

IN TSARNAEV-RELATED CASE, DOJ SUGGESTS THERE IS NO DRAGNET

As a number of stories reported last week, two of Dzhokhar Tsarnaev's college buddies charged with obstruction lost their bid to get the prosecution to turn over texts Dzhokhar sent. The AP has the most detailed account:

The defense requested all communications between Tsarnaev and the three men, as well as all communications between Tsarnaev and other people.

[snip]

Robert Stahl, [Dias] Kadyrbayev's lawyer, said prosecutors told defense attorneys that Tsarnaev destroyed his cellphone before his arrest. Stahl said that in other cases he's had, some text messages have been retrieved from cellphones through a service provider. He asked Judge Douglas Woodlock to ask prosecutors to seek those text messages and turn them over to the defense.

Assistant U.S. Attorney Stephanie Siegmann said prosecutors have already given the defense text messages between Tsarnaev and the three friends taken from the cellphones of the friends.

"I believe the messages we've given them are all we could get," Siegmann told the judge.

Woodlock said the defense was not entitled to get text messages between Tsarnaev and anyone else because they would not be relevant to the defendants' cases.

The BoGlo describes the dispute slightly differently, suggesting the defense asked for

texts **involving** the defendants, with the prosecution responding they had provided the texts **between** Tsarnaev and the defendants.

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Which would be rather interesting given the way NSA collects communications **about** people (though it's unclear how quickly an emergency collection can be collected).

Here's ABC on that dispute. Reuters and Boston Herald focused on other disputes, including that witnesses gave a statement and/or were videotaped by cops, but that this was suppressed.

Before getting too far into these competing claims (at least as presented without a transcript, which I'll take a look at down the road), let me take a step back.

The docket in this case, like Dzhokhar's docket, has a bunch of gaps which presumably reflect sealed filings. Part of that involves the protective order in this case, though it (plus a presumed sealed motion "taken under advisement" is referenced in the minutes for an October hearing).

According to a schedule set on January 15, defendants were supposed to submit motions to compel discovery by February 28. But on some date (the official file date is March 3, which can't be right), defendants filed to extend the deadline to March 1, in part because of new discovery that week. The defense submitted their motion to compel on March 3, the prosecution responded on March 7; both those filings are still sealed. The hearing was on March 10. So

it's possible that some of these issues, including the question of what texts are accessible to prosecutors in a case related to the Boston Marathon attack, just came up in the last several weeks.

So.

In response to a defense demand that – in a case where the key physical evidence (the computer and firecracker casings Dzhokhar's friends are accused of throwing away) yielded no DNA or fingerprint evidence, where Dzhokhar is accused of destroying his phone within a day of the time he texted his friends suggesting they "take" what they want – the defense get the other texts Dzhokhar may have sent during this period, the prosecution did not, apparently make the argument the judge ultimately adopted, that these texts weren't relevant. Rather, AUSA Stephanie Siegmann seems to have suggested that the government had no ability to get any other texts.

Not only would that suggest Dzhokhar managed to destroy his cell phone in precisely the sweet spot between the time the cops admit to having IDed them (assuming that claim is credible) and when he lost the physical ability to do so as he bled out in the boat in Watertown. (Remember, according to some narratives he was using it during the car chase the night before.) But it would also suggest the NSA has no ability to get text messages from providers once a cell phone has been destroyed (nor was able to get the receiving end of those text messages based on the metadata of the texts).

Golly. It's as if no dragnet exists, even in spite of NSA claims they used that very same dragnet to gain "peace of mind" after the attack.

We won't learn any more of this claim unless and until the defense appeals this decision.

But FBI's claimed inability to access Dzhokhar's text messages in this case does seem remarkable.