribution of people in the Eastern Division. Additionally, some of the results appear at odds with the defendant's position. For example, almost all individuals who answered the poll questions were familiar with

the bombing and the majority of them answered that they believed the defendant is "probably" or "definitely" guilty in all four jurisdictions surveyed. In any event, "[s]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits" of a widely-publicized criminal case such as this one. See Irvin, 366 U.S. at 722-73.

As to the passage of time, unlike cases where trial swiftly followed a widely reported crime, e.g., Rideau v. Louisiana, 373 U.S. 723, 724 (1963) (two months after videotaped confession was broadcasted), more than eighteen months have already passed since the bombings. In that time, media coverage has continued but the "decibel level of media attention [has] diminished somewhat." See Skilling, 561 U.S. at 361. The defendant's submissions do not prove otherwise.

Finally, although it is not possible to evaluate the jury's verdict for impartiality in hindsight at this stage, this Court's recent experience with high profile criminal cases in this District suggests a fair and impartial jury can be empaneled. In each of those cases, the jurors returned mixed verdicts, indicating a careful evaluation of the trial evidence despite widespread media coverage. See, e.g., Jury Verdict, United States v. O'Brien, Cr. No. 12-40026-WGY (July 24, 2014) (ECF No. 579); Jury Verdict, United States v. Tazhayakov, Cr. No. 13-10238-DPW (July 21, 2014) (ECF No. 334); Jury Verdict, United States v. Bulger, Cr. No. 99-10371-DJC (Aug. 12, 2013) (ECF No. 1304); Jury Verdict, United States v. DiMasi, Cr. No. 09-10166-MLW (June 15, 2011) (ECF No. 597).

In support of his argument, the defendant cites in passing only a few cases in which the Supreme Court has presumed prejudice for the purposes of transferring a case, Rideau v. Louisiana, 373 U.S. 723 (1963), Sheppard v. Maxwell, 384 U.S. 333 (1966), and Estes v. Texas,

381 U.S. 532 (1965).[3] First, all three cases are about fifty years old, and both the judicial and media environments have changed substantially during that time. Second, important differences separate those cases from the defendant's. Rideau involved a defendant whose detailed, twenty-minute videotaped confession during a police interrogation was broadcast on television multiple times in a small community parish of only 150,000 people two months before trial. 373 U.S. at 724-28. In both Estes and Sheppard, the actual courtrooms were so overrun by media that the trial atmosphere was "utterly corrupted by press coverage." See Skilling, 561 U.S. at 380; Sheppard, 384 U.S. at 353, 355, 358 ("[B]edlam reigned at the courthouse during the trial and newsman took over practically the entire courtroom," thrusting jurors "into the role of celebrities" and creating a "carnival atmosphere"); Estes, 381 U.S. at 536 (describing reporters and television crews who overran the courtroom with "considerable disruption" so as to deny the defendant the "judicial serenity and calm to which [he] was entitled"). None of those circumstances are present here.

The defendant has not proven that this is one of the rare and extreme cases for which a presumption of prejudice is warranted. See Skilling, 561 U.S. at 381; United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012). Although the media coverage in this case has been extensive, at this stage the defendant has failed to show that it has so inflamed and pervasively prejudiced the pool that a fair and impartial jury cannot be empaneled in this District. A thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection. See Skilling, 561 U.S. at 384 ("the

[3] The defendant attempts to rely more heavily on United States v. McVeigh, 917 F. Supp. 1467 (D. Colorado 1996), a pre-Skilling out-of-circuit district court case. Though there may be some similarities, that case is not pertinent. There, the main federal courthouse itself had suffered physical damage in the explosion at issue, and both parties agreed the case should not be tried in the district where the crime occurred. The issue was to which other district the trial should be moved.

extensive screening questionnaire and follow-up voir dire were well suited" to screening jurors for possible prejudice).

The defendant's motion is denied.

II. Defendant's Motion for Continuance

The defendant has also filed a Motion for Continuance requesting the trial date be rescheduled from November 3, 2014 until September 1, 2015. The defendant's previous request for that same trial date was rejected.

Upon a review of the parties' submissions and oral argument, I find that a short continuance is warranted in this case, primarily on the basis of the amount of discovery involved. Although it appears that the defendant may have overstated his perceived predicament related to the volume and timing of discovery, particularly in light of (a) the government's representation that the defendant has been in possession of the relevant computers for over a year and (b) the level of detail of the government's September disclosures, there is likely utility in allowing the defendant some additional, though limited, time to prepare. See United States v. Maldonado, 708 F.3d 38, 42-44 (1st Cir. 2013); United States v. Saccoccia, 58 F.3d 754, 770-71 (1st Cir. 1995). An additional delay of ten months as requested by the defendant does not appear necessary, however, given the size and experience of the defense team; the availability of assistance from outside sources; the time period the defense already has spent in trial preparation; the relative impact on the other interests, including the Court, the government, and the public, if such a long postponement were granted; and the nature of the defendant's other concerns and the uncertainty that more time would actually be helpful in those respects. See Maldonado, 708 F.3d at 42-44; Saccoccia, 58 F.3d at 770-71.

Accordingly, the trial will commence on January 5, 2015. The final pretrial conference will be on December 18, 2014. The current pre-trial conference scheduled for October 20, 2014 is converted to a status conference.

III. Government's Discovery Motions

The government has filed a Renewed Motion to Compel Reciprocal Discovery (dkt. no. 530), requesting an order compelling the defendant to produce discovery and precluding him from using in his case-in-chief any Rule 16(b)(1)(A)—(C) information in his possession that he has failed to produce. The government adopts by reference the arguments it advanced in its motion on the same topic (dkt. no. 245) which is still pending.

Although the Court previously ordered the defendant to produce reciprocal discovery under Rule 16(b)(1)(A)—(C) by September 2, 2014, the government says (and the defendant does not dispute) that the defendant has not made any disclosures under Rule 16(b)(1)(A) or (B), and only one brief disclosure under Rule 16(b)(1)(C). The defendant, in response, argues that he has not yet "identified" which "'documents, data, photographs' or other exhibits might corroborate or illustrate the defense case."

The defendant has stated that it would be considerably easier to respond to the government's Rule 16 requests in staggered stages based on whether the discovery relates to the guilt or penalty phase. A staggered schedule will not unduly prejudice the government as the defendant's Rule 16 discovery for both phases will be due well in advance of jury selection and the deadline for the submission of witness and exhibit lists.

In light of the change of trial date and the defendant's representations, the Court adopts a bifurcated reciprocal discovery schedule to be issued in a separate Scheduling Order. The

government's motions are otherwise denied subject to renewal if the defendant fails to provide the required discovery by the now-extended deadlines.

The government has also filed a Renewed Motion for List of Mitigating Factors (dkt. no. 529), which the defendant has opposed, primarily on Fifth Amendment self-incrimination grounds. It is within the Court's statutory discretion to require the disclosure. See, e.g., United States v. Wilson, 493 F. Supp. 2d 464, 466-67 (E.D.N.Y. 2006); United States v. Taveras, No. 04-CR-156 (JBW), 2006 WL 1875339, at *8-9 (E.D.N.Y. July 5, 2006); see also Catalan Roman, 376 F. Supp. 2d. 108, 115-17 (D.P.R. 2005). The Federal Death Penalty Act provides both parties a fair right of rebuttal, see 18 U.S.C. § 3593(c), a right which would be meaningless if information is not provided sufficiently early to rebut. See Catalan Roman, 376 F. Supp. 2d. at 116-17; Wilson, 493 F. Supp. 2d at 466; see also Williams v. Florida, 399 U.S. 78, 82 (1970) (A criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."). Further, to the extent there are mitigating factors the defendant presently intends to pursue at a sentencing phase which it has not already disclosed, the disclosure of that information may be necessary to select a fair and impartial jury, and ultimately will "contribute to the truth-seeking process, resulting in a more reliable sentencing determination." See Catalan Roman, 376 F. Supp. 2d. at 114. The government does not seek to use the list of mitigation factors as a statement against him at trial, and if the defendant is found guilty, he would ultimately have to disclose to the jury the mitigating factors he pursues. See id. at 117 ("[T]here is no constitutional violation by requiring a defendant to disclose mitigating information he intended to offer the jury anyway.").

Consequently, the defendant shall provide the government a list of all mitigating factors he currently intends to prove in the penalty phase of the case, if any, on or before December 15, 2014. The submission shall be made under seal.

IV. Conclusion

The defendant's Motion for Change of Venue (dkt. no. 376) is DENIED. The defendant's Motion for Continuance (dkt. no. 518) is GRANTED in part and DENIED in part. The government's Motion to Compel Defendant's Compliance with Automatic Discovery Obligations (dkt. no. 245), Renewed Motion to Compel Reciprocal Discovery (dkt. no. 530), and Renewed Motion for List of Mitigating Factors (dkt. no. 529) are GRANTED in part and DENIED in part.

A separate scheduling order shall issue.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge