No. 20-443

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DZHOKHAR A. TSARNAEV

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that respondent's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about respondent's case.

2. Whether the district court committed reversible error at the penalty phase of respondent's trial by excluding evidence that respondent's older brother was allegedly involved in different crimes two years before the offenses for which respondent was convicted.

RELATED PROCEEDINGS

United States District Court (D. Mass.):

United States v. *Tsarnaev*, No. 13-cr-10200 (Jan. 15, 2016) (amended judgment)

United States Court of Appeals (1st Cir.):

In re Tsarnaev, No. 14-2362 (Jan. 3, 2015) (denying first mandamus petition)

In re Tsarnaev, No. 15-1170 (Feb. 27, 2015) (denying second mandamus petition)

United States v. *Tsarnaev*, No. 16-6001 (July 31, 2020) (resolving direct appeal)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-188a) is reported at 968 F.3d 24. The court's order denying respondent's first petition for a writ of mandamus (App., *infra*, 216a-220a) is reported at 775 F.3d 457. The court's order denying respondent's second petition for a writ of mandamus (App., *infra*, 230a-302a) is reported at 780 F.3d 14. The order of the district court denying petitioner's motion for a new trial or judgment of acquittal (App., *infra*, 303a-349a) is reported at 157 F. Supp. 3d 57. The district court's orders denying respondent's motions for a change of venue (App., *infra*, 190a-201a, 202a-215a, 221a-229a) are not published in

the Federal Supplement but are available at 2015 WL 505776, 2015 WL 45879, and 2014 WL 4823882.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The full text of 18 U.S.C. 3593(c) is reprinted in the appendix to this petition. App., *infra*, 384a-385a.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, respondent was convicted of 30 offenses for perpetrating the 2013 Boston Marathon bombing—"one of the worst" acts of terrorism on United States soil since September 11, 2001. App., *infra*, 1a. The attack killed three people, including an eight-year-old boy, and caused "horrific, life-altering injuries" to many others. *Ibid.* On the jury's recommendation, the district court sentenced respondent to death on six counts, and also imposed 20 sentences of life imprisonment. *Id.* at 18a. The court of appeals affirmed 27 of respondent's convictions, reversed three convictions, vacated his capital sentences, and remanded for a new penalty proceeding. *Id.* at 1a-188a.

1. a. Respondent is a "[r]adical jihadist[] bent on killing Americans." App., *infra*, 1a. In 2012, while in college in Massachusetts, respondent obtained an electronic copy of an al Qaeda publication that included instructions on making bombs and exhortations from al Qaeda leaders for "Muslims in the West" to commit terrorist attacks. Gov't C.A Br. 8 (citation omitted). In late 2012, respondent told a friend by text message that

he wanted to "bring justice for [his] people" and attain the "[h]ighest level of Jannah [paradise]," which his friend understood to mean jihad. *Id.* at 9 (citations omitted). In March 2013, respondent encouraged his Twitter followers to view al Qaeda lectures and told them that he wanted "the highest levels of Jannah" and prayed for "victory over kufr [infidels]." *Id.* at 10 (citations omitted).

On April 15, 2013, respondent and his brother Tamerlan—a fellow jihadist—walked to the Boston Marathon's finish line. Gov't C.A. Br. 6, 13-14. Each carried a backpack containing a homemade pressure-cooker shrapnel bomb, filled with BBs and nails, that could be detonated remotely. *Id.* at 15. Tamerlan placed one bomb at a crowded spot near the finish line, and respondent placed the other down the street directly behind a group of children watching the race. *Id.* at 15-16. About 20 seconds after the brothers spoke on the phone, Tamerlan's bomb exploded. *Id.* at 16. Respondent then moved away from his own bomb, which detonated a few seconds later. *Ibid.*

The bombs caused devastating injuries that left the street with "a ravaged, combat-zone look." App., *infra*, 4a. "Blood and body parts were everywhere," littered among "BBs, nails, metal scraps, and glass fragments." *Id.* at 4a-5a. "The smell of smoke and burnt flesh filled the air," and "screams of panic and pain echoed throughout the site." *Id.* at 5a.

The first bomb "completely mutilated" the legs of race spectator Krystle Campbell, causing her to bleed to death on the sidewalk while her friend attempted to comfort her. App., *infra*, 5a. The second bomb, placed by respondent, "filleted open down to the bone" the leg of Lingzi Lu, a Boston University student. *Ibid.* People

nearby worked frantically to save Lu's life and pleaded with her to "[s]tay strong," but she died within minutes. *Id.* at 5a-6a. The bomb placed by respondent "also sent BBs and nails tearing through eight-year-old Martin Richard's body, cutting his spinal cord, pancreas, liver, kidney, spleen, large intestine, and abdominal aorta, and nearly severing his left arm." *Id.* at 6a. The boy "bled to death on the sidewalk—with his mother leaning over him, trying to will him to live." *Ibid.*

In addition to killing three people, the bombs "consigned hundreds of others to a lifetime of unimaginable suffering." App., *infra*, 6a. Among many other severe injuries, victims lost limbs, their sight, or their hearing. *Ibid.*; see Gov't C.A. Br. 21-25. The bomb placed by respondent, in particular, caused eight people to lose their legs. Gov't C.A. Br. 22. One was the six-year-old sister of Martin Richard. *Ibid.* The same bomb gashed the stomach of Lingzi Lu's friend so severely that she had "to hold her insides in." App., *infra*, 5a.

b. After the bombs exploded, respondent and Tamerlan met and drove to Cambridge, Massachusetts. App., *infra*, 7a. Back at college the next day, respondent accessed the electronic al Qaeda magazine with bomb-making instructions. Gov't C.A. Br. 26. That evening, he worked out with a friend and tweeted, "I'm a stress free kind of guy." App., *infra*, 7a.

Three days later, the Federal Bureau of Investigation (FBI) released surveillance-camera images of the bombing suspects and asked the public for help identifying and locating them. App., *infra*, 7a. That night, respondent and Tamerlan loaded pipe bombs, a handgun, and a shrapnel bomb similar to the ones they had detonated at the marathon into Tamerlan's car. *Ibid.*

The brothers drove past the Massachusetts Institute of Technology, where they saw the squad car of campus police officer Sean Collier. App., *infra*, 7a. They approached the squad car from behind and shot Officer Collier in the head at point-blank range using a pistol that respondent had acquired a few months before. *Ibid.* They attempted to steal Officer Collier's firearm, but they could not remove it from the holster. *Id.* at 7a-8a. The brothers then carjacked graduate student Dun Meng at gunpoint, drove to an ATM, and withdrew $800 from Meng's bank account. *Id.* at 8a. Meng eventually escaped when respondent and his brother stopped for gas, at which point the brothers fled in his SUV. *Ibid.*

Using the built-in tracking system in Meng's SUV, police quickly located respondent and Tamerlan in Watertown, Massachusetts. App., *infra*, 9a. When officers started following them along a residential street, the brothers got out of the SUV and attacked the officers. *Ibid.* Tamerlan began shooting at them, while respondent threw bombs—some of which exploded. *Ibid.* When Tamerlan's gun stopped firing, he charged at the officers, who wrestled him to the ground. *Ibid.* Meanwhile, respondent got back into Meng's SUV and sped toward the officers and Tamerlan. Gov't C.A. Br. 36. The officers managed to get themselves, but not Tamerlan, out of respondent's path. *Ibid.* Respondent ran over Tamerlan, who died a few hours later. *Id.* at 36-37. The shootout also caused life-threatening injuries to one of the police officers. *Id.* at 37.

Respondent abandoned the SUV about two blocks away, then fled a short distance on foot before climbing into a boat shrink-wrapped in plastic behind a home. App., *infra*, 9a. While inside the boat, respondent used a pencil to "write a manifesto justifying his actions."

Ibid. He wrote: "Stop killing our innocent people and we will stop." *Ibid.* Respondent also wrote that he was "[j]ealous" of Tamerlan's martyrdom. *Id.* at 10a. He accused "the U.S. Government [of] killing our innocent civilians" and stated that he could not "stand to see such evil go unpunished." *Ibid.* (brackets omitted). Respondent closed by writing that he "[didn't] like killing innocent people," which is "forbidden in Islam," "but due to said [obscured] it is allowed." *Ibid.*

The homeowner found respondent the next day after noticing something amiss with the boat. App., *infra*, 10a. Respondent ignored police officers' "repeated requests to surrender," but was eventually captured after officers forced him out of the boat. *Ibid.*

2. A federal grand jury in the District of Massachusetts indicted respondent on 30 counts, including three counts of using a weapon of mass destruction resulting in death, in violation of 18 U.S.C. 2332a, and nine counts of using a firearm during and in relation to a crime of violence resulting in murder, in violation of 18 U.S.C. 924(c) (2012). App., *infra*, 12a-15a; see *id.* at 12a n.9 (detailing charges). The government, on the determination of then-Attorney General Eric Holder, sought the death penalty on the 17 counts charging capital crimes. *Id.* at 15a.

a. As trial approached, respondent filed four separate motions for a change of venue, each of which the district court denied. See App., *infra*, 190a-201a, 202a-215a, 221a-229a. The court recognized that the media had reported extensively on the bombing and the allegations against respondent. See, *e.g.*, *id.* at 193a-194a. But after reviewing the media coverage in detail, along with expert reports submitted by respondent on the bias that the coverage would allegedly create, the court

determined that the coverage did not contain the kind of "blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore." *Id.* at 194a. The court added that it would address respondent's publicity concerns during jury selection. See *id.* at 197a. The court of appeals denied a petition for a writ of mandamus seeking a change of venue. *Id.* at 216a-220a.

In early 2015, the district court summoned 1373 prospective jurors and had them complete 100-question questionnaires about their backgrounds, social-media habits, views on the death penalty, and exposure to pretrial publicity about the case. App., *infra*, 27a; see *id.* at 350a-383a (questionnaire). On pretrial publicity, the questionnaire asked each prospective juror whether they had seen a "little," a "moderate amount," or "[a] lot" about the case, and whether, "[a]s a result of what [they] ha[d] seen or read in the news media," they had "formed an opinion" that respondent was "guilty" or "not guilty," or "should" or "should not" receive the death penalty. *Id.* at 372a-373a. After reviewing the completed questionnaires, the parties agreed to excuse most of the prospective jurors. *Id.* at 30a.

The district court called back 256 prospective jurors for individual voir dire, which took place over 21 court days. See App., *infra*, 30a. The court asked each prospective juror about his or her responses to the questionnaire, including about exposure to pretrial publicity. See *id.* at 250a. The court declined respondent's request to ask every prospective juror "content-specific" questions about pretrial publicity, such as "'What stands out in your mind from everything you have heard, read[,] or seen about the Boston Marathon bombing and the events that followed it?'" *Id.* at 30a-

31a. The court observed that the parties already had "detailed answers in the questionnaires concerning * * * exposure to the media," and that the proposed additional questions and likely follow-up would yield "unmanageable data" without producing "reliable answers." *Id.* at 26a, 31a. The court nevertheless permitted defense counsel "considerable latitude" to ask follow-up questions that they thought necessary to assess a prospective juror's impartiality, including with respect to pretrial publicity. C.A. App. 1143.

Near the end of voir dire, the court of appeals denied a second mandamus petition seeking a change of venue. See App., *infra*, 230a-302a. In doing so, the court "reviewed the entire voir dire conducted to th[at] point"—which by then had narrowed the pool to 75 prospective jurors—and described it as "thorough and appropriately calibrated to expose bias, ignorance, and prevarication." *Id.* at 250a. The court observed, among other things, that the district court had "taken ample time to carefully differentiate between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those who have developed an opinion they cannot put aside." *Id.* at 253a.

At the conclusion of voir dire, the parties exercised their peremptory challenges and selected a 12-member jury with six alternates. App., *infra*, 41a, 186a. Many prospective jurors—including all those eventually seated—explained that they had not paid close attention to the media coverage and could set aside any previously held views. See Gov't C.A. Br. 82-83 (collecting citations). And all 12 seated jurors affirmed "that they could adjudicate on the evidence as opposed to personal biases or preconceived notions." App., *infra*, 41a.

b. Before trial, respondent sought to compel discovery from the government relating to a triple murder that occurred in Waltham, Massachusetts, on September 11, 2011, in which Tamerlan had been implicated. App., *infra*, 64a-66a. After the marathon bombing in 2013, investigators had interviewed Tamerlan's friend Ibragim Todashev about his possible knowledge of the bombing, and they came to suspect that Todashev had been involved in the Waltham murders. *Id.* at 64a-65a. Todashev initially denied involvement, but eventually offered to provide information "if he could get a deal for cooperating." *Ibid.*

Todashev then admitted to participating in the Waltham murders, but claimed that the murders had been orchestrated by Tamerlan. App., *infra*, 65a-66a. According to Todashev, he agreed to help Tamerlan rob drug dealers and participated in holding them at gunpoint and binding them, but it was Tamerlan who "cut each man's throat while Todashev waited outside." *Id.* at 65a-66a, 68a. Todashev began writing out a confession, "[b]ut as he was doing so, he attacked the agents—one of whom shot and killed him." *Id.* at 66a.

Respondent's defense team knew the general outlines of Todashev's claims, including that "he and Tamerlan had agreed initially just to rob the victims," and that "Tamerlan decided they should eliminate any witnesses." App., *infra*, 80a-81a & n.47. In addition, the government disclosed a proffer, by an attorney representing one of respondent's friends, that respondent had told the friend that Tamerlan had been involved in the Waltham murders and that respondent had described them to the friend as "jihad." *Id.* at 67a. The government declined, however, to turn over the FBI re-

ports and recordings from Todashev's interviews, maintaining that those materials were not discoverable under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and were privileged. App., *infra*, 66a-67a. After inspecting some of the materials in camera, the district court agreed with the government and denied respondent's motions to compel production. *Ibid.*

The district court also granted the government's motion in limine to preclude respondent from introducing the Waltham murders at the penalty phase of his trial. App., *infra*, 68a-69a. The court found, based on its in-camera review, that "'there simply is insufficient evidence to describe what participation Tamerlan may have had' in the Waltham murders," so that evidence "'would be confusing to the jury and a waste of time, . . . without any probative value.'" *Id.* at 69a.

c. At respondent's 17-day trial, the government called 92 witnesses and introduced more than 1200 exhibits. See App., *infra*, 17a. Respondent's counsel "did not dispute that he committed the charged acts," instead arguing that respondent had participated "under Tamerlan's influence." *Id.* at 16a-17a. The jury found respondent guilty on all 30 counts. *Id.* at 17a.

In the 12-day penalty-phase proceeding, the government called 17 witnesses, and respondent called 46. See App., *infra*, 17a-18a. Victims of the attacks recounted in detail, among other things, their "reactions to facing death," "uncertainty regarding what happened to their family members," "feelings of helplessness as loved ones suffered," and "the long-term implications of becoming an amputee." *Id.* at 100a-101a. The jury recommended the death penalty on six of the 17 capital counts. *Id.* at 18a. The district court imposed that sentence for those counts and imposed a number of concurrent and

consecutive terms on the remaining counts, including 20 life sentences. *Ibid.*

3. Respondent appealed, "rais[ing] 16 issues for review, many with sub-issues and even sub-sub-issues." App., *infra*, 18a. The court of appeals affirmed respondent's convictions, with the exception of three convictions for using a firearm in a crime of violence under 18 U.S.C. 924(c) (2012), which the court viewed as legally deficient. App., *infra*, 134a-152a. Of central relevance here, the court also vacated respondent's capital sentences on two grounds and remanded for a new sentencing proceeding. *Id.* at 44a-60a, 64a-87a, 152a.

a. First, the court of appeals deemed the district court to have abused its discretion by denying respondent's requests for additional specific questions about the jurors' pretrial media exposure. App., *infra*, 44a-60a. The court of appeals took the view that its decision in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969)—a half-century-old decision that respondent had not cited in the district court—had required granting those requests. See App., *infra*, 49a-51a.

The court of appeals in *Patriarca* had affirmed the denial of a motion for a change of venue, but stated that, at the "request of counsel" in a case with "a significant possibility" of prejudicial pretrial publicity, a district court should examine each prospective juror about "the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence." 402 F.2d at 318 (emphasis omitted). In the court of appeals' view, *Patriarca* established a binding requirement to conduct

a more searching inquiry of potential jurors' media exposure than the district court here had done in its questionnaire and 21-day voir dire. App., *infra*, 53a.

The court of appeals recognized this Court's holding in *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991), that the Constitution does not require trial courts to ask prospective jurors "about the specific contents of the news reports to which they had been exposed." *Id.* at 417; see App., *infra*, 57a-59a. The court nevertheless regarded *Patriarca* as establishing a mandatory rule that "emanated from [its] supervisory powers," even though the court had never before described the decision in that way. App., *infra*, 57a. The court also recognized that its decisions denying respondent's mandamus petitions had favorably reviewed the district court's voir dire without mentioning *Patriarca*. *Id.* at 60a. But the court nevertheless deemed it "reasonable to infer that the mandamus panels reasonably expected that the [district] judge would" follow *Patriarca*. *Ibid.*

The court of appeals found that any potential bias resulting from the district court's perceived failure to follow *Patriarca* was harmless as to respondent's convictions, because he had conceded his guilt. App., *infra*, 60a, 61a n.33. But the court concluded that vacatur of respondent's death sentences was required. *Id.* at 60a.

b. The court of appeals also concluded that the district court had abused its discretion by excluding evidence about the Waltham murders from the penalty phase and by declining to order the government to disclose additional information about those murders. App., *infra*, 64a-87a; see *id.* at 87a n.51 (noting that Judge Kayatta disagreed with the particular conclusion that the district court abused its discretion in excluding

Todashev's statements, as opposed to other Waltham-related evidence).

The court of appeals reasoned that the Waltham evidence should have been admitted because respondent's argument at his penalty proceeding was "premised * * * on his being less culpable than Tamerlan," App., *infra*, 77a, so he was entitled to argue that "Tamerlan's lead role in the Waltham killings * * * makes it reasonably more likely that he played a greater role in the crimes charged here," *id.* at 75a-76a. The court also viewed evidence about the Waltham murders as "highly probative of Tamerlan's ability to influence" respondent, and believed that admission of that evidence "could reasonably have persuaded at least one juror that [respondent] did what he did because he feared what his brother might do to him if he refused." *Id.* at 76a.

The court of appeals rejected the government's contention that the district court's rulings were supported by 18 U.S.C. 3593(c), which permits the exclusion of potential mitigating evidence whose "probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." App., *infra*, 80a-83a. The court of appeals asserted that the district court "could have limited the evidence" or defense counsel's "presentation" if it "became too extensive." *Id.* at 82a. The court of appeals also rejected the government's argument that any error was harmless, stating that "the omitted evidence might have tipped at least one juror's decisional scale away from death." *Id.* at 83a-84a.

The court of appeals gave a similar rationale for requiring the government to disclose the report and recordings of Todashev's interview with investigators. App., *infra*, 85a-87a. The court reasoned that those

materials "strongly supported [respondent's] arguments about relative culpability" and that there was "a reasonable probability that the material's disclosure would have produced a different penalty-phase result." *Id.* at 86a. The court rejected the government's contention that the Todashev evidence was privileged. *Id.* at 86a-87a.

c. Because the court of appeals vacated respondent's death sentences on the two grounds described above, the court did not definitively rule on respondent's claim that venue had been improper based on prejudicial pretrial publicity. App., *infra*, 48a. But the court explained that, "if pressed to decide the venue question now," a majority "would likely find the judge abused no discretion in finding venue proper in Boston in 2015." *Ibid.* The court also declined to definitively resolve respondent's allegations that two jurors were dishonest during voir dire, that one juror was improperly excluded based on his opposition to the death penalty, and that admission of a video of respondent shopping at Whole Foods after the bombing was reversible error. *Id.* at 61a-63a, 102a.

d. Judge Torruella wrote a separate concurrence "agree[ing] that jury selection in this case failed to comply with" *Patriarca*, but expressing his view that respondent's motion for a change of venue should have been granted. App., *infra*, 155a.

REASONS FOR GRANTING THE PETITION

The decision below improperly vacated the capital sentences recommended by the jury and imposed by the district court in one of the most important terrorism prosecutions in our Nation's history. In doing so, the court of appeals announced an unexpected and inflexible voir dire rule that denies district courts the broad

discretion to manage juries that this Court's precedents provide. The court of appeals similarly failed to give adequate deference to the district court's discretionary judgment that any minimal probative value of evidence concerning Tamerlan and the independent Waltham murders was outweighed by the risk of confusing the jury as it considered the appropriate sentence for respondent's own horrific crimes.

Although the court of appeals' errors are largely case-specific, the context of this case makes them exceptionally significant. To reinstate the sentences that the jury and the district court found appropriate for respondent's heinous acts, the government will have to retry the penalty phase of the case; the court will have to conduct (and prospective jurors will have to undergo) a voir dire that will presumably be much longer and more onerous than the original 21-day proceeding; and the victims will have to once again take the stand to describe the horrors that respondent inflicted on them. Given the profound stakes of the erroneous vacatur of respondent's capital sentences, the First Circuit should not have the last word. This Court should grant the petition for a writ of certiorari and put this landmark case back on track toward its just conclusion.

A. The Court Of Appeals Erred In Applying An Inflexible Voir Dire Rule To Respondent's Case

The district court, recognizing that respondent's case garnered substantial pretrial publicity, conducted an exhaustive jury-selection process, including a 21-day voir dire, to ensure that the seated jurors would be impartial. App., *infra*, 30a-41a. While that voir dire was occurring, the court of appeals praised its thoroughness and effectiveness, which the court cited as a reason for denying a change of venue. *Id.* at 250a. Following the

trial and sentencing, however, a different panel of the court of appeals relied on dicta in a 52-year-old circuit precedent—unmentioned until direct appeal—to hold that the voir dire had in fact been insufficient because the district court had not asked every potential juror particular questions about pretrial publicity. See *id.* at 49a-60a. This Court, however, has made clear that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*" and that review of voir dire should be deferential. *Skilling* v. *United States*, 561 U.S. 358, 386 (2010). And the Court has expressly held that the rigid rule applied by the court below is not constitutionally required. See *Mu'Min* v. *Virginia*, 500 U.S. 415, 424-425 (1991). The court of appeals erred in its after-the-fact application of an inflexible voir dire rule to invalidate respondent's capital sentences.

1. The district court's extensive jury-selection procedures appropriately and effectively ensured that respondent received a fair trial

As this Court has recognized, "pretrial publicity—even, pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling*, 561 U.S. at 384 (citation omitted). Jurors "need not enter the box with empty heads in order to determine the facts impartially"; instead, it "'is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.'" *Id.* at 398-399 (brackets and citation omitted). To ensure that jurors meet that standard, the judicial system places "primary reliance on the judgment of the trial court," with its local knowledge and firsthand observations, to craft appropriate jury-selection procedures. *Id.* at 386 (citation omitted); see *id.* at 385-388 & n.21, 399 n.34.

The district court's careful procedures in this case provide no basis for disregarding "the respect due to [its] determinations," *id.* at 387, on that jury-management issue.

a. A criminal defendant is entitled to trial "by an impartial jury." U.S. Const. Amend. VI; see Fed. R. Crim. P. 21(a). But "juror *impartiality* * * * does not require *ignorance*." *Skilling*, 561 U.S. at 381. As the Court has long recognized, "every 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). Jurors exposed to publicity can nevertheless be impartial so long as they remain free of "bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); see *Skilling*, 561 U.S. at 398-399.

In rare cases, "extraordinary local prejudice will prevent a fair trial" by any potential jury where the crime was committed, thereby requiring a transfer of venue. *Skilling*, 561 U.S. at 377-378; see *id.* at 378-385. The court of appeals did not find this to be such a case. Indeed, it rejected two venue-change requests during pretrial proceedings, and the decision below stated that a majority of the panel, "if pressed to" again "decide the venue question" posttrial, "would likely find the judge abused no discretion in finding venue proper in Boston in 2015." App., *infra*, 48a.

The court of appeals instead premised its impeachment of the jury's impartiality in this case on the particular jury-selection procedures that the district court

employed. Even though the court had previously approved those procedures while the jury-selection process was ongoing, see App., *infra*, 250a, and even though this Court has held that specific questions of the kind requested by respondent are not constitutionally required, see *Mu'Min*, 500 U.S. at 424-425, the court of appeals accepted respondent's posttrial contention that the lengthy questionnaire and 21-day voir dire were inadequate to ensure an impartial jury, App., *infra*, 49a-60a.

That reversal cannot be squared with the "respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality." *Skilling*, 561 U.S. at 387; see *Mu'Min*, 500 U.S. at 424-425; *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (plurality opinion). As this Court recently reaffirmed in *Skilling* v. *United States*, *supra*, its latest precedent addressing voir dire in a case with substantial pretrial publicity, determining juror impartiality in such circumstances is "particularly within the province of the trial judge." 561 U.S. at 386 (citation omitted). Because "[a]ppellate courts making after-the-fact assessments of the media's impact on jurors * * * lack the on-the-spot comprehension of the situation possessed by trial judges," they must be "resistant to second-guessing the trial judge's estimation of a juror's impartiality" and "of the measures necessary to ensure that impartiality." *Id.* at 386-387.

b. Only through inappropriate second-guessing could a reviewing court fault the district court's careful jury-selection procedures here. "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes especially good sense' because the judge 'sits in the locale where the publicity is said to

have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" *Skilling*, 561 U.S. at 386 (quoting *Mu'Min*, 500 U.S. at 427) (brackets omitted). And as the court of appeals had previously recognized, the district court's voir dire in this case was "thorough and appropriately calibrated to expose bias, ignorance, and prevarication." App., *infra*, 250a. Indeed, the district court's approach "in many ways mirror[ed] the one [this] Court found appropriate in *Skilling*." *Id.* at 249a.

As part of the district court's "rigorous" selection process, it summoned an expanded pool of over "a thousand prospective jurors" and directed them to complete "a long and detailed one-hundred-question questionnaire under oath." App., *infra*, 249a. The questionnaire included questions about media exposure generally and exposure to "media coverage * * * about this case" specifically. *Id.* at 372a; see *id.* at 361a, 371a. Of particular relevance, Question 77 asked prospective jurors whether, "[a]s a result of what [they] ha[d] seen or read in the news media," they had "formed an opinion" that respondent was "guilty" or "not guilty" and "should" or "should not" receive the death penalty. *Id.* at 373a. The questionnaire then asked whether, if prospective jurors had formed such an opinion, they could "set aside [that] opinion and base [their] decision about guilt and punishment solely on the evidence that will be presented * * * in court." *Ibid.* After receiving the questionnaires, the parties "agreed to excuse many" of the prospective jurors, but the district court "called back 256 for individual voir dire—which lasted 21 days." *Id.* at 30a.

During the lengthy voir dire, the district court asked prospective jurors to "amplify" or explain their answers

to Question 77, and frequently asked follow-up questions on that subject. See, *e.g.*, C.A. App. 338, 355-356, 380, 404, 409-410, 424-425, 502-503. The court likewise permitted respondent's counsel "considerable latitude" to ask questions about potential prejudice, including based on pretrial publicity. *Id.* at 1143. Respondent's counsel used that latitude to question multiple prospective jurors—including prospective jurors whom counsel neither asked the court to excuse for cause nor peremptorily struck—about the content of the pretrial publicity that they had seen. See, *e.g.*, *id.* at 942, 1044-1046, 1385-1386, 1810-1812, 2559-2560. At the same time, the court itself excused for cause many prospective jurors who indicated that they could not set aside their opinions and decide the case based on the evidence. See, *e.g.*, *id.* at 840, 1569, 1826-1828, 1882, 2066, 2847. Ultimately, all 12 seated jurors affirmed "that they could adjudicate [the case] on the evidence as opposed to personal biases or preconceived notions." App., *infra*, 41a.

As in *Skilling*, the district court's meticulous voir dire, relying on the "face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news," provided the court with "a sturdy foundation to assess fitness for jury service." 561 U.S. at 395. To the extent that the particular circumstances of this case might have required more extensive procedures than the ones in *Skilling*, the district court accounted for those differences through a 21-*day* voir dire whose length and detail far exceeded the 5-*hour* voir dire this Court approved in *Skilling*. *Id.* at 387; cf. *id.* at 437 (Sotomayor, J., concurring in part and dissenting in part). The court of appeals originally recognized as much, emphasizing that it "should commend,

not decry," the district court's "rigorous efforts to ensure" a fair trial. App., *infra*, 253a.

Particularly in light of the broad "deference due to district courts" in conducting voir dire, *Skilling*, 561 U.S. at 396, no sound basis exists to second-guess the "efforts the district court [took] to carefully explore, and eliminate, any prejudice" in this case, App., *infra*, 253a. Indeed, the seated jurors' ultimate decision not to recommend the death penalty on 11 of the 17 capital counts confirms that the district court correctly assessed the jury's impartiality. See *Skilling*, 561 U.S. at 395 (observing that the jury's acquittal on nine counts "suggests the court's assessments [of juror impartiality] were accurate").

2. The court of appeals wrongly invalidated respondent's capital sentences based on a previously unmentioned and inflexible voir dire rule

In invalidating respondent's capital sentences, the court of appeals did not conclude that any juror was biased by pretrial publicity or unable to render a decision based on the trial evidence. Nor did the court identify particular contextual factors specific to the jury selection in this case that required the district court to do more to ensure the jury's impartiality. The court of appeals instead took the view that its half-century-old decision in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969)—which was not cited by anyone until the posttrial appeal—mandates that a district court must *always* grant counsel's request to ask every prospective juror in a "high-profile case" what they had "'read and heard about the case.'" App., *infra*, 53a. The court of appeals' post hoc application of that rigid rule was both unexpected and unsound.

a. In *Patriarca*, several criminal defendants moved for a change of venue based on pretrial publicity. 402 F.2d at 315-316. The district court denied the motion. *Id.* at 316. At the request of defense counsel, the court asked "'if there is any member of the jury here who feels that he would not be able to give the defendants a fair and impartial trial.'" *Id.* at 318. When "[n]o response was forthcoming," the court "assumed that all were 'in agreement on this particular question,'" and began the trial. *Ibid.*

The court of appeals affirmed the district court's denial of the change-of-venue motion. *Patriarca*, 402 F.2d at 317. The court of appeals then observed that voir dire had provided "another opportunity for counsel to mitigate any possible effect of pretrial publicity." *Ibid.* It noted that the district court could not be "charged with error" for "d[oing] all that was requested," but commented that "such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity." *Id.* at 318. "In cases where there is, in the opinion of the court, a significant possibility that jurors have been exposed to potentially prejudicial material," the court continued, "we think that" a district court should "on request of counsel * * * proceed to examine each prospective juror" individually "with a view to eliciting the kind and degree of his exposure * * * , the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence." *Ibid.* The court of appeals added that its view was "in accord with the suggestions of" a tentative draft statement of standards by the American Bar Association. *Ibid.*

b. Before the decision below, nothing would have put the district court on notice that *Patriarca*'s statement required a more searching jury-selection process in this case than the one it conducted. The court's careful investigation into the potential effect of pretrial publicity on prospective jurors' impartiality—which included questions in the initial questionnaire and follow-up by the court and counsel during a 21-day voir dire—is decidedly unlike the single generalized question in *Patriarca*, which was directed only to the already-seated jury (not prospective jurors) and did not even mention pretrial publicity. See 402 F.2d at 317.

For the first 52 years after *Patriarca*, moreover, the court of appeals never relied on that decision to vacate a conviction or sentence. Instead, the First Circuit repeatedly cited *Patriarca* to *reject* pretrial-publicity challenges, and recognized that district courts have "broad discretion in [their] conduct of the *voir dire*." *United States* v. *Medina*, 761 F.2d 12, 20 (1985) (citing 402 F.2d at 318); see, *e.g.*, *United States* v. *Orlando-Figueroa*, 229 F.3d 33, 43 (2000); *United States* v. *Vest*, 842 F.2d 1319, 1331-1332, cert. denied, 488 U.S. 965 (1988). Respondent accordingly did not rely on *Patriarca* in the district court. And the court of appeals did not mention *Patriarca* when reviewing the voir dire in connection with its denial of respondent's change-of-venue requests, let alone indicate that the voir dire process was inadequate in light of the opinion in that case.

To the contrary, the court of appeals before trial emphasized that the district court—which had already completed most of the jury-selection process—had "taken ample time to carefully differentiate between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those

who have developed an opinion they cannot put aside." App., *infra*, 253a. The decision below attempted to square its posttrial emphasis on *Patriarca* with the court's earlier failure to mention that decision by deeming it "reasonable to infer" that the previous panel "reasonably expected that the judge would conduct the kind of searching voir-dire inquiry required by our caselaw." *Id.* at 60a. But the district court had no way to know that its voir dire procedures contradicted circuit case law when the court of appeals had itself "reviewed the entire voir dire" to that point, *id.* at 250a, and suggested no such contradiction.

c. In addition to being unexpected, the court of appeals' holding that a district court *must* ask prospective jurors what specific media coverage they have seen or heard is unsound. That one-size-fits-all requirement is precisely the sort of "hard-and-fast formula" about the "necessary depth or breadth of *voir dire*" that this Court has disavowed in favor of a case-specific inquiry. *Skilling*, 561 U.S. at 386.

In *Mu'Min*, the Court squarely rejected the claim that, in a capital case that has received media attention, the Constitution requires questioning "about the specific contents of the news reports to which [prospective jurors] had been exposed" or "precise inquiries about the contents of any news reports that potential jurors have read." 500 U.S. at 417, 424-425. *Mu'Min* recognized that this Court "enjoy[s] more latitude in setting standards for voir dire in federal courts under [its] supervisory power than [it does] in interpreting the provisions of the Fourteenth Amendment with respect to voir dire in state courts." *Id.* at 424 (emphases omitted). And *Mu'Min* observed that circuits exercising their supervisory powers had taken different views on whether

"in some circumstances such an inquiry is required." *Id.* at 426; see *id.* at 426-427. But *Mu'Min* did not identify *Patriarca* (or any other First Circuit decision) as adopting such a "some circumstances" rule, nor did it approve the sort of sweeping and categorical rule that the decision below invoked *Patriarca* to impose.

Mu'Min instead emphasized that, even in the supervisory-power context, this Court's precedents recognize that "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." 500 U.S. at 424. And *Skilling*—a precedent arising from a federal prosecution—affirmatively repudiates inflexible rules of the sort that the court of appeals adopted here. See 561 U.S. at 386. Application of such a supervisory rule is particularly unwarranted in this terrorism case, as it deviates sharply from the principle that "reversals of convictions under [a] court's supervisory power must be approached 'with some caution' and with a view toward balancing the interests involved," including "the trauma the victims of * * * particularly heinous crimes would experience in a new trial" and the "practical problems of retrying the[] sensitive issues [long] after the events." *United States* v. *Hasting*, 461 U.S. 499, 506-507 (1983) (citations omitted).

The court of appeals' inflexible rule also makes little practical sense. While asking questions "about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial" in some cases, *Mu'Min*, 500 U.S. at 425, that does not mean that such questions are required or even useful in every case. In cases featuring a substantial amount of nationwide publicity—transmitted, as is increasingly common, through 24/7 news coverage, social

media, and breaking news alerts pushed out to Americans' personal devices—asking members of a large jury pool to recount the coverage they have seen or heard would be "unmanageable" at best and counterproductive at worst. App., *infra*, 26a (quoting district court). Not only would "digging for [such] details * * * not likely yield reliable answers," but it could cause jurors to dredge up memories that actually induce prejudice. *Id.* at 31a. And a rule focused rigidly on the information to which prospective jurors have been exposed does not reflect the critical inquiry a court must make "at the end of the [voir dire] questioning": whether a prospective juror has "formed an opinion about the case." *Mu'Min*, 500 U.S. at 425; see *Skilling*, 561 U.S. at 398-399. This Court should make clear that no such wooden rule justified the posttrial vacatur of respondent's capital sentences.

B. The Court Of Appeals Erred In Finding Reversible Error In The Penalty-Phase Exclusion Of Evidence Of Independent Crimes By Respondent's Brother

The court of appeals was also wrong to conclude that the district court abused its discretion at the penalty phase of respondent's trial by excluding evidence of Tamerlan's alleged involvement in the 2011 Waltham murders. The district court correctly determined that any minimal probative value of that evidence was outweighed by the danger of confusing the jury. And in any event, the record amply demonstrates that any error was harmless. Even if jurors found the Waltham evidence credible, Tamerlan's alleged commission of independent crimes almost two years before the bombing had no reasonable prospect of altering the jury's recommendation that respondent receive the death penalty for his own acts of terrorism.

1. The district court did not abuse its discretion by excluding the Waltham evidence

Although the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, generally permits evidence relevant to aggravation or mitigation to be introduced "regardless of its admissibility" under other evidentiary rules, the statute expressly retains district courts' traditional discretion to exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. 3593(c); see App., *infra*, 72a-73a (recognizing abuse-of-discretion standard of review). In this case, the district court did not abuse its discretion by declining to allow a complicated minitrial on the sensational but unsolved Waltham murders.

a. In order to give any consideration to the Waltham murders, the jurors would at a minimum have had to determine whether or how Tamerlan was, in fact, involved. That, in turn, would have required evaluating the credibility of Todashev's statements that allegedly linked Tamerlan to those crimes. But Todashev had every reason to deflect blame for the murders onto someone else, and he may well have exaggerated Tamerlan's role. Determining what really happened in Waltham would have been extremely difficult given that "the only identified suspects—Tamerlan and Todashev—were both dead." App., *infra*, 87a.

The district court was not required to sidetrack the penalty-phase proceeding in this case by inviting the jurors to solve a different crime. See, *e.g.*, *United States* v. *Umaña*, 750 F.3d 320, 350-351 (4th Cir. 2014) (finding no abuse of discretion in denial of capital defendant's request to admit evidence of separate murders where "the process would amount to mini-trials

that would take days and distract the jury"), cert. denied, 576 U.S. 1035 (2015). The court of appeals suggested (App., *infra*, 82a) that the district court might have been able to cabin the scope of the inquiry, but it is difficult to see how. Proof or disproof about Tamerlan's role in the Waltham murders likely would have required calling the interviewing agents as witnesses or introducing possible additional extraneous evidence, taking up a substantial portion of the jury's time on what was (at best) an ancillary matter.

b. Even if believed, evidence about Tamerlan's role in the Waltham murders had no significant probative value. Contrary to the court of appeals' suggestion (App., *infra*, 75a-76a), such evidence would not have indicated that Tamerlan "played a greater role" than respondent in the Boston Marathon bombing, that Tamerlan's "ability to influence" respondent played a significant role in his own participation in the bombing, or that respondent went along with the bombing "because he feared what his brother might to do him if he refused."

Whether or not Tamerlan was involved in the Waltham murders in the manner that Todashev suggested, those murders were a separate crime with a separate accomplice. Todashev's story was that Tamerlan recruited him only to participate in a robbery, decided on the spur of the moment to kill the victims, and allowed Todashev to *opt out* of the actual killings. See App., *infra*, 65a-66a. The relevance of any of that to the marathon bombing was extremely tangential. Unlike the Waltham crime, the marathon bombing was a planned terrorist attack that was the culmination of respondent's own jihadist aspirations and in which he himself directly murdered and injured his victims. See Gov't

C.A. Br. 10 ("I want the highest levels of Jannah.") (citation omitted); *id.* at 9 ("I wanna bring justice for my people.") (citation omitted); *id.* at 38 ("I ask Allah to make me a shahied [martyr].") (citation omitted).

Whatever ability Tamerlan might have had to strong-arm Todashev into helping with a robbery, it would not show that he could or did strong-arm respondent into perpetrating a terrorist attack. The record contains no evidence that respondent was reluctant to kill and maim marathon spectators, to ambush and murder Officer Sean Collier, to carjack and rob a graduate student, or to throw bombs at officers in Watertown. Among other things, after Tamerlan's death, respondent expressed "[j]ealous[y]" at Tamerlan's martyrdom and explained his belief that "killing innocent people" was "allowed" because of wrongdoing that he perceived by the United States government. App., *infra*, 10a.

2. Any error in excluding the Waltham evidence was harmless

Even assuming that the district court abused its broad discretion by excluding the Waltham murder evidence, the record overwhelmingly demonstrates that introducing that evidence would not have changed the outcome of respondent's penalty proceeding. See 18 U.S.C. 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless * * * where the Government establishes beyond a reasonable doubt that the error was harmless.").

As discussed above, the record shows conclusively that respondent was an active and willing participant in the acts of terrorism for which he was convicted and sentenced to death. Respondent read radical Islamic

publications that gave instructions on making shrapnel bombs and encouraged readers to attack civilians. Gov't C.A. Br. 8. He texted with a friend about being interested in jihad and martyrdom. *Id.* at 9. While separated from his brother, he placed a bomb in a crowd within a few feet of several children, and detonated the bomb. *Id.* at 15-16, 25. When he returned to college after the bombing, he expressed no fear or remorse, but instead reviewed al Qaeda material, worked out at the gym, and tweeted that he was a "stress free kind of guy." App., *infra*, 7a; see Gov't C.A. Br. 26. Respondent later voluntarily returned to the Boston area with Tamerlan and joined him in murdering Officer Collier, carjacking Dun Meng, and trying to kill police officers during the Watertown shootout. App., *infra*, 7a.

No reasonable prospect exists that the Waltham evidence would have changed the jury's determination that respondent deserved the death penalty for his horrific crimes. Indeed, respondent's praise of Tamerlan's putative involvement in the Waltham crimes as righteous "jihad," App., *infra*, 65a-67a, would simply have reinforced respondent's own independent culpability in the jihadist marathon bombings. His own culpability is also confirmed by his solo actions after Tamerlan was captured. Rather than disassociating from Tamerlan, respondent instead tried to drive an SUV into the police officers who had chased them down. *Id.* at 9a. And when respondent believed that Tamerlan had died, he expressed his own desire for martyrdom and attempted to "shed light on [his] actions" by reiterating his own belief that the killings were justified. *Id.* at 9a-10a.

C. The Questions Presented Warrant Review

The Boston Marathon bombing was one of the most devastating acts of terrorism in United States history.

See App., *infra*, 1a. The bombs killed three people, permanently maimed dozens, and injured hundreds. *Id.* at 1a-2a. The enormous efforts devoted to respondent's capital trial by the jury, the district court, the victims, and the government reflect the seriousness of respondent's crimes. In view of the significance of this case to the Nation, appellate review should include the Nation's highest Court.

In addition, the first question presented implicates an issue—the management of a trial of a widely publicized crime—that may arise in other significant cases and that this Court has repeatedly found to warrant certiorari. See, *e.g.*, *Skilling*, *supra* (defense-side petition in federal case); *Rosales-Lopez*, *supra* (same); *Mu'Min*, *supra* (defense-side petition in state case); *Patton* v. *Yount*, 467 U.S. 1025 (1984) (government petition in state case); *United States* v. *Wood*, 299 U.S. 123 (1936) (government petition in federal case); cf. *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000) (government petition in federal case about use of peremptory strikes in jury selection). The grants of certiorari in those cases presumably reflect, in part, the recognition that although the particular circumstances of each case are necessarily somewhat unique, precedential decisions like the one below will affect future prosecutions of great public importance.

The court of appeals' approach to such prosecutions diverges from other circuits'. The Fourth Circuit, for example, has explained that a "per se rule" of the kind adopted here "is simply inconsistent with the broad deference traditionally and wisely granted trial courts in their conduct of voir dire." *United States* v. *Lancaster*, 96 F.3d 734, 741 (1996), cert. denied, 519 U.S. 1120 (1997). And the Second Circuit "appears never to have

reversed a conviction for the failure to ask a particular question." *United States* v. *Lawes*, 292 F.3d 123, 129 (2002). Although some variation among circuits' supervisory rules is permissible, the vacatur of respondent's nationally significant capital sentences on the basis of a circuit-specific rule weighs strongly in favor of this Court's intervention. And the court of appeals' additional error in purporting to identify an alternative basis for vacating those sentences (the exclusion of distracting evidence) should not preclude further review.

Even if the only relevant consideration were the effect of the court of appeals' errors on this particular case, this Court's review would still be warranted. It is not uncommon for this Court to grant review in capital cases that present questions whose primary significance is to the parties involved. See, *e.g.*, *Flowers* v. *Mississippi*, 139 S. Ct. 2228 (2019); *Kansas* v. *Carr*, 136 S. Ct. 633 (2016). Respondent's trial was lengthy and, for many victims of his crimes, painful. The penalty-phase proceeding required many victims to testify about the terror that respondent inflicted on them and the ways that their lives continue to be permanently altered by his brutality. See p. 10, *supra*. Allowing the decision below to stand would require the United States either to abandon pursuit of the death penalty in this case—an option that it has rejected—or to conduct another penalty trial, which would require those victims to return to court to "relive their disturbing experiences." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). It would also require selecting a new jury through an unnecessarily onerous process that promises to be even longer and more burdensome than the original jury selection. And a new penalty trial would be at least eight

years removed from the events of the marathon bombing, creating a significant prospect that the "[p]assage of time, erosion of memory, and dispersion of witnesses" could complicate that retrial. *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982).

The victims, the potential jurors, the district court, the government, and the Nation should not have to bear those burdens to reinstate the capital sentences the original jury unanimously approved for respondent's appalling crimes. This Court should accordingly grant the petition for a writ of certiorari to reverse the court of appeals' erroneous decision. And to avoid further delay in this long-running and critically important prosecution, the government respectfully submits that the Court should hear and decide the case this Term.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-6001

UNITED STATES OF AMERICA, APPELLEE

v.

DZHOKHAR A. TSARNAEV, DEFENDANT, APPELLANT

July 31, 2020

Appeal from the United States District Court
for the District of Massachusetts
[Hon. George A. O'Toole, Jr., U.S. District Judge]

Before: TORRUELLA, THOMPSON, and KAYATTA, Circuit Judges.

THOMPSON, Circuit Judge.

OVERVIEW

Together with his older brother Tamerlan, Dzhokhar Tsarnaev detonated two homemade bombs at the 2013 Boston Marathon, thus committing one of the worst domestic terrorist attacks since the 9/11 atrocities.[1] Radical jihadists bent on killing Americans, the duo caused battlefield-like carnage. Three people died. And hundreds more suffered horrific, life-altering injuries.

[1] We will sometimes use first names in this opinion, not out of disrespect or as a sign of familiarity but to avoid confusing references to persons with the same last name.

Desperately trying to flee the state, the brothers also gunned down a local campus police officer in cold blood. Reports and images of their brutality flashed across the TV, computer, and smartphone screens of a terrified public—around the clock, often in real time. One could not turn on the radio either without hearing something about these stunningly sad events.

Dzhokhar eventually got caught, though Tamerlan died after a violent confrontation with the police.

Indicted on various charges arising from these ghastly events, Dzhokhar stood trial about two years later in a courthouse just miles from where the bombs went off. Through his lawyers, he conceded that he did everything the government alleged. But he insisted that Tamerlan was the radicalizing catalyst, essentially intimidating him into acting as he had. See 18 U.S.C. § 3592(a)(4) (providing that relative culpability is a mitigating factor relevant to the imposition of a death penalty). Apparently unconvinced, a jury convicted him of all charges and recommended a death sentence on several of the death-eligible counts—a sentence that the district judge imposed (among other sentences).

A core promise of our criminal-justice system is that even the very worst among us deserves to be fairly tried and lawfully punished—a point forcefully made by the then-U.S. Attorney for Massachusetts during a presser at the trial's end.[2] To help make that promise a reality, decisions long on our books say that a judge handling a case involving prejudicial pretrial publicity must elicit

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[2] See Michele Gorman, *Boston Marathon Bomber Tsarnaev Sentenced to Death*, Newsweek (May 15, 2015), https://www.newsweek.com/boston-marathon-bomber-dzhokhar-tsarnaev-sentenced-332032.

"the kind and degree" of each prospective juror's "exposure to the case or the parties," if asked by counsel, see Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968)—only then can the judge reliably assess whether a potential juror can ignore that publicity, as the law requires, see United States v. Vest, 842 F.2d 1319, 1332 (1st Cir. 1988).[3] But despite a diligent effort, the judge here did not meet the standard set by Patriarca and its successors.

Another error forces us to act as well, this one involving the judge's denial of Dzhokhar's post-trial motion for judgments of acquittal. Navigating a complex and changing area of the law, the judge let stand three of Dzhokhar's convictions for carrying a firearm during crimes of violence, in violation of 18 U.S.C. § 924(c). The judge thought that each of the underlying offenses constituted a crime of violence. But with respect (and with the luxury of time that district judges rarely have), we believe the current state of the law propels us toward the opposite conclusion.

The first error requires us to vacate Dzhokhar's death sentences and the second compels us to reverse the three § 924(c) convictions. On remand, then, the district court must enter judgments of acquittal on the relevant § 924(c) charges, empanel a new jury, and preside over a new trial strictly limited to what penalty Dzhokhar should get on the death-eligible counts.[4] And just to be crystal clear: Because we are affirming the

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[3] For simplicity's sake, we will occasionally call this the "Patriarca standard."

[4] "Remand" is legalese for "[t]he act or an instance of sending something (such as a case, claim, or person) back for further action." See *Remand*, Black's Law Dictionary (11th ed. 2019).

convictions (excluding the three § 924(c) convictions) and the many life sentences imposed on those remaining counts (which Dzhokhar has not challenged), Dzhokhar will remain confined to prison for the rest of his life, with the only question remaining being whether the government will end his life by executing him.

What follows is an explanation of our reasoning, as well as our take on certain issues that may recur on remand.[5]

HOW THE CASE CAME TO US

The facts of today's appeal are painful to discuss. We apologize for their graphic detail. We also do not attempt to cover all of the case's complicated events in this section—instead we offer only a summary, adding more information during our discussion of particular issues.

Bombings

On Patriots' Day 2013—April 15, to be exact, a local holiday celebrating the first battles of the American Revolution—the Tsarnaev brothers set off two shrapnel bombs near the finish line of the world-famous Boston Marathon, leaving the area with a ravaged, combat-zone look.[6] BBs, nails, metal scraps, and glass fragments

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[5] Before going on, we wish to compliment counsel for both sides for their helpful briefs and arguments. We never hesitate to call out lawyers who fail to meet the minimum professional standards expected of them. So it is only fair that we thank today's attorneys for their exceptional performance in this most serious and high-profile case. And while our views on some of the issues differ from the district judge's, we commend him for all his hard work in very trying circumstances.

[6] All relevant activities occurred in Massachusetts.

littered the streets and sidewalks. Blood and body parts were everywhere—so much so that it seemed as if "people had just been dropped like puzzle pieces onto the sidewalk" (a description taken from a witness's trial testimony). The smell of smoke and burnt flesh filled the air. And screams of panic and pain echoed throughout the site. "Mommy, mommy, mommy," a five-year-old boy cried out over and over again, his leg cut to the bone. Others yelled "help us," "we're going to die," or "stay with me."

Now brace yourself for how Marathon-goers Krystle Campbell, Lingzi Lu, and Martin Richard spent the last few minutes of their lives.

Krystle Campbell was watching the race with her friend Karen Rand (now known as Karen McWatters) when the first bomb went off. Rand got knocked to the ground. But she dragged herself over to Campbell, burning herself on hot metal pieces as she did so. She put her face next to Campbell's and held her hand. Campbell was "complete[ly] mutilat[ed]" from the waist down. Speaking very slowly, Campbell said her "legs hurt"—even though they had been blown off. Moments later, her hand went limp in Rand's. And she never spoke again, bleeding to death right there.

Lingzi Lu was with her friend Danling Zhou as the second bomb exploded. Zhou got a gash across her stomach, requiring her to hold her insides in. While Lu had her arms and legs, she did have a significant thigh injury. "[B]asically her leg had been filleted open down to the bone," a doctor on the scene later said. He tried to tourniquet the wound. But she had lost a lot of blood and didn't have much of a pulse. Despite knowing that she was going to die, the doctor asked a nearby

person to start CPR. A firefighter later moved in and pumped air into Lu's mouth with his mask. And a police officer did chest compressions, telling her, "[S]tay with us. You can do this. You're going to be okay. Stay strong." He and others put Lu on a backboard and placed her in an ambulance. But a paramedic told them to get her off because she "was gone" and he needed to keep the ambulance free for those who could be "save[d]."

The second bomb also sent BBs and nails tearing through eight-year-old Martin Richard's body, cutting his spinal cord, pancreas, liver, kidney, spleen, large intestine, and abdominal aorta, and nearly severing his left arm. He bled to death on the sidewalk—with his mother leaning over him, trying to will him to live. Searching for his two other children, Martin's father, Bill, first found son Henry (age twelve) and then daughter Jane (age six). Jane tried to stand up but fell—because her left leg was gone. Bill carried her for a bit. And then an off-duty firefighter tourniqueted the leg, saving her life.

Not only did the Tsarnaev brothers kill Krystle Campbell, Lingzi Lu, and Martin Richard, they also consigned hundreds of others to a lifetime of unimaginable suffering. Some lost one or more limbs, blown off as they stood near the finish line or amputated later because they were so badly mangled. Others lost sight, still others hearing. And years after the bombings, many still had debris in their bodies. One survivor had shrapnel in her that occasionally worked its way to the surface and had to be removed; another had a ball bearing stuck in his brain—to give just a few examples.

Manhunt and Capture

Leaving the scene, Dzhokhar and Tamerlan drove to Cambridge and stopped at a Whole Foods. Dzhokhar went in, grabbed a bottle of milk, paid for it, and left. About a minute later, he returned to the store and exchanged the bottle for a different one.

Back at his school the next day (UMass Dartmouth, as it is known locally), Dzhokhar resumed his normal routine. He worked out with a friend at the campus gym, for example. "I'm a stress free kind of guy," he tweeted.

Aided by a description given by a man from his hospital bed, as well as by videos from security cameras and bystanders' cell phones, law enforcement released images of the bombers two days later on April 18, and asked the public to help identify them and provide information about their whereabouts. The FBI (short for the Federal Bureau of Investigation) produced a "wanted poster" on its website and asked the local community to give any details that could lead to their arrests.

That night, still April 18, Tamerlan and Dzhokhar put pipe bombs, a handgun, and a shrapnel bomb (similar to the ones they exploded at the Marathon) into Tamerlan's Honda Civic and drove off from his Cambridge home. Passing by the Massachusetts Institute of Technology ("MIT," from now on), they spotted the squad car of campus police officer Sean Collier. Approaching the squad car from behind, the brothers shot Collier dead at close range—twice in the side of the head, once between the eyes, and three times in the hand. They tried and failed to take his gun (the holster's retention system

tripped them up, apparently). Startled by an MIT student riding by on a bike, they got back in the Honda and sped away.

The brothers then drove to Brighton where they crossed paths with Dun Meng, who was sitting in his parked Mercedes SUV. After pulling up behind him, Tamerlan got out of the Honda and knocked on Meng's passenger window. Meng rolled the window down. Tamerlan leaned in, opened the door, jumped in, aimed a gun at him, and demanded cash. A frightened Meng handed over his wallet. Explaining that he had exploded the bombs at the Marathon and had just killed Collier, Tamerlan ordered Meng to drive. So drive Meng did. Dzhokhar followed behind in the Honda.

Tamerlan eventually had Meng pull over on a street in Watertown. Tamerlan got into the Mercedes's driver's seat. Meng got into the Mercedes's front passenger's seat. And after parking the Honda, Dzhokhar got into the Mercedes's back passenger's seat. Tamerlan drove to an ATM. Dzhokhar withdrew $800 from Meng's account using Meng's bank card and PIN ($800 was the card's withdrawal limit).

Tamerlan drove back to his Honda to get a music CD with nasheeds on them (nasheeds are Islamic chants). He played the CD in the Mercedes—music that sounded a "bit weird" and "religious" to Meng. Tamerlan then stopped for gas in Cambridge. Fearing this might be his last chance to escape, Meng made a break for it, sprinting across the street to a different gas station where he begged the attendant to call the police. Tamerlan and Dzhokhar took off in the Mercedes.

Meng told the arriving officers that the carjackers were the Boston Marathon bombers. He also told them that his Mercedes had a built-in tracking system.

Good police work then led authorities to the Tsarnaev brothers in Watertown, where the two had returned to get the Honda. Tamerlan got out of the Mercedes. Dzhokhar got out of the Honda. Tamerlan started shooting at the officers. And he and Dzhokhar threw some pipe bombs and a larger bomb that looked "like a big cooking pot." A couple of the bombs exploded.

After getting shot, and having possibly run out of bullets, Tamerlan tossed his gun at one of the officers and ran toward them. They wrestled him to the ground, however. Dzhokhar got back in the Mercedes. And while trying to make his getaway, he ran over his brother, who died hours later.

Also hurt in the shootout was MBTA police officer Richard Donohue. He nearly bled to death after a bullet hit his groin area. It took months in a hospital to recover from his injury.

Back to Dzhokhar. He could only drive about two blocks, because the police had damaged the Mercedes's tires. So he exited the car and fled on foot. In a nearby backyard, he found a boat shrink-wrapped in plastic and climbed inside. And he stayed there overnight, bleeding from his wounds.

Dzhokhar did, however, have enough strength to write a manifesto justifying his actions. On two wooden slats attached to the boat he carved the words, "Stop killing our innocent people and we will stop." "God has a plan for each person," he wrote on the fiberglass hull (with a pencil he found on the boat). "Mine

was to hide in this boat and shed light on our actions." "[J]ealous" of Tamerlan's martyrdom, he accused "[t]he U.S. Government [of] killing our innocent civilians." Stressing that he could not "stand to see such evil go unpunished," he warned that "we Muslims are one body, you hurt one, you hurt us all." And finishing up, he wrote, "Now I don't like killing innocent people it is forbidden in Islam but due to said [ ] it is allowed."[7]

With Dzhokhar still at large, then-Massachusetts Governor Deval Patrick asked nearly a million citizens of Boston and the five neighboring locales (Belmont, Cambridge, Newton, Waltham, and Watertown) to "shelter in place"—that is, he told them to remain behind closed doors and "not to open the door for anyone other than a properly identified law enforcement officer." He also asked schools and businesses to close—only hospitals and law enforcement would stay open.

Later that day, on April 19, Watertown resident David Henneberry noticed that his boat had some loose shrink wrap and went out to fix it—by this time Governor Patrick had lifted the shelter-in-place order, even though Dzhokhar was still a fugitive. As Henneberry climbed up a ladder, he saw blood in the boat and a person lying there with a hooded sweatshirt pulled over his head. So he raced back inside his house and called 911.

Officers responded rapidly. And after Dzhokhar ignored repeated requests to surrender, they threw flash-bang grenades into the boat and fired a barrage of bullets at it. Officers finally arrested him about 90 minutes after Henneberry's call.

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[7] The bracket represents a portion obscured by a bullet hole.

An ambulance took Dzhokhar to a hospital where he underwent hours of emergency surgery to treat his injuries—injuries that included a gunshot wound to the left side of his face and multiple gunshot wounds to his extremities. Doctors sutured his left eye shut and wired his jaw closed. He could not hear out of his left ear. He had to be intubated and took narcotic pain meds intravenously. FBI agents questioned him off and on for more than 13 hours over the next 36 hours without Miranda-izing him[8]—and without letting lawyers from the federal public defender's office see him either. Most questions he answered by nodding yes or no, or by writing his responses down in a notebook. Repeatedly, he asked for a lawyer. But the agents told him that he first needed to answer their questions "to ensure that the public . . . was no longer in danger." Exhausted and in pain, he asked the agents several times to stop questioning him. But the record does not indicate whether the agents honored these requests. At some point he told them that after the bombings, he and Tamerlan fled Boston by car, and "[o]n the way back to Cambridge, they stopped at a Whole Foods . . . to buy some milk"—the two "were observing the Muslim tradition of fasting on Mondays and Thursdays and needed milk to break the fast."

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[8] Miranda v. Arizona says that before interrogating a custodial suspect, officers must warn him

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.

384 U.S. 436, 479 (1966).

Unsurprisingly, the bombings and their aftermath dominated Boston-area TV, radio, newspapers, and magazines—not to mention web and social-media sites. Locals quickly adopted the "Boston Strong" slogan to convey a message of courage and resilience. And the Boston Strong movement remains vibrant to this very day.

Legal Proceedings

Eventually, a Boston-based federal grand jury indicted Dzhokhar for crimes arising from his unspeakably brutal acts.[9] The indictment also included a number of specific allegations necessary for seeking capital

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[9] The grand jury's 30-count indictment charged him with:

1. Conspiring to use a weapon of mass destruction resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 2332a.
2. Using a weapon of mass destruction (pressure cooker bomb #1) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 2332a.
3. Possessing and using a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 2) resulting in the murder of Krystle Campbell, in violation of 18 U.S.C. 924(c) and (j).
4. Using a weapon of mass destruction (pressure cooker bomb #2) resulting in the deaths of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 2332a.
5. Possessing and using a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 4) resulting in the murders of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).
6. Conspiring to bomb a place of public use resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 2332f.
7. Bombing a place of public use (Marathon Sports) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 2332f.

8. Possessing and using a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 7) resulting in the murder of Krystle Campbell, in violation of 18 U.S.C. § 924(c) and (j).
9. Bombing a place of public use (Forum restaurant) resulting in the deaths of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 2332f.
10. Possessing and using a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 9) resulting in the murders of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).
11. Conspiring to maliciously destroy property resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 844(i) and (n).
12. Maliciously destroying property (Marathon Sports and other property) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 844(i).
13. Possessing and using a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 12) resulting in the death by murder of Krystle Campbell, in violation of 18 U.S.C. § 924(c) and (j).
14. Maliciously destroying property (Forum restaurant and other property) resulting in the deaths of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 844(i).
15. Possessing and using a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 14) resulting in the murders of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).
16. Possessing and using a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 1) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).
17. Possessing and using a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 6) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).

18. Possessing and using a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 11) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).
19. Carjacking resulting in serious bodily injury to Richard Donohue, in violation of 18 U.S.C. § 2119(2).
20. Possessing and using a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 19), in violation of 18 U.S.C. § 924(c).
21. Interfering with commerce by threats or violence (obtaining $800 using Dun Meng's ATM card and PIN), in violation of 18 U.S.C. § 1951.
22. Possessing and using a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 21), in violation of 18 U.S.C. § 924(c).
23. Using a weapon of mass destruction (pressure cooker bomb #3), in violation of 18 U.S.C. § 2332a.
24. Possessing and using a firearm (Ruger 9mm and pressure cooker bomb #3) during and relation to a crime of violence (Count 23), in violation of 18 U.S.C. § 924(c).
25. Using a weapon of mass destruction (pipe bomb #1), in violation of 18 U.S.C. § 2332a.
26. Using a firearm (Ruger 9mm and pipe bomb #1) during and in relation to a crime of violence (Count 25), in violation of 18 U.S.C. § 924(c).
27. Using a weapon of mass destruction (pipe bomb #2), in violation of 18 U.S.C. § 2332a.
28. Possessing and using a firearm (Ruger 9mm and pipe bomb #2) during and in relation to a crime of violence (Count 27), in violation of 18 U.S.C. § 924(c).
29. Using a weapon of mass destruction (pipe bomb #3), in violation of 18 U.S.C. § 2332a.
30. Possessing and using a firearm (Ruger 9mm and pipe bomb #3) during and in relation to a crime of violence (Count 29), in violation of 18 U.S.C. § 924(c).

punishment under the Federal Death Penalty Act ("FDPA"), 18 U.S.C. §§ 3591-99, which governs aspects of this case. And the government later notified him that it would seek the death penalty on all 17 death-eligible counts (Counts 1-10 and 12-18). See 18 U.S.C. § 3593(a).[10]

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[10] That FDPA subsection says (emphasis ours) that

> [i]f, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—
>
> > **(1)** stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
> >
> > **(2)** setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.
>
> The factors for which notice is provided under this subsection *may include* factors concerning the effect of the offense on *the victim and the victim's family*, and may include oral testimony, a *victim impact statement* that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, *and any other relevant information*. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

We will have more to say about the italicized language later.

Because of the extensive pretrial publicity in the Boston area, Dzhokhar filed motions to change venue before the guilt phase started (a capital trial has two phases, a guilt phase and a penalty phase)—motions that the judge denied, though he did promise to conduct a thorough and searching voir dire.[11] A French phrase that (roughly translated) means "to speak the truth," voir dire (as relevant here) "is a process through which a judge or lawyer examines a prospective juror to see if the prospect is qualified and suitable to serve on a jury." See United States v. Parker, 872 F.3d 1, 3 n.1 (1st Cir. 2017) (quotation marks omitted). But the judge stopped Dzhokhar's counsel from asking prospective jurors questions like "[w]hat did you know about the facts of this case before you came to court today (if anything)?" and "[w]hat stands out in your mind from everything you have heard, read[,] or seen about the Boston Marathon bombing and the events that followed it?"

During the guilt phase of his trial, Dzhokhar's lawyers did not dispute that he committed the charged acts. Rather, their guilt-phase defense rested on the idea that

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[11] Dzhokhar twice petitioned unsuccessfully for a writ of mandamus compelling the judge to grant a change of venue (with one judge dissenting each time). See In re Tsarnaev, 780 F.3d 14, 29 (1st Cir. 2015) (per curiam) ("Tsarnaev II"); In re Tsarnaev, 775 F.3d 457, 457 (1st Cir. 2015) (mem.) ("Tsarnaev I"). See generally *Mandamus*, Black's Law Dictionary (11th ed. 2019) (explaining that a mandamus is a "writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act"). We did say, though, that if a jury convicted him "on one or more of the charges against him," he could "raise the venue argument again" in an appeal to us. Tsarnaev II, 780 F.3d at 28.

he participated in these horrible crimes only under Tamerlan's influence. In her opening statement, for instance, one of his attorneys said that "[i]t was him" and that the defense would not "attempt to sidestep" his "responsibility for his actions." But she said that his terrorist path was "created by his brother." And in her closing argument, she said that he "stands ready . . . to be held responsible for his actions." Ultimately the jury convicted him on all counts after hearing testimony from nearly 100 witnesses and after receiving over 1,000 exhibits.

The jury later reconvened for the penalty phase.[12] The parties combined to present some 60 witnesses and

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[12] Here is an overview of how capital sentencing works.

Capital sentencing has two aspects: an "eligibility phase" and a "selection phase." See Jones v. United States, 527 U.S. 373, 381 (1999). A defendant convicted of certain crimes—intentionally killing the victim, for instance—can be declared eligible for death if the jurors unanimously find beyond a reasonable doubt that one of four intent elements and at least one of sixteen aggravating factors are present. See id. at 376-77 (discussing the FDPA). If they find the defendant death-eligible, they must—during the selection phase—decide by a unanimous vote "whether the defendant should be sentenced to death, to life imprisonment without the possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e). To recommend death, the jurors must determine that "all the aggravating . . . factors found to exist sufficiently outweigh all the mitigating . . . factors found to exist." Id. In addition to listing aggravating factors, the FDPA also lists mitigating factors. But the FDPA also allows the parties to offer nonstatutory factors for the jurors to consider as well. Id. § 3592(a), (c); id. § 3593(a). The jurors, however, can find only aggravators for which the government gave notice, id. § 3592(c)—though they can find additional mitigators beyond those proposed by the defense, id. § 3593(a). And while they must find any nonstatutory aggravator unanimously and beyond a reasonable doubt, a single juror may find a mitigator by a preponderance

introduce over 180 exhibits. And after following the process just outlined, the jury recommended the death penalty on six of the death-eligible counts (Counts 4, 5, 9, 10, 14, and 15). The judge, for his part, sentenced Dzhokhar to die, while also giving him a number of concurrent and consecutive prison terms on the remaining counts—including 20 life terms.

And this timely appeal ensued.

DISCUSSION

Dzhokhar's briefs raise 16 issues for review, many with sub-issues and even sub-sub-issues. As we have previewed already, the judge's Patriarca-based error compels us to vacate the death sentences and his crime-of-violence errors require us to reverse three § 924(c) convictions. Not only do we explain those errors below. We also address other issues (even if just briefly) because we know they are likely to resurface on remand. See generally Swajian v. Gen. Motors Corp., 916 F.2d 31, 35 (1st Cir. 1990) (taking a similar approach in a similar situation). So our opinion proceeds as follows. Essentially taking the issues in the order presented to us, we start with venue but pivot to the jury-selection process—because the judge's promise to hold a searching voir dire helped drive his decision to deny a venue change, but his handling of voir dire did not measure up to the standards set by Patriarca and other cases. We

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of the evidence and may "consider such factor established . . . regardless of the number of jurors who concur that the factor has been established." Id. § 3593(c)-(d). Ultimately, if they cannot unanimously agree on a sentence of death or life imprisonment without release, the job of sentencing falls to the judge, see Jones, 527 U.S. at 380-81, who must impose either a sentence of life without release or any lesser sentence permitted by law, see 18 U.S.C. § 3594.

then touch on some matters (in varying levels of detail) that could affect how the penalty retrial on the death-eligible counts proceeds—matters like the retrial's location, the government's failure to disclose evidence material to punishment, the judge's admission of evidence, the prosecution's behavior during opening statements and closing arguments, the judge's jury instructions, the prosecution's private communications with the judge, *etc*. And we last highlight the errors in the judge's crime-of-violence analysis (this is one of the most complex areas of American law, we must say—which is why even well-meaning judges *and* lawyers sometimes make mistakes).

Trial Venue and Jury Selection

We start with Dzhokhar's claims that the judge erred in how he handled the venue-change motions and the jury-selection process (we have a lot to go over, so please bear with us).

Background

It is no exaggeration to say that the reporting of the events here—in the traditional press and on different social-media platforms—stands unrivaled in American legal history (at least as of today). The highlights (or—as Dzhokhar sees some of it—lowlights) of the coverage include:

- Starting with the bombings themselves, the reporting covered the carnage-filled terror scene

—with the sights and sounds of the wounded and the dying in full display.[13]

- The reporting then covered the ensuing search for the bombers—with images of Dzhokhar leaving a backpack behind Martin Richard and walking away before it exploded, with Governor Patrick's press-conference statements about sheltering-in-place, and with at-the-scene videos showing agents removing a bloodied Dzhokhar from the dry-docked boat.
- The reporting did not get every detail right, however—for example, some falsely claimed that Dzhokhar scrawled "Fuck America" in the boat.
- Other reporting mentioned his non-Miranda-ized statements to agents at the hospital—statements not introduced at trial.
- The reporting also explored the lives and deaths of Krystle Campbell, Lingzi Lu, Martin Richard, and Sean Collier—touchingly describing the pain borne by their families and foreshadowing much of the decedent-victim-impact evidence that the jury would hear. And the reporting anticipated much of the testimony from badly-injured survivors—though it sometimes spotlighted accounts from survivors who would never testify.

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[13] To help lend perspective: Four of the *Boston Globe*'s five most-watched videos posted on its YouTube channel deal with the bombings, nearly getting a combined 30 million views.

- The reporting captured the views of prominent community members about the penalty Dzhokhar deserved. For instance, the *Boston Globe* reported that despite his past opposition to capital punishment, the then-Boston mayor thought Dzhokhar should "serve[] his time and [get] the death penalty." And the *Globe* reported as well that a former Boston police commissioner believed the government did the right thing in seeking Dzhokhar's execution, given the evidence's strength.
- More still, the reporting generated lots of stories where everyday people in the area called Dzhokhar a "monster," a "terrorist," or a "scumbag[]." One article even asked if a particular photo of Dzhokhar was "what evil looks like."

First Venue Motion

In June 2014, Dzhokhar moved (before jury selection) for a change of venue, relying on this avalanche of pretrial publicity. He essentially argued that polling data collected by his expert showed potential jurors in the court's Eastern Division were more likely to consider him guilty than those in the district's Western Division, the Southern District of New York, and the District of Columbia.[14] Convinced that the circumstances

[14] The District Court for the District of Massachusetts sits in Boston, Worcester, and Springfield. For jury-selection purposes, the District is divided into three divisions: the Eastern Division, which encompasses the state counties of Essex, Middlesex, Norfolk, Suffolk, Bristol, Plymouth, Barnstable, Dukes, and Nantucket; the Central Division, which encompasses the state County of Worcester; and the Western Division, which encompasses the state counties of

triggered a presumption of prejudice in the District of Massachusetts, he "recommend[ed] the District of Columbia as the venue with the least prejudicial attitudes."

Opposing this motion, the government argued that Dzhokhar failed to show that "12 fair and impartial jurors cannot be found" among the Eastern Division's "large, widespread, and diverse" populace. The government also claimed that his expert's analysis had a slew of problems, including the fact that courts in other "highly-publicized trials have found" his expert's "opinions unhelpful, misleading[,] or wrong." And the government suggested that "[f]ar from 'demonizing'" Dzhokhar, "the local press has largely humanized him . . . , portraying him as a popular and successful student and the beloved captain of his high school wrestling team."

Applying the factors outlined in Skilling v. United States, 561 U.S. 358 (2010), the judge denied Dzhokhar's motion in September 2014.[15] Among other points, the judge noted that the district's Eastern Division has about "five million people," with many of them living outside of Boston—so, he emphasized, "it stretches the imagination to suggest that an impartial jury cannot be

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Franklin, Hampshire, Hampden, and Berkshire. Boston is in Suffolk County. Cambridge and Watertown are in Middlesex County. So these three cities are part of the Eastern Division, for example.

[15] On the presumption-of-prejudice issue, the factors Skilling discussed included the size and characteristics of the community where the crime happened; the nature of the pretrial publicity; whether the passage of time had lessened media attention; and the outcome of the case. See id. at 382-83. According to Skilling, "[a] presumption of prejudice . . . attends only the extreme case." Id. at 381.

successfully selected from this large pool of potential jurors." And, the judge wrote, neither the defense expert's polling nor his newspaper analysis "persuasively show[ed] that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore." Moreover, some of the expert's results, the judge stressed, clashed with Dzhokhar's "position" because they showed that respondents in other jurisdictions were almost as likely to believe him guilty as respondents in Massachusetts's Eastern Division. Also, while "media coverage ha[d] continued" in the 18 months since the bombings, "the 'decibel level of media attention,'" the judge said (quoting Skilling), had "diminished somewhat." For the judge, Dzhokhar had "not proven that this [was] one of the rare and extreme cases for which a presumption of prejudice is warranted." "[A] thorough evaluation of potential jurors in the pool," the judge continued, "will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection."

Second Venue Motion, First Mandamus Petition, And Joint Proposed Jury Questionnaire

A few months later, in December 2014, Dzhokhar filed a second venue-change motion, protesting that a huge portion of the Eastern Division (again, the pool from which his jury would be drawn) "has been victimized by the attack on the Marathon and the related events"—which, combined with the continuing press coverage, made it impossible to seat an impartial jury. Responding to this motion, the government argued that "most of the articles" Dzhokhar mentioned in this memo "have little or nothing to do with this case, and the ones

that do are largely factual and objective in nature." Without waiting for the judge's ruling on the second motion, Dzhokhar—also in December 2014—petitioned this court for mandamus relief. See Tsarnaev II, 780 F.3d at 17 (discussing timeline).

With Dzhokhar's petition pending, however, the judge—now in early January 2015, and after construing the motion as one for reconsideration of the original venue-change denial—rejected his second venue-change bid (just days after he filed his mandamus petition). See id. Of note, the judge again expressed his confidence that the voir-dire process would ensure jury impartiality. "Should [that] process . . . prove otherwise," wrote the judge, "the question of transfer can obviously be revisited." Still in early January 2015, a divided panel of this court then denied Dzhokhar's petition, concluding that he had "not made the extraordinary showing required to justify mandamus relief." See Tsarnaev I, 775 F.3d at 457.

While all this was going on, the parties—in December 2014—submitted a joint proposed questionnaire for use in voir dire. Some of their suggested questions touched on the potential jurors' general thoughts about capital punishment. Others touched on their exposure to pretrial publicity—questions like: "What did you know about the facts of this case before coming to court today (if anything)?"[16]

In a separate legal memo, the defense—citing Morgan v. Illinois, 504 U.S. 719 (1992)—moved to add more specific questions to identify those prospective jurors

[16] From now on we refer to questions of this type as "content-specific questions" (or some variant).

who could consider imposing a life sentence not just abstractly, but in the particular circumstances of the case before them. One proposed question, for example, asked potential jurors to

> [s]tate whether you agree or disagree with the following statements:
>
> The death penalty is the ONLY appropriate punishment for ANYONE who:
>
> A. murders a child. ☐ Agree ☐ Disagree
>
> B. deliberately murders a police officer. ☐ Agree ☐ Disagree
>
> C. deliberately commits murder as an act of terrorism. ☐ Agree ☐ Disagree

Dzhokhar's team wanted these questions to "probe for a common form of bias—the belief that the death penalty should always or automatically be imposed *for certain types of murder*." The government opposed. Relying on and quoting Morgan, the government argued that the defense could ask "whether 'they will always vote to impose death for conviction of a capital offense'" generally —not "whether they will consider a sentence less than death" in response to "a laundry list of potential crime elements and aggravating factors." And according to the government, these questions were nothing but impermissible "stakeout questions"—*i.e.*, questions aimed at getting potential jurors to "stake out a position on the death penalty" before receiving instructions on the law. But according to the defense, "these are the opposite" of stakeout questions since "they seek only to probe whether jurors' minds are open to considering all of the evidence

relevant to sentenc[ing]." The judge, however, decided not to include these questions on the questionnaire, saying he would cover those topics in voir dire.[17]

The judge also focused on the jointly-proposed question asking what potential jurors knew "about the facts of this case before coming to court today (if anything)." Conceding that this question "might get very interesting answers," the judge worried that it could "cause trouble because it will be so unfocused." "But if you want to live with it," the judge said to defense counsel, "this is a question that we'll probably be asking every voir dire person."

Despite having had a hand in submitting the questionnaire, the government now switched gears and argued that the question could cause the parties to have to "follow[] up on every fact asserted"—something that "would take forever." Apparently persuaded by the government's argument, the judge—after noting that the query could generate "unmanageable data"—ultimately struck the question, explaining that prospective jurors' "preconceptions" could instead be gauged by asking whether, "[a]s a result of what you have seen or read in the news media, . . . you [have] formed an opinion" about Dzhokhar's guilt or the proper penalty, and if so, whether "you [can] set aside your opinion and base your decision . . . solely on the evidence that will be presented to you in court." The defense objected, saying that "in a case like this[,] where . . . you really have no idea what the juror may have swirling around in [his or her] head, it makes the juror the judge of [his or her]

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[17] Going forward, we will call these kinds of questions, as a shorthand, "case-specific questions."

own impartiality." "To a large extent that's true," the judge countered, but "the other questions will help us" see if the potential jurors can set aside any preconceived notions about the case—which is "the biggest issue in voir dire, obviously."

Start of Jury Selection, Third Venue Motion, And Second Mandamus Petition

Around the beginning of January 2015, 1,373 potential jurors showed up at the John Joseph Moakley U.S. Courthouse for the start of jury selection. The judge divided them into six panels. As a preliminary matter, the judge twice told them that Dzhokhar was "charged in connection with events that occurred near the finish line of the Boston Marathon . . . that resulted in the deaths of three people." And the judge had them fill out a 100-question questionnaire covering their backgrounds, social-media habits, exposure to pretrial publicity (the amount they had seen, whether they had "formed an opinion" about guilt or punishment, *etc.*), and thoughts on the death penalty.[18] The questionnaire also gave a "summary of the facts of this case," including that "two bombs exploded . . . near the Boston Marathon finish line" and that "[t]he explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and

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[18] To give but one example, question 73 asked:

> How would you describe the amount of media coverage you have seen about this case:
>
> ___ A lot (read many articles or watched television accounts)
>
> ___ A moderate amount (just basic coverage in the news)
>
> ___ A little (basically just heard about it)
>
> ___ None (have not heard of case before today)

Martin Richard (8), and injured hundreds of others." "MIT Police Officer Sean Collier (26) was shot to death in his police car," the questionnaire's summary added, and Dzhokhar "has been charged with various crimes arising out of these events." The questionnaire then asked prospective jurors their views on the death penalty for someone convicted of intentional murder and whether they could "conscientiously vote for life imprisonment without the possibility of release."

The judge and the parties identified the potential jurors by numbers. On appeal the parties focus on #138, #286, and #355. So we do too.

Before having the prospective jurors fill out the questionnaires, the judge gave some instructions. For instance, he told them "not to discuss this case with your family, friends[,] or any other person." They could "tell others that you may be a juror in the case," he also said, and could "discuss the schedule with your family and employer." But he warned them "not to discuss anything else, or allow anyone else to discuss with you anything else until you have been excused, or if you're a juror, until the case concludes." And he told them not to "communicate about this case or allow anyone to communicate about it with you by phone, text, message, Skype, email, social media, such as Twitter or Facebook."

As for the answers potential jurors gave on the questionnaires, Dzhokhar—for reasons that will shortly become clear—directs us to these replies by #138, #286, and #355.

Responding to a questionnaire inquiry about social-media use, #138 wrote that he used Facebook "[e]very

other day" at "most." And he wrote "N/A" for a question asking whether he had "commented on this case . . . in an online comment or post."

For her answer to the same question about social-media use, #286 wrote that she looked at Facebook, Instagram, and Twitter "daily" but did not "post daily." For her response to the question about whether she had "commented on this case . . . in an online comment or post," she wrote "don't believe I have." And she wrote "N/A" to the question asking her to explain if she or a family member had been "personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to 'shelter in place' on April 19, 2013)."

On his jury questionnaire, #355 disclosed that he worked as an "attorney." Answering a question about his death-penalty views, he wrote, "Since it is legal, it should be the rarest of punishments. It is much too prevalent in the country." On a scale of 1 to 10, with 1 meaning "that the death penalty should never be imposed" and 10 meaning that it should be imposed for all cases of "intentional murder," he circled 2. He circled another answer option that read, "I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it." He also wrote that "[k]illing people, especially gov't sponsored killing, is generally wrong"—"[w]hile I can imagine a scenario where facts and law call for it, it is an exceedingly rare case." And responding to the question "[i]f you found [Dzhokhar] guilty and you decided that the death penalty was the appropriate punishment . . . , could you conscientiously vote for the death penalty," he checked the box for "I am not sure"

—and then explained, "I cannot possibly prejudge his guilt or potential punishment at this stage."

After both sides agreed to excuse many of the 1,373 potential jurors, the judge called back 256 for individual voir dire—which lasted 21 days. And much happened during that time. Dzhokhar continued to ask the judge to ask prospective jurors case-specific questions (like the ones mentioned above)—but to no avail. For instance, Dzhokhar proposed that the judge ask them if they would automatically impose the death penalty if the defendant "killed a child by deliberately using a weapon of mass destruction"; "us[ed] a weapon of mass destruction to carry out an intentional killing"; "deliberately committed an act of terrorism that killed multiple victims"; or "intentionally murder[ed] a police officer in the line of duty." They "know that this is about a bombing," the judge ruled, "and they know that there are three people who were killed in the bombing." Plus they have "my preliminary instructions, . . . telling them what the offenses were in general," the judge said. And, the judge stressed, "they have those specifics already in their minds as they . . . answer the question about the ability to meaningfully consider life imprisonment." The judge thought, too, that "detailed questioning about what the juror thinks he or she knows about the events" could create the "wrong emphasis" and might inadvertently create bias where none existed before.

Dzhokhar also asked the judge to ask content-specific questions about pretrial publicity (like the ones mentioned earlier)—for example, "What stands out in your mind from everything you have heard, read[,] or seen about the Boston Marathon bombing and the

events that followed it?"[19] But the judge rejected that request, saying that "[w]e have detailed answers in the questionnaire concerning . . . exposure to the media"; that he saw no need to "repeat" questions "covered in the questionnaire"; and that he thought "digging for details . . . will not likely yield reliable answers."

Near the end of January 2015, #138 underwent individual voir dire. The judge reminded him that he had told "everyone to avoid any discussion of the subject matter of the case with anybody," though they "could talk about coming here, obviously, but . . . also [had] to avoid any exposure to media articles about the case." And the judge asked #138 if he had "been able to do that." "Yeah," #138 replied, "I haven't looked at anything" or "talked to anybody about it." The judge then turned to the subject of #138's Facebook use (presumably as a follow-up to #138's questionnaire answers). "What's the nature of your use of it," the judge asked, "[i]s it essentially personal, social-type things?" And #138 said, "Yeah." Asked by the judge if he "comment[ed] on public affairs or anything like that," #138 answered, "Yeah, I see what my friends are doing and comment on that." Which prompted the judge to ask if anyone was "commenting about this trial"—to which #138 replied, "No."

The same day as #138's individual voir dire, Dzhokhar filed a third venue-change motion. Highlighting statistics based on questionnaire answers, he noted

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[19] This was a paraphrase from a question in Skilling. See 561 U.S. at 371 (noting that the defendant there asked the district court to ask prospective jurors "'what st[ood] out in [their] minds' of 'all the things [they] ha[d] seen, heard or read about'" the company the defendant had worked for (alterations in original)).

(among other arguments) that out of a pool of 1,373 prospective jurors, 68% thought he was "guilty, before hearing a single witness or examining a shred of evidence at trial," and 69% "have a self-identified connection or expressed allegiance to the people, places, and/or events at issue in the case." "Stronger" evidence "of presumed prejudice in Boston is difficult to imagine," he wrote. And as far as he was concerned, "[g]iven the extent of prejudice and personal connections," the judge could not count on voir dire to get "a jury that is both actually impartial and preserves the appearance of impartiality."

Disagreeing with Dzhokhar, the government argued (among other assertions) that Dzhokhar's own survey showed "that nearly 100% of respondents in Springfield, New York City, and Washington, D.C. said they had been exposed to publicity about this case." That makes sense, the government added, because "[t]he bombings and their bloody aftermath" made national and international news. And, the government emphasized, the percentage of people who believe Dzhokhar is guilty is greater in those locales than in the Eastern Division (according to the jury questionnaire responses): "84% in Springfield, 92% in New York City, and 86% in Washington, D.C." Also, according to the government, "of the 68% of potential jurors in this case who have formed an opinion that [Dzhokhar] is guilty, fully 60% said they could set aside that opinion and decide the case solely on the [trial] evidence." So as the government saw it, the questionnaires and voir dire could protect Dzhokhar's right to an impartial jury.

Before the judge ruled on the motion, Dzhokhar filed a second mandamus petition with us in early February

2015. But individual voir dire still continued. During her turn—and responding to questions from the judge (who was following up on her questionnaire answers)—#286 disclosed that she used Facebook, Instagram, and Twitter "just [for] social" purposes. "I watch TV," she explained, "and kind of tweet while I'm watching TV with other people that are watching the same programs that I'm watching." And she implied that she had not been "locked down" with her family—saying that while at work on April 19, she "jok[ed]" with her boss that she had to go home. "I live in Boston," she said, "and Boston was on lockdown. I'm, like, I have to go home. We're on lockdown." Defense counsel then asked her if any family or friends had talked with her "about the Marathon bombing[s] . . . [o]r any of the events of that week." "[M]aybe in general or something but not really," she said. Dzhokhar's lawyer then asked, "Can you tell us what stands out in your mind that you read" about the case? But the government objected. And the judge sustained the objection.

A day later, with Dzhokhar's mandamus petition still pending, the judge denied Dzhokhar's third venue-change motion—"for reasons both old and new." We focus here on the judge's new reason. Conceding both that "[c]hecking a box" on a questionnaire "may result in answers that appear more clear and unambiguous than the juror may have intended or than is actually true," and that handwritten "answers" frequently "can . . . be unclear, inapposite, or incomplete," the judge concluded that the voir dire underway was "successfully identifying potential jurors who are capable of serving" fairly and impartially.

A week after the judge's ruling, #355 was individually voir dired. #355 said that he did not think that his work as a criminal lawyer would affect his impartiality. "[I]f asked to vote on" the death penalty," he explained, "I would probably vote against it because of my belief that it is overused." But he later added that "[i]f, after hearing the [judge's] instructions, and if I believed it . . . fit into one of those rare cases where I believed the death penalty should be imposed, having understood the law as given to me, then . . . I could vote to impose the death penalty." Asked by the government whether he could "imagine any case that [he] would think is appropriate for the death penalty," #355 said, "I think Slobodan Milosevic was close, if not a prime example."[20] Asked by the defense whether he could "actually vote to impose" the death penalty in an appropriate case, #355 stated, "I think I could." "Are you pretty confident of that answer?" the defense asked. "Yes," #355 replied.

The government moved to strike #355 "for his bias" as a criminal defense lawyer and "for his death penalty answers." To the government's way of thinking, #355 was "substantially impaired" because "the only time . . . he could think that he could impose the death penalty would be in a case of genocide." The defense opposed the motion, pointing out that #355 said he could "make a decision" to impose the death penalty "in a given set of facts." The judge granted the motion, however. "I would not exclude [#355] because of his . . .

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[20] A former president of Serbia, Milosevic led a campaign of genocidal aggression during the Balkan wars of the 1990s. See Slobodan Milošević, Wikipedia (last visited July 23, 2020), https://en.wikipedia.org/wiki/Slobodan_Milo%C5%A1evi%C4%87.

criminal defense work," the judge noted. But relying on his "sense of him," the judge concluded that #355 was not adequately "open to the possibility of the death penalty"—especially given "the genocide issue," which made #355's "zone of possibility . . . so narrow" that he was "substantially impaired." All in all, the judge was not convinced that #355 "was going to be truly open in the way that would be necessary."

In the last week of February 2015, the judge provisionally qualified 75 prospective jurors—a group that included #138 and #286. The judge ended up excusing 5 of the 75 for hardship. And it was from this group of 70 that the parties would choose a jury.

That same week, a divided panel of this court denied Dzhokhar's second mandamus petition because he had not shown a clear and indisputable right to a venue change (which is what he had to show to get mandamus relief). See Tsarnaev II, 780 F.3d at 15, 19-20. To give one of the panel majority's reasons: Although Dzhokhar argued that we had to "presume prejudice for any jury drawn from the Eastern Division of Massachusetts," the panel majority found that "his own statistics reveal that hundreds of members of the [jury pool] have not formed an opinion that he is guilty"—and "[t]he voir dire responses have confirmed this." Id. at 21. The panel majority also believed that a rigorous and thorough voir dire would secure an impartial jury. See id. at 21-24.

Motions to Excuse #138 and #286,
Fourth Venue Motion, and Peremptory Strikes

On the same day Tsarnaev II came down, Dzhokhar filed motions to strike #138 and #286 for cause from the

provisionally qualified jury pool—motions premised on alleged newly discovered information.[21]

In his motion against #138, Dzhokhar claimed that he had just learned that #138 "was dishonest . . . about comments on Facebook" and had defied the judge's "instructions" within mere "hours of receiving them." For support, he pointed to the following:

- On the day #138 went to court to complete his juror questionnaire, he posted on Facebook, "Jury duty. . . . this should be interesting . . . couple thousand people already here."[22]
- Two of his Facebook "friends" responded. One said, "How'd you get stuck going to Boston?" The other said, "Did you get picked for the marathon bomber trial!!!??? That's awesome!" #138 replied, "Ya awesome alright haha there's like 1000s of people."
- Over the next few hours, people left more comments, saying things like, "If you're really on jury duty, this guys got no shot in hell" and "They're gonna take one look at you and tell you to beat it."
- Despite hearing the judge's preliminary warnings —"not to discuss anything else, or allow anyone else to discuss with you anything else until you

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[21] Dzhokhar says in his brief to us that "the defense exercised diligence in investigating the 1,373" potential jurors, "scour[ing]" their "social media profiles" as best they could, given the other "extraordinary demands" on his lawyers' time—"including the ongoing jury selection process, discovery review,

[22] In our quotations from the posts, we use the spelling, grammar, and punctuation that appear in the original messages.

> have been excused," not to "communicate about this case or allow anyone to communicate about it with you by phone, text message, Skype, email, social media, such as Twitter or Facebook," *etc.* —#138 returned to the Facebook thread later that day and posted, "Shud be crazy [Dzhokhar] was legit like ten feet infront of me today with his 5 or 6 team of lawyers . . . can't say much else about it tho . . . that's against the rules." His Facebook friends responded, "Whoa!!"; "Since when does [#138] care about rules?"; and "Play the part so u get on the jury then send him to jail where he will be taken care of." #138 replied, "When the Feds are involved id rather not take my chances . . . them locals tho . . . pishhh ain't no thaang." "Yea super careful," a Facebook friend wrote back, "bc should you get picked any mention of anything can get you booted or call for mistrial."

Dzhokhar argued that these actions by #138 showed "a willingness to flout the rules, a lack of maturity, and a failure to appreciate the seriousness of these procedures." So he asked the judge to "excuse[]" #138 "for cause."

Dzhokhar's motion against #286 claimed that "[a]fter her voir dire questioning," he discovered information about #286's social media "postings at the time of the Boston Marathon Bombings and their aftermath" that undermines "her juror questionnaire" answers. He emphasized the following:

- On the day of the bombings, #286 tweeted, "Need something to make you smile and warm your heart after today's tragedy at #BostonMarathon, take a

look at #BostonHelp." About Martin Richard, she tweeted, "Little 8yr old boy that was killed at marathon, was a Savin Hill little leaguer :-(RIP little man #Dorchester #bostonmarathon." #286 was from Dorchester too (Dorchester is a neighborhood in Boston).

- During the shelter-in-place situation, #286 tweeted that she was "locked down" with her family, adding, "it's worse having to work knowing ur family is locked down at home!! Finally home locked down w/them #boston."
- After Dzhokhar's capture, #286 retweeted expressions of celebration—including a tweet that said, "Told y'all. Welcome To Boston The City Of CHAMPS! We get our shit DONE! #BostonStrong." Another of her retweets said, "Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage." And another of her retweets read, "Monday started in celebration and ended in tragedy. Today began in tragedy and ended in celebration. You can't keep us down. #BostonStrong."
- Over the following year, #286 retweeted additional posts about the victims—including retweets of a photo of Martin Richard's sister singing the national anthem at Fenway Park (home to the Boston Red Sox), a photo of Martin's older brother running the Boston Athletic Association Youth Relay Race in 2014, and photos of officers Sean Collier and Richard Donohue at their police academy graduation (the caption over the

> photos read, "Please keep both in your prayers").

Dzhokhar contended that #286's tweets and retweets showed "a community allegiance that is certain to color her view of the case," making her claim that she could fairly and impartially "consider life versus the death penalty at trial exceedingly suspect." So he asked the judge to "excuse[]" #286 "for cause" or "recall[]" her "for follow-up questioning."

In a memo opposing Dzhokhar's motions, the government called his challenges to #138 and #286 untimely because he did not object when the judge provisionally qualified them. And that untimeliness, said the government, could not be excused based on newly discovered evidence because the motions relied on "social media postings . . . that predated voir dire, often by years." On the merits, the government asserted that #138 did not disobey the judge's instructions by "simply reporting that [Dzhokhar] was ten feet in front of him at one point and had a team of five or six lawyers" (though the government did not address how #138 told the judge during individual voir dire that his Facebook friends were not "commenting" on the "trial"). And as for #286, labeling her tweets and retweets "innocuous," the government argued that she "may well not have considered 'tweeting' (or especially 'retweeting') a photograph to be the same as 'comment[ing] on this case in a letter to the editor, in an online comment or post, or on a radio talk show'" (the government made no mention of her "piece of garbage" retweet or her being "locked down" with her family, however).

The judge orally denied Dzhokhar's motions at a conference the first week of March 2015. "I reviewed the jury questionnaires," the judge said, and the voir dire

> transcripts. First of all, I agree with the government that the objections are late and it is—we have a procedure. We have done it with some care and taken the time to do it. And I think the time to raise the issues was in the course of that process and not thereafter. So I am not inclined—and will not—reopen the voir dire for late discovery matters that could have been discovered earlier.

Continuing on, the judge added that he found Dzhokhar's objections "largely speculative." "There are various possible explanations," he said,

> and none of them is . . . serious enough to warrant changing our provisional qualification, and in particular, none of the issues that were raised seem . . . to suggest the presence of a bias that would be harmful to jury impartiality in this case. They're collateral matters about things, they are—people close to them may have done, but none of them speak to actual bias in the case. So we leave the roster as it is.

Around this time—early March 2015—the defense filed a fourth venue-change motion—essentially arguing that of the 75 provisionally qualified jurors, 42 "self-identified . . . some connection to the events, people, and/or places at issue in the case"; 23 "stated . . . that they had formed the opinion that [Dzhokhar] 'is' guilty, with . . . 1 . . . of those . . . 23 stating . . . that he would be unable to set aside that belief"; and that 48 "either believe that [Dzhokhar] is

guilty, or have a self-identified connection, or both." The government opposed, contesting (among other things) the defense's statistical methodology.

While that motion was pending, the defense used all 20 of its peremptory strikes, see Fed. R. Crim. P. 24(b)(1), but did not strike #138 or #286 (the judge denied the defense's request for 10 more peremptories).[23] The government used all of its peremptory challenges too. Both #138 and #286 got on the jury (#286 ultimately served as the jury foreperson). Of the 12 jurors seated by the judge, 9 got there without disclosing the specific content of the media coverage they had seen[24] —recall how the judge rejected the defense's efforts to learn not just *whether* prospective jurors had seen media coverage of this case but *what specifically* they had seen. And of those 9, 4 believed based on pretrial publicity that Dzhokhar had participated in the bombings. But all 12 did say that they could adjudicate on the evidence as opposed to personal biases or preconceived notions.

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[23] A peremptory challenge is defined generally as "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." See *Challenge*, Black's Law Dictionary (11th ed. 2019) (second definition).

[24] The defense asked one of the seated jurors what "st[ood] out in [her] mind, if anything, about this case from anything you've heard, seen." She replied, "The only thing that I definitely can remember from that time is probably after the fact when they showed the finish line." Another seated juror volunteered that she had watched "the shootout in Watertown" on TV. And another seated juror volunteered that she had seen "video evidence" and Dzhokhar's "being in the boat."

On the first day of trial—also in early March 2015—the judge orally denied the defense's pending venue-change request, without an on-the-spot explanation.

Basic Appellate Arguments

Dzhokhar presents a raft of venue- and juror-selection claims on appeal.

Starting with venue, Dzhokhar contends that his trial in the district's Eastern Division violated his constitutional right to an impartial jury for either of two reasons: "The community's exposure to the bombings and ensuing pre-trial publicity . . . warranted a presumption of prejudice," or "the jurors' questionnaire and voir dire responses establish[ed] actual prejudice." Hoping to counter that claim, the government argues that "[p]rejudice should not be presumed in a venue with a population of almost five million and where more than half of the prospective jurors had either not prejudged guilt or had stated under oath that they could set aside their view that [Dzhokhar] was guilty." And the government also insists that the record nowhere shows that the pretrial publicity "actually biased" the potential or seated jurors.

From there, Dzhokhar argues that both #138 and #286 lied under oath during voir dire about their social-media postings. And, he says, by not striking them for cause, the judge robbed him of his constitutional rights to due process, an impartial jury, and a reliable sentencing decision. The government responds that even if #138 and #286 "had fully disclosed everything" that Dzhokhar says "they should have, they would not have

been stricken for cause." Which is why the government thinks that Dzhokhar "cannot show entitlement to a new trial or an evidentiary hearing."

Dzhokhar then argues that the judge stacked the deck against him by excusing #355 based on the mistaken belief that #355's death-penalty views would have "substantially impaired" him in his ability to perform as a juror. Calling him "[a]n educated professional who had devoted" considerable thought to the question, Dzhokhar notes that #355 said that he could vote for the death penalty in the right case—despite his personal views on capital punishment. Conversely, the government contends that #355 "gave hesitant and carefully hedged answers about the death penalty," plus "was unable to think of any category of crimes beyond genocide where he believed the death penalty would be appropriate."

Penultimately (at least for this part of this opinion), Dzhokhar faults the judge for "taking a crabbed view of Morgan." The nub of his complaint is, to quote his brief, that a faithful application of Morgan required the judge to ask prospective jurors "whether they could take into account mitigating evidence and consider a sentence of life imprisonment not just in the abstract, but in light of specific allegations in his case." Unpersuaded, the government sees no legal error under Morgan, because the suggested questions "were impermissible 'stakeout' questions" that basically asked potential jurors "to prejudge the appropriateness of the death penalty in this case without consideration of the [judge's] instructions or mitigating factors." And, the government adds, even if Morgan required the judge to tell prospective jurors about "certain case-specific facts,"

Dzhokhar's suggested questions were unnecessary because they already knew about the case's key facts from the judge's preliminary instructions and the juror questionnaire—"and they could have considered those facts when answering questions about their views on the death penalty."

Relying on Patriarca and its offspring, Dzhokhar lastly argues here that the judge erred in denying his request to ask potential jurors content-specific questions about "what they had seen, read, or heard about his case." The pretrial publicity, he writes (quoting Patriarca), created a "'significant possibility that jurors [had] been exposed to potentially prejudicial material'" and so "trigger[ed]" a "duty to inquire." Which, according to him, means that the judge had to ask "not just *whether* prospective jurors had seen media coverage of this case, but *what*, specifically, they had seen." And by not doing so, the judge (in Dzhokhar's words) produced "a jury biased by prejudicial publicity." Trying to meet this argument, the government—citing Mu'Min v. Virginia, 500 U.S. 415 (1991)—principally contends that Supreme Court precedent "reject[s] the claim that such an inquiry is required."

Analysis

We start, as the parties do, with the judge's decision not to change venue—a decision that receives abuse-of-discretion review. See United States v. Casellas-Toro, 807 F.3d 380, 385 (1st Cir. 2015). Anyone alleging an abuse of discretion faces an uphill climb. See generally United States v. Rivera-Carrasquillo, 933 F.3d 33, 44 (1st Cir. 2019) (explaining that a judge abuses his discretion "if no reasonable person could agree with the ruling"), cert. denied, No. 19-7879 (Apr. 20, 2020). And

that is certainly true when a party asks us to critique a denial of a motion grounded on alleged jury partiality, because—as no less an authority than the Supreme Court has said—"[i]n reviewing claims of this type, the deference due to district courts is at its *pinnacle*." Skilling, 561 U.S. at 396 (emphasis added).

Two of us find serious points against Dzhokhar's venue-change arguments.

First, the polling data shows that many in Boston were undecided about whether Dzhokhar should receive death—even after all the publicity. The defense expert's own survey data revealed that only 36.7% of people in Boston favored the death penalty for Dzhokhar before the trial, leaving 63.3% undecided or leaning against death. Since the Eastern Division has a population of about five million, that leaves several million people (even minus children, *etc.*) open to a life sentence despite all the publicity. The data from the voir-dire questionnaire is even more telling, showing that only 23% of the prospective-juror panel had formed an opinion that Dzhokhar should die—and just 16% held that view and said they could not be convinced otherwise. This means that of the 1,373 potential jurors, over 1,000 of them had not predetermined that death was the right sentence.

Second, the same polling data shows public awareness and attitudes were not materially different in, for example, Springfield or New York City. In Springfield, 51.7% said Dzhokhar was "definitely guilty" and 32.2% said he was "probably guilty" based on the pretrial publicity, compared with 47.6% and 44% in Manhattan, and 57.8% and 34.5% in Boston. The numbers re-

garding penalty are also similar—in fact fewer respondents preferred life without the possibility of parole in Springfield (45.4%) than in Boston (51.2%).

Also and importantly, the polling inquiry does not ask respondents to judge for themselves whether they are biased. Nor does it fail to overlook subliminal biases. Instead, the pollster asked whether Dzhokhar should get the death penalty. The answer to that question likely reflected whatever actual bias might have been operating, knowingly or otherwise. So (extrapolating from the relevant figures) the fact that so many hundreds of thousands in the pool of potential jurors were undecided, and that the percentage of those persons was not materially less than the percentage for New York City, does support the judge's venue decision in a powerful way.

We note too that this is not a case where almost everybody locally knows something and very few elsewhere know of it. Plus the data seemingly contradicts any claim that the Boston Strong movement and the sheltering in place account for undue prejudice—were it otherwise, the difference in attitudes would probably be much greater in, for example, New York City.

Third, most of the publicity was true—something we now know from Dzhokhar's guilt admission in his lawyer's guilt-phase opening and closing statements (notably, Dzhokhar does not say he would have raised an innocence defense in another venue). See Murphy v. Florida, 421 U.S. 794, 802 (1975) (noting the truth of the pretrial publicity); see also Skilling, 561 U.S. at 382-83; Casellas-Toro, 807 F.3d at 387. So after the first day of trial, a juror from Boston and one from California would know essentially the same things about the case

—even though the California juror would have seen less of the publicity. Contrast that with Rideau v. Louisiana, 373 U.S. 723 (1963), where an inadmissible taped confession by a guilt-contesting defendant was televised only on the local news. As for the untrue pieces of publicity, they seem trivial given the true and relevant information—for example, the report that Dzhokhar's boat message said "fuck America" got quickly disproved once jurors saw the actual message; and at any rate, the words "fuck America" added very little if anything to what he actually wrote.

Fourth and finally, comparing Dzhokhar's case to other venue-change cases—specifically Skilling and Casellas-Toro—makes it hard to say the judge abused his discretion. Starting with the size and diversity of the metropolitan area (the first Skilling factor), Boston is very large and diverse—much closer to Houston in Skilling, 561 U.S. at 382 (a "large, diverse pool" of 4.5 million eligible jurors in the area made the "suggestion that 12 impartial individuals could not be empaneled . . . hard to sustain"), than to the Indiana community in Irvin v. Dowd, 366 U.S. 717, 719 (1961) (about 30,000 people), or to Puerto Rico in Casellas-Toro, 807 F.3d at 386 ("a compact, insular community" of 3 million people that "is highly susceptible to the impact of local media" (quotation marks omitted)). The nature of the publicity (the second Skilling factor) was, as discussed, largely factual and the untrue stuff was no more inflammatory than the evidence presented at trial. As to passage of time (the third Skilling factor), two years had elapsed between the crime and the trial—which is closer in magnitude to the four years in Skilling (a point cutting against a venue change) than the two months in Casellas-Toro (a point favoring a venue change). And the verdict

shows no affirmative signs of bias (the fourth Skilling factor), since the jury recommended Dzhokhar die for six of seventeen death-eligible counts, similar to Skilling's acquittal on certain counts and contrasted with Casellas-Toro's guilty verdict on counts lacking sufficient evidence. Dzhokhar asks us to give no weight to the jury's decision not to recommend death on most of the death-eligible counts. He reasons that the jury's decision-making can be explained by the fact that the government can only kill him once. But the jurors had seventeen death counts to consider. And they decided on death for six of those. That selectivity cannot be explained (as he presumes) by his the-government-can-only-execute-me-once theory. For if he were right, the jury would have returned a death verdict on just one count. To pick six and not one or seventeen, the jurors must have had some other rationale in mind that required them to draw distinctions between facts that they thought warranted a death verdict and those that they thought did not. And that sort of nuance favors a view of the jury as intent on following the law and the facts.

Dzhokhar's chief argument—that the nature of the crime (terrorism) might be viewed as an attack on the Boston community specifically—does not appear in the framework of these cases. But it seems just as likely that a juror in, say, New York City would view the crime as an attack on all of America (as he himself did)—thus negating any advantage in changing venues.

So if pressed to decide the venue question now, two of us would likely find the judge abused no discretion in finding venue proper in Boston in 2015. But we need not make such a decision now. That is because, as explained next, we must remand the penalty-phase portion

of this trial for a retrial—regardless of how we rule on venue. And it also is because, given the sizable passage of time, the venue issue should look quite different the second time around, likely in 2021. See Skilling, 561 U.S. at 383.

Now for our remand-for-a-penalty-phase-retrial explanation. Even assuming (favorably to the government) that the judge did not reversibly err on the venue question, he still had to oversee a voir-dire process capable of winnowing out partial jurors through careful questioning—indeed, in denying Dzhokhar a venue change, the judge premised his analysis in part on a pledge to run a "voir dire sufficient to identify prejudice."[25] But performance fell short of promise, providing (as Dzhokhar's counsel said at oral argument) a sufficient ground to vacate his death sentences—even on abuse-of-discretion review.[26] See United States v. Casanova, 886 F.3d 55, 60 (1st Cir. 2018). See generally United States v. Connolly, 504 F.3d 206, 211-12 (1st Cir. 2007) (noting that "an erroneous view of the law" is always an abuse of discretion). With the venue assumption in place, we lay out our reasoning.

Patriarca is the key. A pretrial-publicity case, Patriarca involved an organized-crime prosecution where the press called one of the defendants "'Boss' of the New England 'Cosa Nostra'" and reported how a lawyer for

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[25] For some cases making a venue-was-proper assumption and then deciding the appeal on another basis, see In re Horseshoe Entm't, 337 F.3d 429, 435 (5th Cir. 2003); Emrit v. Holland & Knight, LLP, 693 F. App'x 186, 186-187 (4th Cir. 2017) (per curiam).

[26] By the way, Dzhokhar's sentencing arguments target only the death sentences.

a government witness nearly died in a car-bomb incident. See 402 F.2d at 315-16. Convinced that the news accounts might make prospective jurors think (wrongly, apparently) that the defendants had something to do with the bombing, the defense teams moved to change the trial's venue—and lost. Id. at 316-17.

The defendants appealed, relevantly arguing that the judge "erred in denying" the change-of-venue motion "because of prejudicial publicity." Id. at 315. We noted "that the amount of coverage diminished sharply after the week following the bombing." Id. at 317. We also noted that the defense had the chance "to mitigate any possible effect of pretrial publicity—[namely,] on the voir dire." Id. Counsel for one of the defendants had asked the judge to "ask a question of the jury in connection with this case, in the light of all the publicity." Id. at 317-18. And the judge said that he would ask the jurors "if there is any member . . . who feels that he would not be able to give the defendants a fair and impartial jury." Id. at 318. Counsel said "thank you." Id. The judge put the question to the jury, got "[n]o response" from the members, and so saw no reason not to proceed to trial. See id. Given this set of circumstances, we found no sign of abused discretion in the judge's venue decision. Id.

But crucially, we felt "bound" to address "sua sponte" —*i.e.*, without prompting from either side—the scope of voir dire judges should conduct "[i]n cases where there is, in the opinion of the [judge], a significant possibility that jurors have been exposed to potentially prejudicial material." Id. Specifically, we directed that

> on request of counsel, . . . the [judge] should proceed to examine each prospective juror apart from

> other jurors and prospective jurors, with a view to eliciting ***the kind and degree of his exposure to the case or the parties***, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence.

Id. (double emphasis added).

And in driving this directive home, we explicitly endorsed section 3.4 of the American Bar Association's then-recent Standards Relating to Fair Trial and Free Press. See id. (emphasizing that "we are in accord with the suggestions of section 3.4").[27] Section 3.4, in turn, said that in cases involving prejudicial pretrial publicity, voir-dire "questioning shall be conducted for the purpose of determining what the prospective juror has *read and heard about the case*." See Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 3.4(a), at 130 (Tentative Draft Dec. 1966) (emphasis added).[28]

The rationale for the Patriarca standard is obvious. Decisions about prospective jurors' impartiality are for the judge, not for the potential jurors themselves. See, e.g., United States v. Rhodes, 556 F.2d 599, 601 (1st Cir.

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[27] The American Bar Association is familiarly known by its abbreviation "ABA."

[28] This standard has endured for 50-plus years. See Am. Bar Ass'n, Fair Trial and Public Discourse, Standard 8-5.4 (2016) (stating that "[i]f it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial"), available at https://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk/ (last visited July 23, 2020).

1977). And that is because prospective jurors "may have an interest in concealing [their] own bias" or "may be unaware of it." Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring); see also Sampson v. United States, 724 F.3d 150, 164 (1st Cir. 2013) ("Sampson II") (emphasizing that "a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit her lack of objectivity"). So asking them only "whether they had read anything that might influence their opinion" does not suffice, for that question "in no way elicit[s] what, if anything," they have "learned, but let[s] [them] decide for themselves the ultimate question whether what they [have] learned had prejudiced them." Rhodes, 556 F.2d at 601.

With these principles in mind, we have held that a judge in a high-profile case "fully complied with" Patriarca by asking potential jurors if they "had read or heard anything about the case in the newspapers, on television[,] or radio"—and if so, by "*prob[ing] further* as to the extent of such knowledge." See United States v. Medina, 761 F.2d 12, 20 (1st Cir. 1985) (emphasis added). We have also found "no inconsistency" with Patriarca when a judge in another high-profile case "asked the prospective jurors, collectively," if they "had heard 'anything at all' about the case"—and then asked those who had "to recount" at side bar "*all that [they] knew* about the case." See Vest, 842 F.2d at 1332 (emphasis added). And we have held that a judge in yet another high-profile case satisfied Patriarca when he asked potential jurors if they "had seen or read anything about the case"—and then asked those who had about "*the circumstances* under which [they] had been exposed to publicity." See United States v. Orlando-

Figueroa, 229 F.3d 33, 43 (1st Cir. 2000) (emphasis added).

Despite his best intentions, Dzhokhar's judge did not meet the Patriarca standard, however—even though the case met Patriarca's conditions for requiring extensive inquiry. Dzhokhar, do not forget, "request[ed]" voir dire on the contents of the material that the potential jurors had seen. See Patriarca, 402 F.2d at 318. And there was "a significant possibility" that the prospective jurors had been "exposed to potentially prejudicial material." See id. Again, the pervasive coverage of the bombings and the aftermath featured bone-chilling still shots and videos of the Tsarnaev brothers carrying backpacks at the Marathon, of the maimed and the dead near the Marathon's finish line, and of a bloodied Dzhokhar arrested in Watertown (to name just a few). Also, while the media (social, cable, internet, *etc.*) gave largely factual accounts, see Tsarnaev II, 780 F.3d at 21-22, some of the coverage included inaccurate or inadmissible information—like the details of his un-Miranda-ized hospital interview and the opinions of public officials that he should die.

With Patriarca's prerequisites satisfied, the judge had to ascertain not just the "degree" but the "kind" of "exposure to the case or the parties" that the prospective jurors had experienced, see 402 F.2d at 318—that is, "what [they] ha[d] read and heard about the case," see Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 3.4(a), at 130 (cited in Patriarca, 402 F.2d at 318). But as to 9 of the 12 seated jurors, the judge fell short on this front. To repeat what we wrote earlier, the judge qualified jurors who had already formed an opinion that Dzhokhar was guilty—and he did so in

large part because they answered "yes" to the question whether they could decide this high-profile case based on the evidence. The defense warned the judge that asking only general questions like that would wrongly "make[]" the potential jurors "judge[s] of their own impartiality"—the exact error that the Patriarca line of cases seeks to prevent. But the judge dismissed the defense's objection, saying that "[t]o a large extent" jurors must perform that function. Yet by not having the jurors identify what it was they already thought they knew about the case, the judge made it too difficult for himself and the parties to determine both the nature of any taint (*e.g.*, whether the juror knew something prejudicial not to be conceded at trial) and the possible remedies for the taint. This was an error of law and so an abuse of discretion. See Connolly, 504 F.3d at 211-12; see also Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003) (echoing the truism that "[i]t is an abuse of discretion for the district court to apply an erroneous standard of law").

The government offers a number of arguments to the contrary. But none of them changes the result.

The government first argues that the Patriarca language we bank on is "dicta."[29] True, the pertinent appellate claim there concerned a venue-change denial. See 402 F.2d at 315. But after rejecting that claim, we "fe[lt] *bound*" to address the sufficiency of the voir dire

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[29] "Dictum"—the singular of "dicta"—"is a term that judges and lawyers use to describe comments relevant, but not essential, to the disposition of legal questions pending before a court." See Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 861 (1st Cir. 1993), abrogated on other grounds by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

—which we did by stating that in high-profile cases, district judges "should proceed to examine each prospective juror . . . with a view to eliciting the *kind and degree* of his exposure to the case." Id. at 318 (emphasis added). And as a later case confirms, Patriarca intended to and does state "the *standards* of this circuit." See Medina, 761 F.2d at 20 (emphasis added). So the government's dicta argument does not work.

Nor does the government's suggestion that the voir dire here actually "elicit[ed] the kind and degree" of the potential jurors' exposure to the case. In making this claim, the government (paraphrasing the questionnaire) notes that prospective jurors had to disclose "what newspapers, radio programs, and television programs [they] viewed and with what frequency, as well as how much media coverage [they] had seen about the case." And that suffices, the government says, because we have not read Patriarca to require content-specific questioning. But this is wrong for several reasons. For one thing, learning that prospective jurors read, say, the *Boston Globe* daily and have seen a lot of coverage about the case is not the same as learning that they read *Globe* articles quoting civic leaders saying *Dzhokhar should die*—statements that could not constitutionally be admitted into evidence. See Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam). For another thing, the government's rejoinder rests on a misreading of Patriarca—an opinion that *does* require inquiry into what information potential jurors have been exposed to. Again, Patriarca endorsed the ABA's standards calling for content-specific questioning "for the purpose of determining what the prospective juror has read and heard about the case." Also and critically, post-Patriarca caselaw clarified that the defect Patriarca aimed to cure

was delegating to prospective jurors the job of evaluating their impartiality—a defect that content-specific questioning can fix. See Vest, 842 F.2d at 1332. Consider Vest. Following the correct approach, the district judge there did not ask potential jurors "to decide for themselves the 'ultimate question' of impartiality"—instead, "once a juror admitted to any knowledge of the case," the judge "individually questioned" him or her "as to the facts and extent of such knowledge." Id. And contrary to the government's characterization, Vest concerned not just individual versus group voir dire, but also content-specific versus noncontent-specific questioning.

Quoting Mu'Min, the government then makes its biggest argument—namely, that this post-Patriarca opinion by the Supreme Court (emphasis ours) "rejected the argument that the *Constitution* requires [judges] to question prospective jurors 'about the specific contents of the news reports to which they had been exposed.'" But there is a major flaw in the government's theory. Mu'min arose on direct review of a state-court criminal conviction—which meant the Supreme Court's "authority" was "limited to enforcing the commands of the [federal] *Constitution*." 500 U.S. at 422 (emphasis added). Dzhokhar, contrastingly, was "tried in federal court[]"—and thus was "subject to" the "*supervisory power*" of the federal appellate courts. See id. (emphasis added). And this distinction makes all the difference, because "[w]e enjoy more latitude in setting standards for voir dire in federal courts under our supervisory power than we have in interpreting" the federal Constitution "with respect to voir dire in state courts." See id. at 424 (italics omitted); see also Kater v. Maloney, 459 F.3d 56, 66

n.9 (1st Cir. 2006) (noting that Mu'Min "carefully distinguished between constitutional requirements which states must meet and the exercise of its broader supervisory authority over cases tried in federal courts").

Patriarca did not say that the endorsed standard sprang from the Constitution. And neither did Patriarca explicitly say that it emanated from our supervisory powers—yet we see plenty of signs that it did indeed emanate from that source. For starters, neither side in Patriarca made voir dire an issue. And it is highly unlikely that we would have engaged in a constitutional excursion without prompting by the parties. Also and relatedly, given the well-entrenched doctrine of constitutional avoidance, it is equally unlikely that we would have gone out of our way to issue a constitutional decision. See Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 161 (1989) (per curiam) (explaining that the doctrine counsels against issuing "unnecessary constitutional rulings"). Plus as we have noted, Patriarca relied on the ABA standards. And those standards are meant as templates for courts, not as constitutional pronouncements. Cf. Br. of Am. Bar Ass'n as Amicus Curiae at 2, Martinez v. Ryan, 566 U.S. 1 (2011) (No. 10-1001), 2011 WL 3584754, at *2 (explaining that the ABA Standards for Criminal Justice "represent a collection of 'best practices' based on the consensus views of a broad array of professionals involved in the criminal justice system"). Mu'Min itself recognized that other federal appellate courts have mandated content-specific questioning in the exercise of their discretionary supervisory powers, not as a matter of constitutional law.

See 500 U.S. at 427.[30] One of those courts—the Fifth Circuit—later specifically said that "Mu'Min does not

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[30] The Mu'Min majority cited United States v. Davis, 583 F.2d 190 (5th Cir. 1978); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); and Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). See Mu'Min, 500 U.S. at 426. The lead Mu'Min dissent added United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), to that list. See Mu'Min, 500 U.S. at 446 (Marshall, J., dissenting). Here is a sampling of those cases' key statements:

- Because "the nature of the publicity as a whole raised a significant possibility of prejudice," the district court "should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed." Davis, 583 F.2d at 196.
- Because "the publicity surrounding the instant case was tremendous," creating a "possibility" that prospective jurors "had formed opinions before they entered the courtroom," the district court "had a duty to inquire into pretrial publicity on voir dire"—and the court's "general inquiry into whether there was any reason [they] could not be fair and impartial . . . was not expressly pointed at impressions [they] may have gained from reading or hearing about the relevant events." Dellinger, 472 F.2d at 375.
- "[W]hether a [prospective] juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on [his] own assessment of self-righteousness"—and given the amount of pretrial publicity, the district court should have made "a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles" they had read. Silverthorne, 400 F.2d at 639 (quotation marks omitted).
- Invoking "our supervisory powers over the district courts in this circuit, . . . we recommend" that district judges ask content-specific questions in cases involving "a significant pos-

abrogate" that court's earlier holding "that, where pretrial publicity creates a significant possibility of prejudice, the district court must make an independent determination of the impartiality of jurors." United States v. Beckner, 69 F.3d 1290, 1292 n.1 (5th Cir. 1995) (discussing Davis).

The government also defends some (not all) of the judge's reasons for declining to ask content-specific questions. But concerns about "unmanageable data" from content-specific questions—in a case where 1,373 prospective jurors each completed a 100-question questionnaire and the judge designated 21 days for voir dire—seem misplaced. So too does any fear that content-specific questioning could accidentally create bias where none existed. If potential jurors recall a particular piece of reporting well enough to bring it up at voir dire, and the reporting is prejudicial, then potential bias was already present. Far from "reinforc[ing] potentially prejudicial information," content-specific questioning would have brought such material front and center. The parties and the judge could then assess the publicity's effect on the prospective jurors' ability to reach a fair verdict, thus putting the judge in a position to take any necessary measures to protect Dzhokhar's fair-trial rights.

Patriarca was a noncapital case, unlike Dzhokhar's. And the pretrial publicity in Patriarca pales in comparison to the pretrial publicity surrounding Dzhokhar's case. Surely then, with his life at stake, Dzhokhar deserved the type of voir dire that Patriarca calls for.

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sibility that [prospective jurors] will be ineligible to serve because of exposure to potentially prejudicial material." Addonizio, 451 F.2d at 67 (quotation marks omitted).

See generally Sampson II, 724 F.3d at 159-60 (suggesting that protections are generally heightened in capital cases, because death is different from other kinds of penalties).

In denying Dzhokhar mandamus relief on the venue-change issue, it is reasonable to infer that the mandamus panels reasonably expected that the judge would conduct the kind of searching voir-dire inquiry required by our caselaw. But regrettably, we conclude that his efforts fell short for the reasons just stated. Dzhokhar's appellate counsel admitted at oral argument that this error was harmless at the guilt stage, given his trial concession (through his trial lawyer) that he had done what the government accused him of doing. The government suggests that "any error was harmless" at the penalty stage too, because prospective jurors said that they could serve impartially. Not only does the government push a theory that clashes with our caselaw—caselaw that again says that in a situation like Dzhokhar's, a judge cannot delegate to potential jurors the work of judging their own impartiality. But the government never explains how its flawed argument proves the error's harmlessness beyond a reasonable doubt. See 18 U.S.C. § 3595(c)(2)(C) (providing that "[t]he court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless" if "the [g]overnment establishes beyond a reasonable doubt that the error was harmless").[31] So the government's harmless-error theory is a nonstarter.

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[31] Proof beyond a reasonable doubt is evidence that lets a rational "factfinder . . . reach a subjective state of near certitude of the guilt of the accused." See Victor v. Nebraska, 511 U.S. 1, 15 (1994) (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)).

Given our ruling that the judge's Patriarca-based error demands vacatur of the death sentences,[32] the remaining issues listed above (in the "Basic Appellate Arguments" section) require only the briefest discussion —but discussion nevertheless, at least on matters that may arise again on remand.

Regarding Dzhokhar's claim that #138 and #286 lied during voir dire, we repeat a point made in our caselaw again and again (and again) because it is so very important to our system of justice: If a defendant "com[es] forward" at any point in the litigation process "with a 'colorable or plausible'" juror-misconduct claim, "an 'unflagging duty' falls to the district court to investigate the claim." United States v. French, 904 F.3d 111, 117 (1st Cir. 2018) (quoting United States v. Zimny, 846 F.3d 458, 464 (1st Cir. 2017)), cert. denied sub nom. Russell v. United States, 139 S. Ct. 949 (2019). See generally Sampson II, 724 F.3d at 169 (stressing that "[j]urors who do not take their oaths seriously threaten the very integrity of the judicial process"). But our decision on the content-specific-questioning issue makes it unnecessary to address the misconduct charge.[33]

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[32] Vacatur is "[t]he act of annulling or setting aside." See *Vacatur*, Black's Law Dictionary (11th ed. 2019).

[33] Citing French, 904 F.3d at 120, Dzhokhar briefly argues that any error regarding juror misconduct would require vacatur of his convictions as well as the death sentence. But this case is unique in that Dzhokhar's counsel admitted his guilt in the opening and closing statements of the trial's guilt phase, and he has not argued that he would have used a different trial strategy in another venue or before a different jury. At oral argument here, Dzhokhar's lawyer conceded that this guilt admission would allow us to affirm the convictions despite the alleged juror-misconduct error—or any other error, including venue. We agree.

And that same ruling also makes it unnecessary to touch on Dzhokhar's argument that the judge wrongly excused #355 for his views on the death penalty.

That leaves us with Dzhokhar's claim that the judge kept him from asking case-specific death-penalty questions critical to seating an impartial jury—questions like whether potential jurors could consider mitigating circumstances on the ultimate life-or-death issue, given "the specific allegations in his case: the killing of multiple victims, one of them a child, in a premediated act of terrorism." On this issue—which also gets abuse-of-discretion review, see Casanova, 886 F.3d at 60—it is enough for us to say that even assuming without deciding that the judge had to inform prospective jurors of certain case-specific facts, he did do so here. Recall the judge's preliminary instructions to prospective jurors before they filled out the questionnaires—that Dzhokhar was "charged in connection with events that occurred near the finish line of the Boston Marathon . . . that resulted in the deaths of three people." Recall too the questionnaires' "summary of the facts of this case"—that "two bombs exploded . . . near the Boston Marathon finish line[,] . . . kill[ing] Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others"; that "MIT Police Officer Sean Collier (26) was shot to death in his police car"; and that Dzhokhar "has been charged with various crimes arising out of these events." And like the judge,

we think that because potential jurors knew these details, the voir dire adequately covered Dzhokhar's case-specific questions.[34]

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[34] Dzhokhar argues that Ham v. South Carolina, 409 U.S. 524 (1973), prevents us from so holding. We see things differently, however.

The state in Ham tried a locally known African-American civil-rights activist on a marijuana-possession charge. Id. at 524-25. He defended on the theory that the police had framed him as payback for his civil-rights work. Id. at 525. Despite these circumstances, the trial judge denied his request that voir dire include questions aimed at racial prejudice. Id. at 525-26 & n.2 (noting that the proposed questions asked whether prospective jurors could "fairly try this case on the basis of the evidence and disregarding the defendant's race," whether they had "no prejudice against negroes" or "[a]gainst black people," and whether they "would . . . be influenced by the use of the term 'black'"). The Supreme Court later reversed his conviction because "the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record [he] be permitted to have the jurors interrogated on the issue of racial bias." Id. at 527.

Dzhokhar notes that the state's brief there had argued that the judge's general "bias or prejudice" question sufficed because the defendant was "within sight" of the prospective jurors, who could discern his race—which, according to the state, made the specific questions about race redundant and thus unnecessary. See Br. for Resp., Ham, 409 U.S. 524 (No. 71-5139), 1972 WL 135829, at *3-4. And by Dzhokhar's account, the Supreme Court's reversal of Ham's conviction "establishes that a [prospective juror's] awareness of facts which could give rise to potential bias, coupled with general questions about bias, do not obviate a particularized investigation into prejudice." Extrapolating from this reading, he argues that Ham shows the judge legally erred by deeming case-specific questions about prospective jurors' death-penalty views unnecessary because of what they already knew about the case. The simplest response is that the Ham Court *never* addressed the state's argument that a general question sufficed. So Ham does not help his cause.

Having said all that needs saying on these subjects, we press on—for the reader's information, everything from here on out until we reach the crime-of-violence issue also falls within the category of issues that could easily reappear on remand.

Mitigation Evidence About Tamerlan's Possible Homicidal Past

We shift our focus to Dzhokhar's claim that the judge damaged the defense's mitigation case by barring evidence tying Tamerlan to a triple murder in 2011, and by keeping the defense from seeing a confession Tamerlan's friend made to the FBI about how he and Tamerlan had committed those crimes.

Background

On September 11, 2011—the tenth anniversary of the 9/11 terrorist attacks—someone (or a number of someones) robbed and killed three drug dealers in an apartment in Waltham, Massachusetts. All three were found bound, with their throats slit. These crimes remain unsolved to this day.

Fast forward to 2013. Soon after the Marathon bombings, federal and state law-enforcement officers interviewed Tamerlan's friend, Ibragim Todashev—a mixed-martial-arts fighter who had come to the United States from Chechnya in 2008 and met Tamerlan shortly

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See generally Ristaino v. Ross, 424 U.S. 589, 596 (1976) (emphasizing that "[b]y its terms, Ham did not announce a requirement of universal applicability").

afterwards.[35] Officers interviewed Todashev, then living in Florida, four separate times in April and May. The first two interviews focused on his relationship with Tamerlan and his possible knowledge of the bombings. At some point, agents began suspecting that Todashev had a hand in the 2011 murders. During the final interview on May 21, Todashev said he knew something about the murders and asked if he could get a deal for cooperating.

After waiving his Miranda rights, Todashev gave the following account. Tamerlan recruited Todashev to rob the men. They drove to a Waltham apartment, held the men at gunpoint (with a gun Tamerlan had brought), beat them, and bound them with duct tape. Not wanting to leave any witnesses, Tamerlan cut each man's throat while Todashev waited outside (Todashev did not

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[35] Perhaps this is as good a place as any to say a few words about Dzhokhar's family background, as best we can discern it from the record.

Dzhokhar and Tamerlan's father, Anzor, is of Chechen ancestry born in Kyrgyzstan. Their mother, Zubeidat, is of Avar ancestry born in Dagestan. She and Anzor met as teenagers in Siberia in the early 1980s—she was there living with her brother, and he was stationed there with the Soviet Army. The two later married and moved around a bit, living in Siberia, Chechnya, Dagestan, and Kyrgyzstan (for example). During this time, they had four children — including Tamerlan (in 1986) and Dzhokhar (in 1993).

In 2002, with the region embroiled in a bloody war with Russia, Anzor, Zubeidat, and Dzhokhar emigrated from Kyrgyzstan to the United States—specifically, to Cambridge, Massachusetts. Dzhokhar's other siblings joined them in 2003. Anzor and Zubeidat returned to Russia in 2012, leaving Dzhokhar in the United States with Tamerlan.

want any part of the throat cutting, apparently). Tamerlan then waved Todashev back in to help remove all traces of evidence.

Todashev agreed to write out a confession. But as he was doing so, he attacked the agents—one of whom shot and killed him. The FBI documented Todashev's statements in memos known as 302 reports. And a state trooper recorded most of his statements at his final interview. The Florida attorney general's office investigated the circumstances of Todashev's death and found the agent had acted reasonably in using deadly force.

Dzhokhar's lawyers repeatedly asked the judge pretrial to make the government produce all reports and recordings of Todashev's statements about the Waltham crimes, either directly to them or to the judge for an in-camera inspection.[36] The government opposed each of the defense's motions, arguing that the sought-after materials were not discoverable under the federal or local criminal rules or under Brady v. Maryland, 373 U.S. 83 (1963), and were protected by the law enforcement investigatory privilege.[37] In the government's telling, because prosecutors had informed the defense that Tamerlan had "participated in the Waltham triple homicide," it did not have to disclose the actual reports and

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[36] In camera means "in a chamber." See *In Camera*, Black's Law Dictionary (11th ed. 2019).

[37] Basically, this judge-devised doctrine sometimes keeps the government from having to turn over materials law enforcement has for use in criminal investigations—"sometimes," however, is a tip-off that the privilege is not absolute, since it can be overridden in appropriate cases by a party's need for the privileged items. See, e.g., Puerto Rico v. United States, 490 F.3d 50, 64 (1st Cir. 2007).

recordings. After inspecting some of the items in camera, the judge refused to disclose any of the materials documenting Todashev's statements. Agreeing with the government that prosecutors had "conveyed the fact and general substance of Todashev's statements," the judge said that the FBI's 302 report of Todashev's final interview did "not materially advance [the mitigation] theory beyond what is already available to the defense." The judge also said that disclosing Todashev's statements "risk[ed] revealing facts seemingly innocuous on their face, such as times of day or sequences of events," that "would have a real potential to interfere with the ongoing state investigation."

While all this was going on, a lawyer representing Dzhokhar's college friend Dias Kadyrbayev—who faced prosecution for hiding Dzhokhar's backpack and computer—told the government that his client "may be able to provide" some information, including that "Kadyrbayev learned in the fall of 2012 from Dzhokhar . . . that Tamerlan . . . was involved in the Waltham murders" and that "Dzhokhar . . . told Kadyrbayev that [Tamerlan] 'had committed jihad' in Waltham." The government disclosed Kadyrbayev's lawyer's proffer to Dzhokhar's counsel.

Anyway, because of the judge's rulings, the defense never learned key details about the murders (as disclosed by Todashev)—including:

- Tamerlan brought the "tools" he and Todashev used to commit the crimes (a gun, knives, duct tape, cleaning supplies).
- Tamerlan and Todashev got into the apartment because Tamerlan knew one of the victims, Brendan

Mess—Tamerlan and Mess were close childhood friends.

- Tamerlan had Todashev duct tape one of the victim's hands and feet. And Tamerlan duct taped the others.
- Tamerlan beat Mess to try to get him to say where more money was in the apartment.
- Todashev had agreed with Tamerlan to rob the men. But after they had bound and robbed them, Tamerlan decided to kill the men—a decision that made Todashev shake with nerves, because while he did not want to participate in the murders, he felt he "had to" since he "did not have a way out."
- Tamerlan slashed each man's throat.
- Tamerlan gave Todashev $20,000 from the money they had stolen.[38]

The government later moved in limine to bar Dzhokhar from introducing any evidence about the Waltham murders at the guilt or penalty phases.[39] Among other theories, the government called Todashev's statements about Tamerlan's role "unreliable" since he had an obvious motive to pin the murders on someone else (what the government did not tell the judge, however, was that agents had previously relied on Todashev's statements in applying for a search warrant to look for evidence

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[38] Following an order from us, authorized counsel got to review the in-camera materials for the first time.

[39] In limine means "at the outset"—"a motion . . . raised preliminarily, esp[ecially] because of an issue about the admissibility of evidence believed by the movant to be prejudicial." See *In-Limine*, Black's Law Dictionary (11th ed. 2019).

from the Waltham homicides in Tamerlan's car). The government also argued that, apart from Todashev's statements, it had no "evidence that Todashev and/or Tamerlan . . . actually participated in the Waltham triple homicides." The government further claimed that Todashev's statements should not come in because he "cannot be cross-examined," because he "obviously was not of sound mind" since he attacked armed agents, and because admitting this evidence would confuse the jurors by opening the door to "a great deal of information having nothing to do with" Dzhokhar's crimes. And the government claimed that "[t]here's no evidence that the defense can point to anywhere, including . . . Todashev's own statement, that Tamerlan . . . controlled him in any way."

Dzhokhar's lawyers argued in opposition that evidence showing Tamerlan's having committed the crimes was highly probative of the brothers' respective roles in the bombings and was sufficiently reliable to be admitted under the evidentiary standards applicable at the penalty phase. They also stressed that whether to credit Todashev's statements was for the jury.

The judge orally granted the government's in-limine motion, finding that "there simply is insufficient evidence to describe what participation Tamerlan may have had" in the Waltham murders. From his check of the evidence—which "include[d] an in-camera review of some Todashev 302s," but not the recordings of the confession—the judge thought that "it [was] as plausible . . . that Todashev was the bad guy and Tamerlan was the minor actor." So the judge concluded that the murder evidence "would be confusing to the jury and a waste of time, . . . without any probative value."

Dzhokhar's mitigation theory portrayed him as influenced by Tamerlan to take part in the Marathon bombings. "[I]f not for Tamerlan," said his lawyer to the penalty-phase jury, "this wouldn't have happened." And the defense sought to prove several mitigating factors about their relationship and their relative culpability— including:

- Dzhokhar "acted under the influence of his older brother";
- "because of Tamerlan's age, size, aggressiveness, domineering personality, [and] privileged status in the family," Dzhokhar "was particularly susceptible to his . . . influence";
- "Dzhokhar['s] . . . brother Tamerlan planned, led, and directed the Marathon bombing[s]";
- "Dzhokhar . . . would not have committed the crimes but for his older brother Tamerlan"; and
- "Tamerlan . . . became radicalized first, and then encouraged his younger brother to follow him."

Without the Waltham evidence, the defense supported its mitigation theory with testimony like:

- Tamerlan became radicalized first, began proselytizing his views, and sent jihadi materials to Dzhokhar;
- the oldest brother in a Chechen family like the Tsarnaevs usually receives deference (an associate professor from Princeton University testified that "it's expected that the younger brothers will listen to the older brother");

- Tamerlan occasionally broke the rules of the gym he belonged to (he used other members' equipment without asking, for instance);
- Tamerlan sometimes got argumentative at a mosque (for example, he twice called the Imam a "hypocrite");
- Tamerlan yelled at a store owner for selling halal turkey for Thanksgiving (halal is a term associated with Islamic dietary laws); and
- Tamerlan once might have physically abused his then-girlfriend (he later married her).

Conversely, the government tried to convince the jury that Dzhokhar should die because he and Tamerlan were equally culpable in the bombings and that Tamerlan had played no role in Dzhokhar's decision to participate. During the penalty phase, the government argued that the defense's mitigation evidence consisted of little more than "testimony that Tamerlan was bossy." The government also described Tamerlan as a "handsome," "charming," "loud" guy who "sometimes lost his temper." And the government implored the jurors to "ask [themselves] if there's anything about Tamerlan . . . that will explain . . . how Dzhokhar . . . could take a bomb, leave it behind a row of children, walk . . . down the street, and detonate it." Insisting that no evidence supported the notion that Tamerlan had "coerced or controlled" Dzhokhar, the government labeled the brothers "a partnership of equals" and so "bear the same moral culpability for what they did."

Basic Appellate Arguments

Dzhokhar presents essentially two arguments about the judge's handling of the Waltham evidence. The

first claim is that the judge violated his right to present a complete mitigation defense by keeping from the jury major proof of Tamerlan's brutal past, his ability to enlist others in acts of extreme cruelty, and thus his relative culpability—an error the government exploited by distorting Tamerlan's character and suggesting no evidence showed his influence over Dzhokhar. The second claim is that the judge violated his Brady rights by refusing to give the defense a 302 report and recordings of Todashev's confession—evidence that, "if presented," would have shown "why Tamerlan was to be feared, and his ability to influence others to commit horrific crimes."

The government takes a different view of the matter. According to the government, the Waltham evidence was not relevant mitigation evidence because nothing suggests Tamerlan's alleged commission of the Waltham crimes had any link to Dzhokhar's commission of the crimes here. And, says the government, even if the Waltham evidence had some slight relevance, the judge rightly excluded it because the risks of confusing the issues and misleading the jury outweighed any probative worth. The government also thinks that any error by the judge was harmless beyond a reasonable doubt because "overwhelming[]" evidence (the government's word) showed Dzhokhar willingly engaged in the crimes charged here. Wrapping up, the government says that the undisclosed "information was not discoverable under Brady" and "was subject to the law enforcement privilege."

Analysis

We give abuse-of-discretion review to preserved disputes over whether the judge wrongly excluded mitigat-

ing evidence at the penalty phase, showing "great deference" to his balancing of the evidence's probative worth against its possible prejudice. See United States v. Sampson, 486 F.3d 13, 42 (1st Cir. 2007) ("Sampson I").[40] We also give abuse-of-discretion review to preserved disputes over whether the judge wrongly kept Brady material from the defense. See United States v. Bulger, 816 F.3d 137, 153 (1st Cir. 2016).

With these preliminaries out of the way, we turn to Dzhokhar's first claim: that the judge committed prejudicial error by keeping the Waltham evidence from the jury at the penalty phase.

Because it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision," the Supreme Court has for years said that if "the evidence introduced and the arguments made . . . do not prejudice a defendant, it is preferable not to impose restrictions." Gregg v. Georgia, 448 U.S. 153, 203-04 (1976). So a defendant convicted of capital crime has a constitutional right to put before the jury, "*as a mitigating factor*, any aspect of [his] character or record and any of the circumstances of the offense that [he] proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); see also Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting the rule announced by the

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[40] Dzhokhar argues that we owe no deference because the judge "reviewed only the summary 302 report prepared by the FBI" and not "the video and audio recordings themselves." But the two cases he cites do not help him, because the judges there—unlike the judge here—denied discovery without reviewing *any* of the at-issue materials. See United States v. Rosario-Peralta, 175 F.3d 48, 55 (1st Cir. 1999); United States v. Buford, 889 F.2d 1406, 1407 (5th Cir. 1989).

Lockett plurality). Mitigating factors include aspects of "the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence," see 18 U.S.C. § 3592(a)(8)—like, for instance, information bearing on the extent and nature of each defendant's role in the charged crime, see Green v. Georgia, 442 U.S. 95, 97 (1979) (finding a constitutional violation where the judge excluded penalty-phase evidence showing a codefendant's primary role).

This standard is broad, reflecting the idea "that punishment should be directly related to the personal culpability of the criminal defendant." See Penry v. Lynaugh, 492 U.S. 302, 319 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); see also Enmund v. Florida, 458 U.S. 782, 801 (1982) (emphasizing that "punishment must be tailored to [a defendant's] personal responsibility and moral guilt"). And consistent with this lenient approach, mitigating information need not be admissible under the rules of evidence to get in. See 18 U.S.C. § 3593(c). All of which is why the normally low relevance threshold in noncapital cases is lower still when it comes to mitigation evidence in capital cases: Relevant "mitigating evidence" encompasses any "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." See Smith v. Texas, 543 U.S. 37, 44 (2004). Once this modest "threshold . . . is met," the Constitution "'requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." See Tennard v. Dretke, 542 U.S. 274, 285 (2004) (quoting Boyde v. California, 494 U.S. 370, 377-78 (1990)); see also Green, 442 U.S. at 97 (holding that a "mechanistic[]"

use of the hearsay rule to keep a capital defendant from introducing mitigating evidence at sentencing in a capital case offends due process (quotation marks omitted)).

None of this is code for anything goes, however. For a judge can exclude "information" if "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." See 18 U.S.C. § 3593(c); see also Sampson I, 486 F.3d at 45 (stating that the "low barriers to admission of evidence in a capital sentencing hearing 'do[] not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes'" (quoting United States v. Purkey, 428 F.3d 738, 756 (8th Cir. 2005))).

The government in our case recognized that Dzhokhar's penalty-phase defense turned on what Tamerlan's role was. Which probably explains why in its own penalty-phase arguments, the government continually called the brothers equally culpable and stressed Tamerlan's lack of influence over Dzhokhar. The jurors cared about the brothers' relative culpability as well, a point made quite clear by their not recommending death for Dzhokhar on the capital counts involving Tamerlan's conduct in setting off the first bomb. And given how the proceedings played out, the probative value of showing that the bombings were not the first time Tamerlan committed acts of brutality and persuaded others to help him is obvious. So we cannot agree with the judge that the Waltham evidence lacks (emphasis ours) "*any*" probative force.

Inspired by his jihadi beliefs, Tamerlan's lead role in the Waltham killings—felonies (according to the kept-out evidence) that he committed without Dzhokhar—makes it reasonably more likely that he played a greater

role in the crimes charged here than Dzhokhar.[41] And as we said a moment ago, evidence showing a defendant's minor role in the offense is relevant mitigating evidence under the rule broadcast in Lockett. See Enmund, 458 U.S. at 797-98.

But there is more to be said in Dzhokhar's favor than that.

The Waltham evidence was also highly probative of Tamerlan's ability to influence Dzhokhar. Because of the judge's decisions, Dzhokhar did not present proof showing how he learned (months after the fact, per college-acquaintance Kadyrbayev) that Tamerlan had butchered the men, one of whom was a close friend—actions motivated by Tamerlan's vision of jihad.[42] But evidence of this sort could reasonably have persuaded at least one juror that Dzhokhar did what he did because he feared what his brother might do to him if he refused (and remember, a jury may consider any mitigating factor at least one juror found proved by a preponderance of the information). Or put slightly differently, at least one juror could reasonably have found that because of what had happened in Waltham, Tamerlan was not just "bossy" (to use the prosecutor's word) but a stone-cold killer who got a friend to support his fiendish work. And if Tamerlan could influence Todashev (a mixed-martial-arts bruiser who followed Tamerlan because he "did not have a way out"), Tamerlan's influence over

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[41] As Dzhokhar tells us in his reply brief, the government never suggests that Tamerlan did not commit the killings.

[42] Defense counsel told us at oral argument that once the judge granted the government's in-limine motion barring any mention of the Waltham crimes, Dzhokhar had no basis for trying to get his statements to Kadyrbayev admitted.

Dzhokhar (his younger brother with no prior history of violence) could be even stronger.[43] All of which strengthens two of Dzhokhar's mitigating factors—his susceptibility to Tamerlan's influence, and his having acted under Tamerlan's influence.

And despite its hard work, the government's responses do not persuade us otherwise.

The government's lead argument is that the Waltham evidence cannot clear the low relevancy hurdle because that evidence (at least in its mind) would have told the jurors nothing about the brothers' relative culpability here. Not so. Again, Dzhokhar premised his mitigation theory on his being less culpable than Tamerlan because he would not have committed the charged crimes but for Tamerlan's influence. And Tamerlan's earlier domineering and deadly acts had relevance to this theory. The judge admitted other, lesser evidence of Tamerlan's belligerence—like his screaming at others for not conforming to his view of how a good Muslim should act. And the judge did so because he deemed that evidence relevant to Tamerlan's "domination." Even this limited evidence convinced some jurors to find the existence of mitigating factors touching on Tamerlan's prior radicalization, leadership role in the bombings, and influence over Dzhokhar. And if Tamerlan's

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[43] Of course, when the government told the judge that he should bar the materials because "[t]here's no evidence that the defense can point to anywhere, including . . . Todashev's own statement, that Tamerlan . . . controlled him in any way," the defense did not have Todashev's statement—including his telling comment that he felt he "had to" help Tamerlan with the murder clean up because he "did not have a way out."

yelling at someone for selling halal turkeys had the effect of showing his dominance and radicalization, then evidence of his having conscripted a friend into a jihad-inspired robbery and killing scheme would have increased that effect exponentially.

The government is wrong to imply that the jury had to make leaps of imagination to connect what Tamerlan did in Waltham to his influence over Dzhokhar. If the judge had admitted this evidence, the jurors would have learned that Dzhokhar knew by the fall of 2012 that Tamerlan had killed the drug dealers in the name of jihad. They also would have known that it was only after these killings that Dzhokhar became radicalized as well: Evidence actually admitted showed that Dzhokhar first flashed signs of radicalization—as is obvious from his texts on jihad—after spending a holiday break with Tamerlan several weeks or so after learning about the Waltham murders.[44] So if the jurors had heard Todashev's description of how he felt powerless to withdraw from the Waltham crimes once Tamerlan chose to turn an armed robbery into a triple murder, at least one juror might have found that Dzhokhar felt the same way when it came to the bombings in early 2013.

And if the judge had admitted the Waltham evidence —evidence that shows (like no other) that Tamerlan was predisposed to religiously-inspired brutality before the bombings and before Dzhokhar's radicalization[45]—the defense could have more forcefully rebutted the government's claim that the brothers had a "partnership of

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[44] For example, texting with someone (a friend, presumably) about life plans, Dzhokhar wrote: "I wanna bring justice for my people."

[45] Think back to how the Waltham murders occurred on the decade anniversary of the 9/11 attacks.

equals." The Waltham evidence would have helped the defense show that Tamerlan inspired his younger brother not only to believe in jihad but also to act on those beliefs —just as he had in Waltham (again, the government does not suggest that Tamerlan did not commit the murders). Similarly, the evidence could have helped the defense counter the government's argument that Tamerlan and Dzhokhar "bear the same moral culpability" and that Dzhokhar acted "independently" in placing the bomb at the finish line—for the evidence showed that Tamerlan, unlike Dzhokhar, had a history of horrific violence, which he justified as jihad; that Tamerlan, unlike Dzhokhar, had previously instigated, planned, and led brutal attacks; and that Tamerlan, unlike Dzhokhar, had influenced a less culpable person (Todashev) to participate in murder.

The government still could have argued to the jurors —as it does to us—that Dzhokhar was nevertheless a willing criminal. The government also could have challenged the evidence's reliability, arguing that other than his self-serving statement about thinking he "had to" help clean up the scene, nothing proves Tamerlan bullied Todashev into doing anything. See 18 U.S.C. § 3593(c) (providing that either party can rebut any information received at the hearing). And maybe the government could have argued that the evidence undercuts Dzhokhar's mitigation theory—saying something like, Tamerlan had to pay Todashev money to get him to go along, while Dzhokhar joined on for free; and Todashev opted not to kill, while Dzhokhar killed with no reluctance or regret. But all of this goes to weight and credibility and not to admissibility—*i.e.*, the effect of Tamerlan's prior violence on Dzhokhar's radicalization, on

his willingness to go from texting to bombing, was something the jurors should have gotten to decide for themselves. See, e.g., United States v. Guzmán-Montañez, 756 F.3d 1, 9 (1st Cir. 2014) (explaining that "[w]hen the issue lies on credibility of the evidence, it is up to the jury to decide" and adding that "[t]he factfinder is free to conduct its own interpretation of the evidence"); Nelson v. Quarterman, 472 F.3d 287, 313 (5th Cir. 2006) (en banc) (noting that the "strength" or "sufficiency" of mitigating evidence is for the jury to decide).[46]

The government insists that because the circumstances of the Waltham killings are too dissimilar to the bombings, the Waltham evidence has no relevance here. But in both situations, Tamerlan committed murder with help from someone who gave no prior sign of a willingness to commit such acts. And in both situations, Tamerlan used his interpretations of Islam to justify his actions. So the government's too-dissimilar argument has no merit either.

Shifting from the relevancy question, the government defends the judge's actions by insisting that the Waltham evidence's admission would have led to mini-trials over whether Todashev's version of the killings "was believable" or just a pack of lies told to minimize his responsibility for those crimes. But the concern is overblown. As Dzhokhar notes, the defense could have relied, for instance, on the government's sworn search-

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[46] The government does not argue that Todashev's unavailability precludes admission in the penalty-phase context—perhaps because of the relaxed evidentiary standards. And the judge permitted the statements of other unavailable witnesses at the penalty phase—including FBI 302 reports summarizing interviews of some of Tamerlan's friends.

warrant materials (to search Tamerlan's car after the bombings) that credited Todashev's statements to the FBI.[47] The government now tries to soft-pedal its crediting of Todashev's account in the search-warrant affidavit as "a far cry from embracing those claims" at trial. But when the agent swore out the affidavit and

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[47] An FBI agent swore out an affidavit saying that "there is probable cause to believe that Todashev and Tamerlan planned and carried out the murder of three individuals in Waltham . . . in September 2011." "On May 21, 2013," the affidavit stated,

> law enforcement agents interviewed Todashev. Todashev confessed that he and Tamerlan participated in the Waltham murders. He said that he and Tamerlan had agreed initially just to rob the victims, whom they knew to be drug dealers. . . . Todashev said that he and Tamerlan took several thousand dollars from the residence and split the money. Todashev said that Tamerlan had a gun, which he brandished to enter the residence.

The affidavit further said that

> Tamerlan decided that they should eliminate any witnesses to the crime, and then Todashev and Tamerlan bound the victims, who were ultimately murdered. Todashev went on to say that after the murders, Tamerlan and Todashev tried to clean the crime scene . . . to remove traces of their fingerprints and other identifying details. . . . [T]o clean the scene, Todashev said that they used bleach and other chemicals to clean surfaces, and even poured some on the bodies of the victims. Todashev said that they spent over an hour cleaning the scene.

And the affidavit also noted that

> Todashev said that Tamerlan had picked Todashev up in the Target Vehicle and they traveled to the scene of the Waltham murders together. After the robbery and murder, they left the scene in the Target Vehicle.

the prosecutor submitted the materials to the magistrate judge, the government confirmed its belief in Todashev's veracity. See generally Franks v. Delaware, 438 U.S. 154, 164-65 (1978) (explaining that "[w]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing," and adding that "it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true"). We know of no reason why the sworn affidavit—which the government asked the magistrate judge to credit—should now be disbelieved. To this we add that the judge retained control over how much of this evidence could have come in. He also could have limited the evidence as appropriate or cut off the presentation if the evidence became too extensive—a more suitable remedy than barring all evidence of Tamerlan's murderous past. So in the end we think the Waltham evidence was sufficiently reliable to go to the jurors, who could then decide whether to believe it and how much weight (if any) to assign it in mitigation. See Guzmán-Montañez, 756 F.3d at 9.

The government is also off-base in saying that "[t]he Waltham evidence would have confusingly focused the jury's attention on *Tamerlan*'s character and the circumstances of an *unrelated* offense." But the parties and the judge put the mitigating factors before the jury, front and center—factors that made clear that Tamerlan's character and prior conduct were relevant because they bore on the broader circumstances of Dzhokhar's commission of the charged crimes.[48] Arguing to the

[48] We are referring here to the mitigating factors mentioned in the second bullet-point list above, which required the jurors to resolve a

jury, the government called Dzhokhar's mitigation theory (centered on Tamerlan's influence over him) baseless because no evidence supported it. But the Waltham evidence could have been that evidence. And it would not have confused the jurors to have learned about it. Caselaw tells us to presume that juries follow instructions. See, e.g., Richardson v. Marsh, 481 U.S. 200, 211 (1987). And the jurors' penalty-phase verdicts —not recommending death on 11 of the 17 death-eligible counts—show they fully understood that Tamerlan's relative culpability was mitigating only to the extent it bore on the brothers' respective roles in committing the charged crimes.[49] Which compels us to reject the government's claim that the jurors would have lost sight of this distinction.

So we find the judge abused his discretion in banning the Waltham evidence. Compare McKinney v. Arizona, 140 S. Ct. 702, 706 (2020) (stressing "that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence"), with United States v. Rodriguez, 919 F.3d 629, 634 (1st Cir. 2019) (explaining "that a material error of law always amounts to an abuse of discretion"). The government thinks that any error

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set of "whethers": whether Dzhokhar acted under the influence of Tamerlan; whether Tamerlan's aggressiveness made Dzhokhar susceptible to following his lead; whether Tamerlan instigated and led the bombings; whether Dzhokhar would ever have committed these crimes were it not for Tamerlan; and whether Tamerlan radicalized first and encouraged Dzhokhar to follow him.

[49] The jury, for example, recommended death on those counts dealing with Dzhokhar's placing a bomb (the zenith of Dzhokhar's responsibility) but did not recommend death on those counts dealing with Tamerlan's placing a bomb (the nadir of Dzhokhar's responsibility).

was harmless beyond a reasonable doubt.[50] But the government's harmlessness claim is essentially a reprise of its argument in support of exclusion: In its view, just as the Waltham evidence is irrelevant because it does not show that Dzhokhar participated in the bombings under Tamerlan's influence, for the same reasons, its exclusion could not have affected the jurors' decision. Again, though, the exclusion of the Waltham evidence undermined Dzhokhar's mitigation case. Sure, as the government argues, a jury armed with the omitted evidence still might have recommended death. But the omitted evidence might have tipped at least one juror's decisional scale away from death. In other words, the government cannot show to a "near certitude," see Victor, 511 U.S. at 15, that the excluded evidence—that Tamerlan cold-bloodedly killed the drug dealers, all in the name of jihad—would not have convinced even one juror that (contrary to the government's jury argument) Dzhokhar did not "bear the same moral culpability" as Tamerlan, see Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding that because the judge's ruling excluding mitigating evidence "may have affected the jury's decision to impose the death sentence," the error was "sufficiently prejudicial" to require vacatur of the defendant's death sentence).

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[50] The parties spar a bit over whether a judge's mistake in banning mitigating evidence is subject to harmless-error review. Dzhokhar argues it is not; the government argues it is. We need not get into that here: Even under its preferred approach, he government cannot win because (as we are about to explain) the government cannot satisfy its harmlessness burden.

This leaves us then with Dzhokhar's Brady-based challenge: that the judge also erred by denying the defense access to additional evidence both favorable and material to him—specifically, the report and recordings of Todashev's FBI confession.

Prosecutors have an "inescapable" duty "to disclose known, favorable evidence rising to a material level of importance." Kyles v. Whitley, 514 U.S. 419, 438 (1995) (discussing Brady). Favorable evidence includes both exculpatory and impeachment evidence that is relevant either to guilt or punishment. See, e.g., United States v. Bagley, 473 U.S. 667, 674-76 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972). Material evidence includes information that creates a "reasonable probability" of a different outcome, see Kyles, 514 U.S. at 433—and in a capital case that encompasses data that "play[s] a mitigating, though not exculpating, role," see Cone v. Bell, 556 U.S. 449, 475 (2009). But make no mistake: "A reasonable probability does not mean that the defendant 'would more likely than not have [gotten] a different [result] with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence'" in the proceeding's outcome. See Smith v. Cain, 565 U.S. 73, 75 (2012) (last alteration in original) (quoting Kyles, 514 U.S. at 434). To find the withheld evidence not material, the judge must conclude that the other evidence is so overwhelming that, even if the undisclosed evidence had gotten in, there would be no "reasonable probability" of a different result. And this standard is not met just because the government "offers a reason that the jury *could* have disbelieved [the withheld evidence], but gives us no confidence that it *would* have done so." Id. at 76.

Several pages earlier we noted how the judge ruled that the government had already given the defense the gist of Todashev's statements and so the sought-after material did "not materially advance [the mitigation] theory beyond what is already available to the defense." But as we also explained, that material had information that the defense never saw below, including: that Tamerlan planned the Waltham crime, got Todashev to join in, and brought the key materials (gun, knives, duct tape, and cleaning supplies) to the apartment; that Tamerlan thought up the idea of killing the three men to cover up the robbery; and that Todashev felt "he did not have a way out" from doing what Tamerlan wanted. Todashev's confession showed—probably more than any other evidence—how and why Tamerlan inspired fear and influenced another to commit unspeakable crimes and thus strongly supported the defense's arguments about relative culpability. And armed with these withheld details, the defense could have investigated further and developed additional mitigating evidence. To us, this means there is a reasonable probability that the material's disclosure would have produced a different penalty-phase result. So the confession constituted Brady material, making it reversible error for the judge to rule the evidence off-limits from discovery.

And we find that the judge also erred by relying on the qualified law enforcement investigatory privilege. As the party asserting the privilege, the government had the burden of showing that withholding the FBI report and recordings would achieve the privilege's "underlying purpose" of not jeopardizing an ongoing investigation. See Puerto Rico, 490 F.3d at 62-64 (recognizing "a qualified privilege for law enforcement tech-

niques and procedures"). The showing must be specific not speculative, concrete not conclusory. See id. at 62. But the government offered no specific ways in which disclosure would have endangered the ongoing Waltham-murders investigation—particularly if disclosure occurred under a protective order. See Ass'n for Reduction of Violence v. Hall, 734 F.2d 63, 66 (1st Cir. 1984) (emphasizing that where possible, a court should accommodate a moving party's interest in disclosure through excising privileged sections, editing or summarizing documents, or okaying discovery subject to a protective order). The Waltham murders occurred in 2011. By 2015, when Dzhokhar's penalty phase began, the only identified suspects—Tamerlan and Todashev—were both dead. And the government did not ask the district attorney's office to explain whether and why the privilege was still viable. Ultimately, the judge's speculation about how disclosing Todashev's statements might compromise the investigation was just that: *speculation*. Which as we just observed is not sufficient.

The long and the short of it is that the judge's handling of the Waltham evidence provides an additional basis for vacating Dzhokhar's death sentences.[51]

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[51] Judge Kayatta does not join in this section of our opinion entitled Mitigation Evidence About Tamerlan's Possible Homicidal Past to the extent it finds an abuse of discretion in refusing to admit the Todashev statements themselves. He does agree that the fact of the Waltham murders, the fact that law enforcement had probable cause to suspect Tamerlan as the perpetrator, the relationship of one of the victims to Tamerlan, and Dzhokhar's professed understanding of Tamerlan's involvement as reflected in the Kadyrbayev letter, collectively satisfied the low threshold for admissibility in the penalty phase of the trial.

Mitigation Evidence About Dzhokhar's Mental Condition

We now consider Dzhokhar's claim that the judge infracted his constitutional right against compelled self-incrimination and the criminal rules of procedure by conditioning the admission of his "non-testimonial neuropsychological evidence" on his "be[ing] interrogated, without limits, by government experts."

Background

A death-penalty defendant wishing to make an issue of his mental health and present expert evidence on that subject must notify the government within specified time limits. See Fed. R. Crim. P. 12.2(b). If he does that, the judge may order a rebuttal exam by the government's expert "under procedures ordered by the [judge]." See Fed. R. Crim. P. 12.2(c)(1)(B). Judges often appoint assistant U.S. attorneys from another district as "firewalled" attorneys to handle this process. See, e.g., United States v. Sampson, 335 F. Supp. 2d 166, 244-45 (D. Mass. 2004). The results and reports from a rebuttal exam must be sealed and not given to the prosecution or the defense unless the defendant is found guilty and confirms his intent to rely on mental-condition evidence during the penalty phase. See Fed. R. Crim. P. 12.2(c)(2). If this happens, the defendant must then give the government any results and reports of his mental condition "about which [he] intends to introduce expert evidence." See Fed. R. Crim. P. 12.2(c)(3). But prosecutors cannot use any statement he made during an exam conducted under this regime unless he first introduces evidence of his mental condition, see Fed. R. Crim. P. 12.2(c)(4)—a rule designed to protect a defendant's Fifth Amendment privilege against compulsory

self-incrimination,[52] see Fed. R. Crim. P. 12.2 advisory committee notes. See also generally Estelle v. Smith, 451 U.S. 454, 466-69 (1981) (recognizing that a psychiatrist's court-ordered competency exam in a capital case raised the same Fifth (and Sixth) Amendment concerns as an in-custody interrogation by law enforcement); Buchanan v. Kentucky, 483 U.S. 402, 424 (1987) (explaining that if a defendant tries to establish a mental-status defense, the government may constitutionally force him to submit to an interview with a mental-health expert for "limited rebuttal purpose[s]").

Citing Criminal Rule 12.2, Dzhokhar's lawyers filed a pretrial notice of intent to introduce expert evidence about "his mental condition as it bears on the issue of punishment." Simultaneously, they told the prosecution that they planned on presenting "neuropsychological testimony" that would rely on the results of various tests done on Dzhokhar (an intelligence test, for example). The judge created a separate sealed docket and appointed two fire-walled assistant U.S. attorneys from Connecticut and New York to manage the government's rebuttal exams and to represent the government in any related litigation. In an ex-parte proffer to the judge, Dzhokhar's attorneys claimed that the neuropsychological and neuroimaging exams revealed information that would support his mitigation theory.[53]

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[52] The self-incrimination clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[53] Ex parte is a Latin phrase basically meaning only one side is heard—"[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an

Through the fire-walled attorneys, the government told the defense that it intended to have two experts examine Dzhokhar. The first would do a clinical interview of him and administer some tests (the just-mentioned intelligence test being one of them). The second would do a psychiatric exam focusing on his "life choices," especially "those decisions and actions underlying the charged criminal conduct," while also "explor[ing] the effects, if any of [his] social history, personality, mental state, social environment, family influences, peer pressure, and any duress to which [he] may have been subjected."[54]

The defense objected to the government's notice. Insisting that prosecutors have "only a limited rebuttal right," the defense asked the judge to limit the exams of the government experts to "the same type of testing conducted by the defense experts"—*i.e.*, "objective" tests, like the "computer based tests," "pen and paper tests," "physical tests," and "neuroimaging test[s]" that the defense experts used. None of these tests, the defense argued, would elicit or rely on statements by Dzhokhar expressing his views about his own symptoms or history. So according to the defense, the judge had to bar the government experts from "asking questions beyond those specified in the test instruments themselves, or otherwise engaging [Dzhokhar] in any com-

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adverse interest." See *Ex Parte*, Black's Law Dictionary (11th ed. 2019).

[54] The government also indicated that it wanted Dzhokhar to undergo some brain-imaging scans, with a third doctor then analyzing the results. But the defense has not complained about this proposed testing, either below or here.

munication intended to elicit testimonial evidence, including[] opinions, view[s], beliefs, historical information or anything else." That is because asking such questions would "compel him to testify against himself," or so the defense contended.

Responding, the fire-walled attorneys argued that Dzhokhar could not "dictate and limit" their experts' "testing by selecting certain tests and then objecting to different tests that inform the subject matter under inquiry." Dzhokhar, they noted, had not revealed exactly "what type of mental disease or defect defense he is intending to assert"—though they suspected he would "claim that he was particularly susceptible to his brother's persuasion" based on "a dependent personality disorder." And they insisted that the government's proposed exams would rebut that claim by showing he could think independently. Admittedly, some of the information the experts got might not be admissible, they said —but they insisted that "curtailing the government's right to *prepare* at this juncture d[id] nothing more than allow the defendant to present completely uncontradicted testimony."

After a hearing, the judge overruled Dzhokhar's objection. Rule 12.2 did not "limit[] the rebuttal to simply the same . . . tests or investigations" that the defense performed, the judge said. "[A]n appropriate rebuttal," the judge pointed out, might be "to say that the wrong tests were done or that insufficient tests were done." The judge did not want to prevent the government experts from using tests that they in their "professional judgment" deemed "appropriate." But the judge made clear that his ruling did not "mean necessarily"

that the exams' results would be "admissible" or "usable" at trial—it all depended on what the "defense present[ed]." Attempting one last stand, defense counsel argued that "we are offering nothing testimonial from [Dzhokhar]," just "the results of pen-and-paper tests." So the defense asked the judge to "make the rebuttal call now as opposed to exposing [him] to an interrogation by a government agent, essentially." But the judge remained unmoved. "I don't think I can make it until I know what the exam[s] might reveal and what [any government expert] might be offered to say." Consequently, the exams could go forward, even though they "may not produce admissible evidence"—an approach that he said posed no constitutional problems.

After the ruling (but before the government experts could examine him), Dzhokhar withdrew his Rule 12.2 notice. "The broad scope" of the planned exams, his lawyers wrote, "without the presence of counsel," plus "the use the [judge] indicated can be made" of the exams' results, violate Dzhokhar's constitutional rights and clash with Rule 12.2. As the defense saw things, "[t]hese conditions separately and cumulatively impose too great a cost on the introduction of [his] proposed [mental-health] evidence."

Basic Appellate Arguments

Broadly speaking, Dzhokhar claims that the judge created a "constitutional mismatch." In his telling, the results of the testing he planned to introduce were not testimonial in any constitutional sense. During his test-taking—which he calls a "pen and paper" exercise, like having his "reflexes" evaluated—he neither offered his beliefs or thoughts on "historical or life events," nor talked about "the crimes charged against him[] or his

family background." Contrastingly—at least according to Dzhokhar—and "as the price of" admitting his "non-speech" mental-health evidence, the judge essentially ruled that the government experts could interrogate him on a wide range of topics, including "the charged criminal conduct." And, the argument goes, by setting this price, the judge forced him to withdraw his notice, damaging his mitigation case—which violated his rights both under the Fifth Amendment and Rule 12.2.

The government counters with several arguments. Among other things, the government contends—citing Luce v. United States, 469 U.S. 38 (1984)—that by withdrawing his Rule 12.2 notice and not presenting his mental-health evidence, Dzhokhar failed to preserve this issue for appeal. Preservation aside, the government claims that he cannot show that the Fifth Amendment privilege—which protects against real rather than speculative dangers—actually applied here. The judge did not order him to submit to any mental-health exams, the government notes, and prosecutors did not comment on his failure to introduce mental-condition evidence—which makes this situation the direct opposite of compulsory. Also, the government reminds us, the judge repeatedly said that he would not necessarily admit the results of the government experts' exams. And, the argument proceeds, even if the judge did admit the exam results, prosecutors could only use them for rebuttal purposes—which the government says is perfectly permissible under Kansas v. Cheever, 571 U.S. 87, 94, 98 (2013). Additionally, to quote again from the government's brief, Dzhokhar's mental-health evidence "would have had little or no mitigating effect," because other evidence rebutted what the government surmises was

his mitigation defense (the government highlights testimony about his academic achievements, like his getting mostly A's in middle school).

Pertinently for our purposes, Dzhokhar's reply contests the government's preservation point. As he sees things, a pair of Supreme Court cases—Brooks v. Tennessee, 406 U.S. 605 (1972), and New Jersey v. Portash, 440 U.S. 450 (1979)—allows a defendant to challenge on appeal obstacles that "'reach[] constitutional dimensions' without first taking the stand," which he argues is the situation here.

Analysis

The parties note that different standards of review may come into play here: for instance, fresh-eyed review ("de novo," in legal parlance) for claims involving the judge's interpretation of the protections provided by privilege against forced self-incrimination, see Amato v. United States, 450 F.3d 46, 49 (1st Cir. 2006), but abuse-of-discretion review for claims about the exclusion of testimony under Rule 12.2, see United States v. Cartagena-Carrasquillo, 70 F.3d 706, 710 (1st Cir. 1995), and for claims concerning the scope of rebuttal testimony, see United States v. Sebaggala, 256 F.3d 59, 66 (1st Cir. 2001).

Often "[t]he simplest way" to decide an issue is "the best." See Stor/Gard, Inc. v. Strathmore Ins. Co., 717 F.3d 242, 248 (1st Cir. 2013) (quoting Chambers v. Bowersox, 157 F.3d 560, 564 n.4 (8th Cir. 1998) (R. Arnold, J.)). And that is so here.

Skipping over the parties' preservation points (which lets us avoid having to work through a complex series of

arguments and cases), we conclude that Dzhokhar's reliance on the Fifth Amendment privilege fails. To get anywhere, he must show that he had "reasonable cause to apprehend danger" from submitting to interviews with the government experts, see Hoffman v. United States, 341 U.S. 479, 486 (1951)—for as the Supreme Court has long emphasized, "the privilege protects against real dangers, not remote and speculative possibilities," see Zicarelli v. N.J. State Comm'n of Investigation, 406 U.S. 472, 478 (1972). But the judge here said over and over again that he would not automatically admit the results of the government experts' exams, and that even if he did admit them, prosecutors could use them only for "rebuttal"—which is copacetic under the Fifth Amendment. See Cheever, 571 U.S. at 94, 98. So no appreciable danger of a Fifth Amendment violation would have arisen unless (1) Dzhokhar incriminated himself during the government experts' exams, (2) he still chose to present mental-health evidence, (3) the judge let a government expert testify based on Dzhokhar's self-incriminating comments, and (4) the expert's testimony was not proper rebuttal. To ask us to find this rank conjecture sufficient (as Dzhokhar does) is asking too much. See Minor v. United States, 396 U.S. 87, 98 (1969) (explaining that one must show "'real and appreciable' risks to support a Fifth Amendment claim").

On then to another issue.

Surviving Victims' Testimony

In this section we tackle Dzhokhar's claim that the judge erred by admitting "victim impact" testimony by survivors at the penalty phase. As briefed here, his

challenge is factually and legally intricate. But because there is a straightforward route to resolving it, we can streamline and simplify our discussion.

The FDPA says that when the government seeks a death sentence, it must "serve on the defendant[] a notice . . . setting forth the aggravating factor or factors" it believes justify the death penalty. 18 U.S.C. § 3593(a). In its notice here, prosecutors specified several statutory aggravators they envisioned proving in pursuing the death penalty against Dzhokhar—including:

- his "knowingly creat[ing] a grave risk of death to 1 or more persons in addition to" the victims who died, see 18 U.S.C. § 3592(c)(5);
- his "committ[ing] the offense in an especially heinous, cruel, and depraved manner in that it involved serious physical abuse to the victim," see id. § 3592(c)(6); and
- his "committ[ing] the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism," see id. § 3592(c)(9).

The notice also listed several nonstatutory aggravators, see id. § 3593(a)(2)—including:

- his "target[ing] the Boston Marathon, an iconic event that draws large crowds of men, women[,] and children to its final stretch, making it especially susceptible to the act and effects of terrorism"; and
- his "participat[ing] in additional uncharged crimes of violence," like "assault with intent to maim, mayhem[,] and attempted murder."

Dzhokhar's appellate argument only focuses on the victim-impact aggravator. And it proceeds in four steps: (1) He notes (emphasis ours) that § 3593(a)(2) provides that nonstatutory aggravators

> may include factors concerning *the effect of the offense on the victim and the victim's family,* and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

(2) He then says that the reference to the "victim and the victim's family" precludes penalty-phase testimony on "the impact of survivors' injuries on those survivors (or their families) themselves." (3) That is so, he contends, because even though this FDPA subsection does not define "victim," Congress used "victim" in three other subsections and in the Act's legislative history to refer to a "victim" who died.[55] And (4) asking us to ap-

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[55] The provisions he cites are: 18 U.S.C. § 3591(a)(2) (referring to offenses where the defendant "killed the victim," offenses that "resulted in the death of the victim," and offenses where the "victim died"); 18 U.S.C. § 3592(a)(7) (listing as a mitigating factor the fact that the victim "consented to the criminal conduct that resulted in the victim's death"); and 18 U.S.C. § 3592(c)(5) (providing for an aggravating factor where the defendant "created a grave risk of death to 1 or more persons in addition to the victim of the offense"). The legislative history he quotes says that the "aggravating factors for which notice is provided may include factors concerning the effect of the offense on the victim and the victim's family" and that "[t]he effect on the victim may include the suffering of the victim in the course of the killing or during a period of time between the infliction of injury and resulting death." H.R. Doc. No. 102-58, at 166 (1991).

ply the usual rule of statutory interpretation that identical words bear identical meaning throughout the same act, he believes that such an analysis should lead us to conclude that the judge misinterpreted the statute to allow "victim impact evidence from surviving victims at the penalty phase."

If preserved, we review challenges to the judge's interpretation of the FDPA afresh (*i.e.*, de novo), see United States v. Troy, 618 F.3d 27, 35 (1st Cir. 2010), and challenges to his rulings admitting or excluding evidence for abuse of discretion, see Sampson I, 486 F.3d at 42. Dzhokhar says he preserved his challenges at trial; the government says he did not and so must now prove plain error on the judge's part. A famously demanding standard, plain error requires the proponent to show not just error, but error that is plain, that affects his substantial rights, and that seriously impaired the fairness, integrity, or public perception of the trial. See, e.g., United States v. Takesian, 945 F.3d 553, 563 (1st Cir. 2019). Because we see no error in any event, we need not resolve their dispute about the standard of review.

We can leave the resolution of the interpretive question about the FDPA for another day, because (as the government notes) even assuming *without granting* that Dzhokhar is correct here, the surviving spectators' testimony had relevance to the jury's weighing of aggravating factors other than victim impact.[56]

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[56] Dzhokhar accepts, as he must, that "surviving victims—like any other witnesses—may testify at the penalty phase in support of any properly alleged statutory or non-statutory aggravating factor relating to the capital charges."

For organizational convenience, the survivors' testimony Dzhokhar complains about can be grouped into these categories:

1. "[R]eactions to facing death": Jeffrey Bauman, for example, described making "peace" with death because he "had a great life." Roseann Sdoia said she knew she "was bleeding out" but resolved to "stay calm and stay conscious" because if she panicked she "would die." And Celeste Corcoran described how she at first "wanted to die" because she was in so much pain but realized she needed to "be there" for her family.

2. "[U]ncertainty about what had happened to other family members": Eric Whalley, for instance, said he and his wife each thought the other had died. And Stephen Woolfenden said he was "terrified" when first responders whisked his son away because he "didn't know if [he] was ever going to see [him] again."

3. "[F]eelings of helplessness watching their injured child or partner suffer": Rebekah Gregory, for example, said she could hear her son calling "mommy" after the blast and felt "helpless as a mother" because she could not go to him. Lying there on the pavement, she said a prayer, "God, if this is it, take me but let me know that Noah is okay." And Jessica Kensky discussed her frustration at not being able to care for her husband (one of the bombs left his "foot and part of his leg . . . completely detached, hanging on kind of by a thin thread").

4. "[T]he long-term implications of becoming an amputee": Roseann Sdoia, for instance, said her amputation made it "extremely difficult" to learn to walk and run again, and to deal with the snow. Jessica Kensky said becoming a "bilateral amputee" was "terrifying." She wanted to keep "some memory" of her legs, to "paint [her] toenails," and to "put [her] feet in the sand." And the pain from surgeries and treatments was "[a]bsolutely horrendous," putting her "in a very dark place" of "really not wanting to live" anymore. And Adrianne Haslet-Davis said her husband could not attend the trial because he had checked himself into a mental-health facility.

Given how low the relevance threshold is, we cannot say that the judge slipped in finding this evidence at least minimally relevant to an aggravating factor other than victim impact.

The survivors' reactions to facing death (category 1) helped show that Dzhokhar "knowingly created a grave risk of death to 1 or more persons in addition to" the persons who died—a statutory-aggravating factor. See 18 U.S.C. § 3592(c)(5). That they felt they might die helps show they actually faced a grave risk of death. And their specific descriptions of what that felt like made it more likely that the jury would credit their statements about being at death's door. Plus their testimony could help the jury in weighing the grave-risk-of-death factor as part of its death-penalty decision. See Sampson I, 486 F.3d at 44 (upholding admission of graphic evidence about a murder because it "would help the jury to determine how much weight it should give" the aggravating factors). Above and beyond all that,

their testimony could help prove other aggravators—that Dzhokhar substantially planned "an act of terrorism," a statutory-aggravator, see 18 U.S.C. § 3592(c)(9); and that he "participated in additional uncharged crimes of violence" like "assault with intent to maim, mayhem[,] and attempted murder," a nonstatutory aggravator.

The survivors' uncertainty regarding what happened to their family members (category 2) was relevant to the grave-risk of-death aggravator. See id. § 3592(c)(5). In most cases, family members got separated because so many victims were on the verge of dying that rescuers had to evacuate them as soon as possible. And the multiple family separations highlighted how "grave" the "risk" was. The evidence was also relevant to the statutory terrorism aggravator. It is hard to think of anything more terrifying than to lose track of one's child or parent in a life-or-death situation. The evidence was additionally relevant to a nonstatutory aggravator—that he "targeted the Boston Marathon," an event "especially susceptible to the . . . effects of terrorism" because of its "large crowds of men, women[,] and children."

The survivors' feelings of helplessness as loved ones suffered (category 3) was relevant for the same reasons. Their inability to aid their family members after the bombings magnified the terror that Dzhokhar sought to create.

Finally, the testimony about the long-term implications of becoming an amputee (category 4) helped establish the statutory grave-risk-of-death aggravator. The survivors' comments about surgeries and suicidal thoughts showed that the risk of death continued past the immediate aftermath of the bombings. And the

long-term effects of their injuries were directly relevant to the existence and weight of these factors.

Enough said about the surviving victims' testimony.

Whole Foods Video

We now take up Dzhokhar's challenge to the admission of a video showing him buying milk at a Whole Foods soon after the bombings. What he essentially wants us to do is to remand for a hearing on his claim that agents derived the video from involuntary statements he made at the hospital after his arrest. Each side spends much energy debating two principal points. The first is whether Dzhokhar waived this claim—the government says he did just that by not moving to suppress the video before trial; while Dzhokhar says prosecutors made a pretrial promise not to use his confession, which excuses any untimeliness in his raising the claim. The second is whether agents discovered the video through an independent source untainted by any constitutional violations—the government says a tip from Tamerlan's wife led agents to the video; while Dzhokhar (noting the government identified her as the tipster *after* he had filed his opening brief) says his involuntary statements (not his sister-in-law's tip) steered the agents to the video. But because Dzhokhar is getting another penalty-phase trial, the parties and the judge should address these matters—*e.g.*, was the source for the video genuinely independent of his hospital confession, and if not, was the confession voluntary?—if the government again opts to offer the video into evidence and Dzhokhar objects.

An Expert's Testimony About ISIS and the Prosecution's Use of an Islamic Song and a Photo of Dzhokhar Raising His Middle Finger

In the next section of his opening brief, Dzhokhar raises three claims. He first knocks the judge for wrongly admitting (in the guilt phase) expert testimony on ISIS (the popular acronym for the Islamic State of Iraq and Syria). He then accuses the prosecutor of committing misconduct by juxtaposing (in the guilt-phase closing) a photo slideshow of the post-bombing carnage with a recording of an Islamic song found on a computer in Tamerlan's home that Dzhokhar used to surf the internet. And he lastly accuses another prosecutor of committing misconduct by displaying (in the penalty-phase opening) posters of the four murder victims beside a photo of him raising his middle finger at a cell-block security camera.

Background

Before trial, the defense had moved to exclude any expert testimony "about terrorist leaders and attacks in which [Dzhokhar] was not involved" unless the government could show that he knew of the materials under discussion and "endorsed" or "absorbed" them. The judge did not rule on the motion until just before the prosecution called Dr. Matthew Levitt as an expert witness on international terrorism during the guilt phase. Recognizing that Federal Rule of Evidence "403 is an important consideration," and cautioning the government not to "step too far on this," the judge denied the motion, saying that Levitt could "testify about the history of recent terrorist activity, particularly the encour-

agement of jihadi actions by particular prominent figures." The government, for its part, promised to be "very sensitive" to the defense's concerns.

Levitt talked to the jury about the "global jihad movement." What drove this movement, he said, was not a formal organizational structure but a decades-old "idea" that "there is a need for a global effort on behalf of Muslims to unite as a nation" and to "defend itself" through "acts of violence." The movement's ideology, he added, permitted the killing of innocents and focused its wrath on the United States. And, he further explained, calling on followers to conduct independent terrorist attacks "at home" had "become a major theme of radical propaganda."

Levitt noted that this was true not only of "al-Qaeda" but "now [also] the so-called Islamic state or ISIS." The defense objected to "bringing in" ISIS. But the judge ruled the testimony admissible "[a]s . . . general background." Levitt then said that "ISIS"—which both fought and cooperated with al-Qaeda—"is the latest incarnation of this global jihad movement." And he explained that "ISIS, like al-Qaeda, has glossy magazines" and "very impressive online radical and radicalization literature" that tells supporters they "don't have to come" to a foreign battlefield—"just do something back home."

Later in his testimony, Levitt described how the conflict in the Russian republic of Chechnya had become a "rallying cry" that jihadists used to "radicalize people." He then said that the "Syrian conflict"—which started "four years" before in 2011—had also "become a rallying cry around the world." The defense objected "to the whole discussion of Syria that goes beyond the date of

any of the events alleged in the indictment"—to which the judge said, "Overruled." Levitt then explained that "[s]ticking even to the first two years of the Syrian conflict two years ago," there were "different things that drew jihadis to this conflict," including "jihadi ideology and want[ing] to go fight with the next incarnation of al-Qaeda."

We fast-forward to the prosecution's guilt-phase closing arguments. There, the prosecutor argued that the Tsarnaev brothers had been "radicalized to believe that jihad was the solution to their problems." He reviewed the evidence of Dzhokhar's radical beliefs—which included Dzhokhar's boat manifesto, plus his "library" of jihadist videos, writings, and "nasheeds" (Islamic chants) that Dzhokhar watched, read, and listened to on his computer and other devices. He noted that after the Tsarnaev brothers carjacked Dun Meng, they "went back to Watertown" to get "a CD containing those jihad nasheeds on it" for some "portable inspiration" as they continued their escape. He also noted that Dzhokhar had created a twitter account with the display name "Ghuraba"—an Islamic word that means "stranger."

Later in his guilt-phase closing, the prosecutor said that Dzhokhar had "murdered four people" and "wounded hundreds" to "make a statement" and to "be a terrorist hero." "This is how [Dzhokhar] saw his crimes," the prosecutor stated while displaying a PowerPoint presentation. The presentation combined photos with the audio of a nasheed. Involving a singer chanting "Ghuraba" repeatedly, the nasheed played over a slide of bombmaking instructions (from *Inspire*, al-Qaeda's English-language magazine), a photo of Dzhokhar seated in front of a black flag with Arabic

script, and three images of severely wounded victims in the aftermath of the bombings. The nasheed played for about 19 seconds. After the chanting stopped, the prosecutor said that "this is the cold reality of what his crimes left behind." And then he showed additional slides of the bombings' aftermath in silence.

Calling the prosecutor's playing "this haunting music over the [photos]" a bid to "inflame religious or ethnic prejudice," the defense moved for a mistrial after the guilt-phase summations and before the jury began deliberating (the defense did not object during the closing, probably to not draw undue attention to the presentation). The government responded that both the audio file and the photos were in evidence and that the slideshow provided "perspective" on Dzhokhar's "state of mind, his radicalization." The judge denied the defense's motion, adopting "the government's radicalization position."

We now skip ahead to the prosecution's penalty-phase opening statement. There, the prosecutor displayed on easels 3-foot by 4-foot photos of Lingzi Lu, Krystle Campbell, Sean Collier, and Martin Richard. A fifth easel in the middle had a black cloth covering it. Near the end of her statement, the prosecutor said:

> On July 10th, 2013, almost three months after Dzhokhar Tsarnaev had murdered Krystle Marie Campbell, Lingzi Lu, Martin Richard, and Officer Sean Collier, he was here in this courthouse. He knew the United States had charged him for his crimes. In the room that he was in, there was a video camera. [He] was alone. There was no brother with him. And once more, just as he had done with the boat [in Watertown], he had one more message to send.

The prosecutor then pulled the black cloth off the middle easel, revealing a 3-foot by 4-foot photo of Dzhokhar in his cell thrusting his middle finger at a surveillance camera. Concluding, the prosecutor remarked:

> This is Dzhokhar Tsarnaev, unconcerned, unrepentant, and unchanged. Without remorse, he remains untouched by the grief and the loss that he caused. And without assistance, he remains the unrepentant killer that he is. It is because of who [he] is that the United States will return and ask you to find that the just and appropriate sentence for [him] is death.

After the opening statement, a lawyer for Dzhokhar noted as a "point of record-keeping" that the prosecution had "displayed the cell block photograph" during its opening. Counsel claimed "that the prejudicial" and "inflammatory" effect "of what we think was an out of context and . . . quite distorted still [shot] from the cell block was greatly enhanced . . . by its juxtaposition between these very attractive and touching photographs of the victims in life." The judge did not comment on the issue.

Basic Appellate Arguments

Dzhokhar calls Levitt's ISIS testimony both "irrelevant and prejudicial," noting that the group (which he had no ties to) "was well known for its barbarism at the time of his trial, but unknown—indeed, hardly existent—at the time of his crimes." He labels the prosecution's audiovisual presentation misconduct. According to him, by "pairing religiously evocative images and gruesome photographs of the bombings, and overlaying both with an Arabic chant," the prosecution "played to commonly held biases against Muslims: that they are

foreign, frightening, and violence-prone." And he alleges an instance of misconduct in the prosecution's extracting the image of him "raising his middle finger at a cellblock camera, juxtapos[ing] it with photographs of the four decedents in the case, and then [telling] the jurors"—"with no factual basis"—"that this obscene gesture was [his] 'message' to his victims." All of which, his theory runs, shows the jury voted for death under the influence of "[p]assion and [p]rejudice."

Taking the opposite view, the government argues that Levitt's testimony was more pertinent than prejudicial, because his comments helped the jurors see how the global jihad movement inspires home-grown militants to commit "independent terrorist attacks"—comments he delivered briefly and in an academic tone. The government also defends the propriety of the PowerPoint presentation, saying the playing of "a 19-second audio clip of a nasheed . . . over photos of [Dzhokhar] and the bombing's aftermath" were "tied specifically to the trial evidence regarding [his] inspiration for the bombing." And the government sees no prosecutorial misconduct regarding the middle-finger poster, because—contrary to the defense's representation—the prosecutor did not "say [Dzhokhar's] middle finger was a message 'to his victims'" but instead only said that his "gesture was intended to send the same 'message' that he had written in a boat before his arrest, when he wrote that the bombings were a 'message' to the United States Government."

Analysis

Taking first things first, we consider Levitt's guilt-phase testimony. Preserved relevance and prejudice claims, like these ones, prompt "abuse-of-discretion

review—a famously-deferential standard that requires a challenger to show that no rational person could accept the judge's decision." See United States v. Rodríguez-Soler, 773 F.3d 289, 293 (1st Cir. 2014). But even deference has limits. See United States v. Ayala-García, 574 F.3d 5, 18 (1st Cir. 2009). And our deference reaches its limit here.

The relevance of Levitt's ISIS testimony is hard to see. For example, we do not understand how the actions of a group that did not meaningfully exist before Dzhokhar's crime could have made any fact of consequence more likely (the government admits that the threat posed by ISIS was generally "after the Boston Marathon attacks"). See United States v. Kilmartin, 944 F.3d 315, 335 (1st Cir. 2019) (emphasizing that "[e]vidence is relevant as long as it has some tendency to make a fact of consequence more or less probable"). And calling the evidence "background," as the judge did, does not move the needle. Again, because ISIS barely existed at the time of the bombings, Levitt's testimony could not have provided "background" or "stich[ed] together an appropriate context in which the jury could assess the evidence introduced during the trial." See United States v. McKeeve, 131 F.3d 1, 13 (1st Cir. 1997). And by falsely linking Dzhokhar to this infamously brutal group, the unfair prejudicial effect of Levitt's ISIS comments far outweighed any probative value that it had.

But what saves the government is that this error is harmless beyond a reasonable doubt. See 18 U.S.C. § 3595(c)(2) (explaining that a circuit court cannot reverse or vacate a federal death sentence if the error is harmless beyond a reasonable doubt). Running about

two transcript pages, the contested testimony was briefly given and tonally academic. Plus an overwhelming amount of other evidence showed that Dzhokhar drew inspiration from radical Islamic propaganda, including from articles in a magazine published by al-Qaeda (*Inspire*) and from lectures given by an Imam connected to al-Qaeda. So any suggestion during the guilt phase that he got inspiration from another radical Islamic group (ISIS) would not have affected the jury's sentencing verdict. Moreover, the jurors unanimously found the existence of several statutory intent factors, statutory aggravating factors, and nonstatutory aggravating factors supported the death penalty. And Dzhokhar does not challenge the evidentiary support for any of them. And given the overwhelming force of these factors—driving home the devastating effects of Dzhokhar's actions—we find beyond a reasonable doubt that the jury would have imposed death even if the judge had excluded the ISIS testimony. See generally Jones, 527 U.S. at 404-05 (noting that a reviewing court doing a harmless-error check of a death sentence can consider whether "the jury would have reached the same conclusion" absent the error).

Turning to the prosecutorial-misconduct claims, we note that we review preserved claims de novo (that is, without giving the district judge's decision any weight), and unpreserved claims for plain error. See, e.g., United States v. Sepúlveda-Hernández, 752 F.3d 22, 31 (1st Cir. 2014). The parties dispute whether Dzhokhar preserved all of his claims. But the dispute is academic, because any error also fails on harmless-error review.

When faced with a prosecutorial-misconduct allegation, we first look to see if the prosecutors acted improperly. See, e.g., United States v. Veloz, 948 F.3d 418, 435 (1st Cir. 2020). If they did, we then see if their misconduct "so poisoned the well that the trial's outcome was likely affected," id. (quoting French, 904 F.3d at 124)—"weigh[ing] factors such as the severity of the misconduct, the context in which it occurred, the presence or absence of curative instructions, and the strength of the evidence," United States v. Walker-Couvertier, 860 F.3d 1, 10 (1st Cir. 2017). Ultimately, reversal is justified "only where there would be a miscarriage of justice or where the evidence preponderates heavily against the verdict." United States v. Rodríguez-De Jesús, 202 F.3d 482, 486 (1st Cir. 2000) (quoting United States v. Gonzalez-Gonzalez, 136 F.3d 6, 12 (1st Cir. 1998)).

Both sides have strong arguments. As for the audiovisual presentation, Dzhokhar correctly says that prosecutors offered no proof that the nasheed used had any significance to him (let alone that he ever played it or that it had any connection to the crimes themselves), and they never played that nasheed during the trial. And the government correctly notes that the presentation consisted of photos and an accompanying audio file that the judge had admitted into evidence. Dzhokhar calls the presentation—scored with a "foreign-sounding soundtrack"—too emotional or frightening, intended not to inform but "to stoke religious bias." To this the government replies—with quotes from United States v. Mehanna, 735 F.3d 32, 64 (1st Cir. 2013) (quotation marks omitted)—that "terrorism-related evidence is often emotionally charged," even "alarming" and "blood curdling," yet "much of this emotional overlay is directly

related to the nature of the [terrorist] crimes." And, the government suggests, if that is true of Mehanna, where the defendant committed no violent acts, it is all the more reasonable to expect emotionally charged evidence and argument here, where Dzhokhar partook in terrorist attacks that killed four and grievously injured hundreds of others.

Rather than resolving this close question, we assume error—though the error did not irreversibly poison the well. As per usual, the judge told the jurors that counsel's arguments are not evidence. And as required by the FDPA, see 18 U.S.C. § 3593(f), the judge told them they could not consider Dzhokhar's religious beliefs or national origin in deciding whether to recommend death. Also as required by the FDPA, they specifically certified in the penalty-verdict form that "consideration of the . . . religious beliefs" or "national origin . . . of Dzhokhar . . . was not involved in reaching" their decision. Last but not least, in the context of this case —with the overwhelming evidence of Dzhokhar's devotion to radical jihadist ideology and with his guilt unquestioned—the jury's penalty-phase verdict was not likely affected by 19 seconds of music played weeks earlier during the guilt phase.

Sounding a familiar refrain, we note that each party makes good points on the next issue too. Dzhokhar insists that by displaying the image of his middle-finger salute alongside photos of those who had died, the prosecutor fueled the jurors' passions by saying—without any factual support—that this was his "message" to the murder victims. The government insists that the prosecutor never said that he was flipping off his victims—rather, she said that what he did was meant to convey

the same "message" as his "boat" manifesto: that a religious duty to wage jihad against the United States justified his actions. And the government reminds us that courts do not lightly infer that a prosecutor intends an "ambiguous remark" to carry its most harmful meaning. Not leaving that claim unanswered, Dzhokhar says that given how the prosecutor displayed the photos, "[t]he inference that these images were related to one another is not only the most damaging meaning, but also the most obvious."

Yet even if the government is wrong and Dzhokhar is right, he cannot win. The evidence overwhelmingly showed his disdain for his victims. Far from simply gesturing at them, he set off a bomb designed to kill them by sending pieces of metal tearing through their bodies. And after doing this, he later tweeted that he was "a stress free kind of guy." So even if the jurors understood the prosecutor as saying that Dzhokhar directed his middle-finger salute at his victims, the prejudice from that inference would pale when compared with evidence of his violently and intentionally killing them —without showing any remorse.

Even though the government won the prosecutorial-misconduct challenges on harmless error, we suggest that prosecutors not to repeat these tactics on remand. And by tactics we mean the prosecution's (a) showing the jury a photo slideshow of the post-bombing carnage scored with a nasheed that had zero connection to the crime itself; and (b) displaying a poster-sized photo of Dzhokhar sticking out his middle finger placed between the same-sized photos of the decedents, thereby implying his gesture constituted his "message" to the victims

—even though no evidence showed he in fact directed his gesture toward the victims.

Penalty-Phase Jury Instructions About Weighing Aggravating and Mitigating Factors

We turn our attention to Dzhokhar's suggestion that the judge stumbled by not telling the jurors that to recommend death they had to find *beyond a reasonable doubt* that the aggravating factors outweighed any mitigating ones.

Background

To place the matter into proper perspective (and to save the reader from having to flip back to a footnote many pages ago), we highlight certain aspects of how capital sentencing works. For a defendant to get a death sentence under the FDPA, the jurors must make several penalty-phase determinations—including: they must find unanimously and beyond a reasonable doubt that he acted with the statutorily required intent, see 18 U.S.C. § 3591(a)(2); they must find unanimously and beyond a reasonable doubt that at least one statutory aggravator is present, see id. § 3593(e)(2); see also id. § 3592(c); and they must find unanimously that the aggravators (statutory and nonstatutory) sufficiently outweigh any mitigators, see id. § 3593(e).

Before the penalty-phase deliberations started, the defense asked the judge to tell the jurors that they could only call for Dzhokhar's death if they found the aggravators outweighed any mitigators "beyond a reasonable doubt." Without hearing any argument, the judge said that "Circuit law" precluded him from giving an instruction like that. The judge probably had in mind Sampson I—a case holding that because "the requisite

weighing constitutes a process, not a fact to be found," a jury need not make the weighing determination beyond a reasonable doubt. See 486 F.3d at 32.

Basic Appellate Arguments

The Supreme Court tells us "that only a jury, and not a judge, may find [beyond a reasonable doubt] facts that increase a maximum penalty, except for the simple fact of a prior conviction." See Mathis v. United States, 136 S. Ct. 2243, 2252 (2016) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). Dzhokhar says that the weighing determination is a "fact[]" that ups a defendant's "maximum possible punishment from life to death." So he argues that the judge erred by not telling the jurors that they had to find the aggravators outweighed the mitigators under the reasonable-doubt standard. He admits that Sampson I forecloses his claim. But he thinks that the Supreme Court "abrogated" Sampson I in Hurst v. Florida, 136 S. Ct. 616 (2016).

The government disagrees. Sampson I, the government says, is still good law because nothing in Hurst weakens Sampson I's holding that the "outweighs" decision—coming into play only after the jurors find the defendant death-eligible beyond a reasonable doubt— is not a fact determination, but a moral one about what is just.

Analysis

Dzhokhar's claim rises or falls on the notion that Hurst requires that jurors make the weighing determination beyond a reasonable doubt. Using our independent (or de novo) judgment, see Sampson I, 486 F.3d at 29, we think his argument must fall.

Hurst invalidated Florida's capital-sentencing scheme. See 136 S. Ct. at 619-20. Under that scheme, "the maximum sentence a capital felon" could get based on "the [jury] conviction alone [was] life imprisonment." Id. at 620. He could get a death sentence only if the judge later determined that (1) "sufficient aggravating circumstances exist" and that (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. at 620, 622 (quotation marks omitted). Hurst said that determination (1)—that sufficient aggravators exist—violated the defendant's constitutional right to a jury trial, because it "impermissibly allowed 'a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.'" McKinney, 140 S. Ct. at 707 (quoting Hurst, 136 S. Ct. at 624). But importantly here, Hurst made no holding regarding determination (2)—that the mitigators do not outweigh the aggravators. See 136 S. Ct. at 624 (summarizing the case as holding that Florida's sentencing procedure, "which required the judge alone to *find the existence of an aggravating circumstance*, is . . . unconstitutional" (emphasis added)).

About a week after Hurst came out, the Supreme Court issued Kansas v. Carr. Carr held that the Constitution does not "require[] capital-sentencing courts . . . to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt." See 136 S. Ct. 633, 642 (2016) (quotation marks omitted). In doing so, Carr

> doubt[ed] whether it is even possible to apply a standard of proof to the mitigating-factor determination. . . . Whether mitigation exists . . . is

> largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.

Id. And then Carr emphasized the discretionary nature of the weighing process, saying

> the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It *would mean nothing*, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.

Id. (emphasis added).[57]

Carr causes problems for Dzhokhar in two ways. One, if the Supreme Court in Hurst intended to impose the reasonable-doubt standard on the weighing process —as Dzhokhar argues—the Court in Carr would not have said days later that telling the jury to use that standard "would mean nothing." And two, Carr's "mercy" talk supports Sampson I's statement that "[t]he outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party." See 486 F.3d at 32.

Now consider McKinney v. Arizona, a Supreme Court opinion from this year. McKinney held that

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[57] Dzhokhar calls this passage "dicta" that we can disregard. But Supreme Court dicta are different from other judicial dicta, because "we 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.'" See LaPierre v. City of Lawrence, 819 F.3d 558, 563-64 (1st Cir. 2016) (quoting Cuevas v. United States, 778 F.3d 267, 272-73 (1st Cir. 2015)).

while cases like Hurst require a jury to "find the aggravating circumstance that makes the defendant death eligible," they "did not require jury weighing of aggravating and mitigating circumstances." See 140 S. Ct. at 707-08 (holding that an appellate court can reweigh aggravators and mitigators if the judge failed to properly consider a mitigator). So McKinney helps sink Dzhokhar's claim that Hurst requires the jury to make the weighing determination beyond a reasonable doubt—a view we hold because McKinney makes crystal clear Hurst addressed only the finding of aggravating facts and had nothing to do with the weighing process.

The bottom line of this discussion is that our Sampson I opinion—holding that the reasonable-doubt standard does not apply to the weighing process—remains good law.[58]

Penalty-Phase Jury Instructions About Jury Deadlock

Dzhokhar makes a second claim of instructional error: that the judge botched the proceedings by not telling the jurors that failure to reach a unanimous recommendation on the death penalty would result in his

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[58] Dzhokhar takes another dig at Sampson I, arguing that Sampson I "failed to take account of" United States v. Gaudin, 515 U.S. 506 (1995). Gaudin held that a jury must decide whether a criminal defendant "is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. at 510. And Gaudin further held that materiality, as an element of a false-statement crime under 18 U.S.C. § 1001, is a mixed question of law and fact for the jury to resolve. Id. at 511-12, 522. But nowhere did Gaudin suggest that the weighing determination is an element or fact that a jury must find applying a reasonable-doubt standard. So Gaudin does not help Dzhokhar.

imposing a life sentence without the possibility of release.

Background

As a matter of helpful repetition, we emphasize again that jurors in a federal capital case cannot recommend that a defendant die unless (as relevant here) they unanimously find beyond a reasonable doubt a requisite intent factor and an aggravating circumstance, and then unanimously find that all the aggravators outweigh any mitigators to justify his getting death. See Jones, 527 U.S. at 376-77 (reviewing the FDPA). And if they cannot make a unanimous recommendation, the judge steps in and can impose either a life sentence without release or any lesser sentence allowed by law. See id. at 380-81. The parties concur that jury deadlock on any of these prerequisites here would have resulted in a sentence of life without release.

With this understanding in place, we return to the particulars of Dzhokhar's case—right before the penalty-phase deliberations. The defense asked the judge to tell the jurors that he would impose a sentence of life without release if, after weighing the aggravating and mitigating circumstances, they could not unanimously agree on a sentencing recommendation. The proposed instruction read:

> If the jury is unable to reach a unanimous decision in favor of either a death sentence or of a life sentence, I will impose a sentence of life imprisonment without possibility of release upon the defendant. That will conclude the case. At this sentencing stage of the case, the inability of the jury to agree on the sentence to be imposed does not require that any part of the

case be retried. It also does not affect the guilty verdicts that you have previously rendered.

The defense conceded that the Supreme Court's Jones decision "authorize[d] district courts" to refuse to give such an instruction. See 527 U.S. at 381 (holding that judges are not required to instruct sentencing juries on the consequences of a deadlock in the weighing process). But the defense claimed that without it, the jury might "wrongly assume that a failure to agree on sentence would require the case to be retried before a new jury." And this mistaken belief, the defense added, would "coerc[e]" some jurors into accepting a death verdict to avoid having to "put the victims and the survivors and the entire community through this entire case again."

The judge rejected the defense's request, saying that the suggested instruction could "undercut[]" the "process anticipated by" the FDPA by essentially empowering "one juror" to "simply decid[e] that the decision was his or hers" without sufficiently engaging in the deliberative process. But the judge explained that he would address the defense's coercion concerns by giving "a very strong instruction" that "each individual juror is to give his or her own [verdict] and not agree just to agree with others."

After the parties presented their penalty-phase evidence, the judge told the jurors that they had to decide —unanimously and beyond a reasonable doubt— whether the government established the existence of one of the "gateway" mental-intent factors (which we will later discuss) and one of the statutory aggravating factors. The judge noted that if they could not so

agree, he then would sentence Dzhokhar to life imprisonment without release. But the judge said that if they could so agree, they then had to consider whether the aggravators outweighed any mitigators to justify a death sentence. And if, after the weighing process, they unanimously found that death or life without release was the proper sentence, the judge stated that they should mark the corresponding part of the verdict form.

The judge did not instruct the jurors about what would happen if they deadlocked in making a sentencing recommendation. But he did tell them that "[b]efore you reach any conclusion based on a lack of unanimity on any count, you should continue your discussions until you are fully satisfied that no further discussion will lead to a unanimous decision." And he emphasized that "[a]ny one of you is free to decide that a death sentence should not be imposed," that "[e]ach juror must individually decide" whether to recommend death, and that "no juror is ever required to impose a sentence of death."

The defense later objected to the judge's "refusal" to instruct the jurors about what would occur if they deadlocked on the penalty recommendation.

Basic Appellate Arguments

Dzhokhar criticizes the judge for not telling the jurors that if they could not unanimously agree on whether to recommend death, then he (Dzhokhar) would automatically get life without release. He thinks this because to him the jurors likely drew a "negative inference" from the instructions at earlier stages—*i.e.*, that because the judge said that deadlock at the intent and aggravator stages would result in an automatic life sentence without release, his not saying anything about

deadlock at the weighing stage would cause them to infer that the "failure to reach unanimity" there "would yield a result other than a mandatory life sentence." And, still repeating arguments made below, this "omission[]" (to quote again from his brief) "created an intolerable risk of coercing holdout jurors for life to acquiesce in a death verdict in order to spare the victims' families, the survivors, and the Boston community the significant financial and emotional strain" of a second penalty-phase "trial."

The government takes a diametrically opposed position. It says that the judge's decision not to instruct about the effect of a deadlock on the sentence decision squares with the Supreme Court's Jones opinion. It also says that Dzhokhar's argument about the jurors drawing a negative inference "is speculative at best" and so cannot undermine the judge's ruling.

Analysis

The parties disagree about what standard of review applies to this claim. We review anew (de novo, as the cases say) preserved claims that the jury instructions mislead the jurors, "taking into account the charge as a whole and the body of evidence presented at trial." Sampson I, 486 F.3d at 29. Dzhokhar believes he said enough below to preserve his arguments. The government believes differently. But we assume without deciding that Dzhokhar is correct because he loses here under either standard.

Jones lights the path to decision. Construing § 3594 of the FDPA, Jones held that if the jury fails to reach a unanimous verdict on punishment for a capital crime, the judge must enter a sentence other than death—so

there is no mistrial or second penalty-phase proceeding.[59] See 527 U.S. at 380-81. Jones also held that a judge need not tell the jurors about the consequences of deadlock at that stage. See 527 U.S. at 381, 384. "[I]n a capital sentencing proceeding," Jones explained, "the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" Id. at 382 (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988)). And telling the jurors about the consequences of nonunanimity, Jones said, could undermine those vital interests because it might amount to "an open invitation for the jury to avoid its responsibility and to disagree." Id. at 383-84 (quoting Justus v. Virginia, 266 S.E. 2d 87, 92 (Va. 1980)). Jones also stressed that if a defendant thinks the judge's charge "caused jury confusion," he must show "a reasonable likelihood that the jury has applied the challenged instruction[s]" in a legally flawed way. Id. at 390 (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)).

Dzhokhar has not shown a reasonable likelihood that the jury applied the instructions incorrectly. Our reasons for so concluding are threefold.

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[59] Section 3594 says:

> Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. § 3594.

In the first place, the judge's instructions that he would sentence Dzhokhar to life without release if the jury deadlocked at the intent-and-aggravator-factor stages passed legal muster. See Jones, 527 U.S. at 380-81. So too did the judge's decision not to instruct on the effect of their deadlocking on the sentence decision. See id. at 381-84. Devastating to his claim, Dzhokhar cites no precedent holding that if the judge instructs on the effect of an impasse at one stage, he must also do so at every other stage.

In the second place, Dzhokhar's negative-inference theory—the omission of a consequences-of-deadlock instruction at the weighing stage signaled to the jury that a deadlock there would lead to a mistrial and a new penalty phase—rests on nothing but speculation. See Carr, 136 S. Ct. at 643 (stressing that "[a] meager 'possibility' of confusion is not enough" (quoting Boyde v. California, 494 U.S. 370, 380 (1990))). We doubt that the jurors recognized the inconsistency that his lawyers see, particularly since "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." See Brown v. Payton, 544 U.S. 133, 143 (2005) (quoting Boyde, 494 U.S. at 380-81). But even indulging his speculative inference drawing, we think that the jurors were at least as likely to conclude that the effect of a deadlock at the weighing stage would be the same as at the earlier stage —*i.e.*, that the judge would hand down a sentence of life without release. And even assuming the jurors wanted to avoid a new penalty phase, we believe the instructions could just as easily have caused them to compromise by choosing to recommend life without release. Anyhow, their verdict shows they did not feel compelled to return

a death verdict, given how they recommended life on 11 of the 17 death-eligible counts.

Also hurting Dzhokhar is that Jones rejected a similar negative-inference claim. The Jones defendant claimed that an alleged ambiguity in the instructions might have caused the jury to think that if it failed to reach unanimity on the sentencing issue, the judge might give him a term less severe than life without release. 572 U.S. at 387. But Jones rebuffed this negative-implication argument, holding that the defendant had "parse[d]" the instructions "too finely" and that—after considering the instructions as a whole—the inferences he relied on did not "create a reasonable likelihood" of confusion over the deadlock's effect. Id. at 391-92.

In the third place and finally, Dzhokhar cites no authority holding that an instruction that is constitutionally permissible can become unconstitutionally coercive by ambiguous negative inferences drawn from other instructions. That is probably because the caselaw is against him. For Jones holds "that instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions." Id. at 391. And reviewing the instructions holistically—instructions that stressed that "[a]ny [juror] is free to decide that a death sentence should not be imposed," that "[e]ach juror must individually decide" whether to recommend death, and that "no juror is ever required to impose a sentence of death" (which we presume they obeyed, see Marsh, 481 U.S. at 206)—we see no basis for Dzhokhar's conjecture that any juror was coerced into voting for a death sentence to avoid causing a mistrial.

Ex-Parte Communications

Up for review here is Dzhokhar's claim that a "secret channel of communication" existed between prosecutors and the judge—"repeated private access" that violated his constitutional rights to due process and effective assistance of counsel.

Background

During Dzhokhar's prosecution, the government filed a number of documents ex parte. And the judge held a number of ex-parte conferences with the government. All of this resulted in 26 ex-parte docket entries, involving 4 court orders, 16 government motions or notices, and 6 ex-parte conferences.

As Dzhokhar's appeal moved along, the government (with the judge's approval) voluntarily disclosed 13 of the ex-parte filings to the defense. After some motion practice, the government disclosed a lightly-redacted transcript of an ex-parte conference on the Waltham evidence. So 12 ex-parte items remain undisclosed.

Basic Appellate Arguments

The nub of Dzhokhar's argument is that the judge's "backchannel talks" with the government robbed him of his "Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel." Quoting a decision from us, he points out that

> not only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure [because it invites the question whether] "[t]he firmness of the court's belief [in the prosecutor's position] may well have been due not

> only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship . . . that permitted such [ex parte] disclosures."

See Haller v. Robbins, 409 F.2d 857, 859-60 (1st Cir. 1969). And he notes that the constitutional right to counsel applies to all critical stages of the prosecution. See Lafler v. Cooper, 566 U.S. 156, 165 (2012) (underscoring that this "constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice").

Seeing no violations, the government insists that the in-camera procedures helped the judge "to independently assess whether the materials were discoverable"—and because they "were not" discoverable, Dzhokhar had "no right to obtain them." As support, the government stresses that a judge's ex-parte, in-camera review of documents may be authorized under the Classified Information Procedures Act and Criminal Rule 16(d)(1). See United States v. Pringle, 751 F.2d 419, 426-28 (1st Cir. 1984).[60] And quoting one of our cases, the government adds that the "requirements of confidentiality

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[60] "[E]nacted to limit the practice of criminal defendants threatening to disclose classified information . . . to force the government to dismiss the charges," the Classified Information Procedures Act (among other things) lists a series of rules for preserving confidentiality of classified information and for allowing discrete use of such information. See Dhiab v. Trump, 852 F.3d 1087, 1092 n.9 (D.C. Cir. 2017). That Act defines "[c]lassified information," in relevant part, as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized

[can] outweigh the interest in adversarial litigation and permit a court to rule on an issue *in camera* and without the participation of an interested party." See United States v. Innamorati, 996 F.2d 456, 487 (1st Cir. 1993).

Analysis

The interests on each side of this controversy are profound. And both parties have points in their favor. But reviewing Dzhokhar's legal challenge de novo, see United States v. Lustyik, 833 F.3d 1263, 1267 (10th Cir. 2016)—*i.e.*, without giving the judge's take any special weight—we side with the government.

A criminal defendant's right to an adversary proceeding is central to our system of justice. See, e.g., Innamorati, 996 F.2d at 487. That right includes the right to have counsel at all critical stages of the criminal process. See, e.g., United States v. Cronic, 466 U.S. 648, 654, 659 (1984). But the law permits some exceptions to this norm. See, e.g., Innamorati, 996 F.2d at 487. In exceedingly "rare situations" a judge may act in camera and with the benefit of only the prosecution's views, like when there is a need to stop disclosure of sensitive information—for example (and without limitation), material that could damage national security, see id., compromise an in-progress criminal inquiry, see Puerto Rico, 490 F.3d at 64, or fall outside the rule of Brady v. Maryland, see United States v. Claudio,

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disclosure for reasons of national security." 18 U.S.C. app. 3 § 1(a). And Criminal Rule 16(d)(1) provides that "[t]he court may permit a party to show good cause [for an order restricting discovery] by a written statement that the court will inspect ex parte."

44 F.3d 10, 14 (1st Cir. 1995).[61] And because the point is so powerful and cannot be made enough, we repeat what we said in Innamorati:

> Outside of emergencies, . . . the *ex parte* submission of information from a party to the court and the court's ruling on that information without notice to or participation of the opposing party is fundamentally at odds with our traditions of jurisprudence . . . and can be justified only in the most extraordinary circumstances.

996 F.2d at 487.

The "burden of justification" here is on the government. See Claudio, 44 F.3d at 14. And it is a burden the government has carried.

The government notes that aside from a few documents on a restitution issue (which the judge never ruled on), all of the remaining ex-parte items involve "either classified or otherwise sensitive material" that prosecutors gave the judge for an in-camera review to see if "the material should be protected from disclosure or should instead be produced to the defense."[62] Asking us to take his side, Dzhokhar zeroes in on an ex-parte proceeding held after the defense filed a motion challenging the prosecution's proposed trial exhibits. With the benefit of only the government's presentation, the

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[61] Generally speaking (and as noted earlier), Brady requires the prosecution to give the accused information that is both favorable and material to guilt or punishment. See 373 U.S. at 87.

[62] The government has given Dzhokhar's appellate counsel and us a document (filed under seal) describing the ex-parte materials and explaining why the defense should not get them.

judge there offered some suggestions about how the evidence could best be shown at trial. But neither he nor the government touched on Dzhokhar's objections. We do not understand why the judge had to consider this presentation issue on an ex-parte basis. But given the "unimportance of the material" discussed at this brief hearing, any error "inflicted no prejudice" on Dzhokhar. See Innamorati, 996 F.2d at 488.

As for the other ex-parte communications, we think that the necessity to keep sensitive information from the defense sufficiently justified the procedures employed in this case. And not for nothing, but these ex-parte measures actually helped protect Dzhokhar's due-process rights, for they allowed the judge to review and rule on the materials' discoverability—rather than leaving the decision in the hands of prosecutors. See generally Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) (explaining that "[i]n the typical case where a defendant makes only a general request for exculpatory material under Brady . . . , it is the [government] that decides which information must be disclosed"). On this point Innamorati put it best: "[T]he interests of justice are better served by encouraging the government to let the district court resolve" concerns about sensitive information "in close cases"; and a "[d]efendant[] in general would not gain from a regime that encouraged the government to decide the matter itself." See 996 F.2d at 488. See also generally Ritchie, 480 U.S. at 59-60 (finding the defendant's interest in discovering exculpatory information adequately protected by trial court's in-camera review of sensitive materials).

Dzhokhar does not gain any more traction by turning to the judge's ex-parte, in-camera handling of the Todashev material—proceedings prompted by the government's pressing the qualified law enforcement investigatory privilege. True, we today hold that the judge erred by denying the defense access to these items. But the potentially sensitive nature of the information involved justified the judge's "initial" ex-parte examination. See Innamorati, 996 F.2d at 488. Which is why we applaud rather than criticize the judge's use of established protocols for assessing the merits of this privilege claim.

Not only does Dzhokhar's due-process argument collapse—his right-to-counsel argument does too.

Citing Cronic, Dzhokhar insists that "[t]he *ex parte* communications concerning contested discovery" violated his right to counsel at a "critical stage" of his prosecution. Cronic held that if a defendant was completely denied the right to counsel for a "critical stage" of the trial, we irrebuttably presume that it was harmful (we do not ask whether the error was harmless). See 466 U.S. at 659 & n.25; see also Bell v. Cone, 535 U.S. 685, 695-96 (2002). But Dzhokhar never explains how these ex-parte proceedings qualified as critical stages. Then there is the just-discussed caselaw saying that ex-parte review is appropriate in those "rare" instances where the need to keep sensitive information from the opposing party "outweigh[s] the interest" in inquisitorial proceedings. See Innamorati, 966 F.2d at 487. See also generally Ritchie, 480 U.S. at 60 (recognizing that ex-parte proceedings "den[y]" the defendant "the benefits of an 'advocate's eye,'" but finding no constitu-

tional problem there because the trial judge was "obligated to release information material to the fairness of the trial"). And that takes care of his right-to-counsel theory.

We end here with a caveat. This is a jury trial, not a bench trial where the judge decides the facts. And our reasoning does not necessarily apply to the latter without further consideration.

Fair-Cross-Section Requirement

Dzhokhar contends that an underrepresentation of African Americans in the grand and petit jury wheels violated his right to an impartial jury selected from a fair cross-section of the community.[63] He calls the statistical methodology that our circuit uses to determine underrepresentation—the absolute-disparity method—"legally and statistically unsound."[64] Conceding that we as a three-judge panel are stuck with this circuit's approach, he says that he raises the issue simply to preserve it for possible "en banc or Supreme Court review." So "[f]or present purposes," he adds, "nothing else need be said"—a point with which we agree.

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[63] A jury wheel is "[a] physical device or electronic system used for storing and randomly selecting names of potential jurors." See *Jury Wheel*, Black's Law Dictionary (11th ed. 2019). A grand jury decides whether to indict a suspect. See *Grand Jury*, Black's Law Dictionary (11th ed. 2019). And a petit jury decides whether to convict the indictee. See *Jury: Petit Jury*, Black's Law Dictionary (11th ed. 2019).

[64] The absolute-disparity method "measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members on the jury wheel." United States v. Royal, 174 F.3d 1, 6-7 (1st Cir. 1999) (discussing United States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984)).

Death Penalty for Offenders Under Age 21

That takes us to Dzhokhar's constitutional claim that as a person accused of having committed death-eligible crimes when he was under 21 (he was 19 at the time of the bombings), he is "categorically exempt from the death penalty."

Citing Roper v. Simmons, 543 U.S. 551 (2005), Dzhokhar concedes—as he must—that the Supreme Court has "dr[awn] a bright line" for death eligibility "at age 18." He just thinks that the factors Roper considered relevant in granting death-penalty immunity to persons under 18—that they lack the maturity we attribute to adults; that they are more vulnerable to peer pressure than are adults; and that their personality traits are less fixed, suggesting a higher likelihood of rehabilitation of juveniles than of adults, see id. at 569-79—apply equally to persons under 21. Looking for support, he argues that "scientific research" since Roper "has explained the effects of brain maturation, or the lack thereof, on the behavioral and decision-making abilities of late adolescents in their late teens and early twenties." He also says that there is a "growing national consensus against the death penalty" for offenders between 18 and 20. See Am. Bar Ass'n, Resolution 111 (2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf.

Unimpressed, the government writes that Dzhokhar discusses no research about "brain maturation that is substantially different from the research available" at the time Roper came down. Citing one of his sources, the government also writes that "not a single state with an active death penalty scheme" bans the execution of 18-to-20-year-olds. And if the United States made that

group death-penalty immune, the government adds, quoting another of his sources, it "would be taking an unusual legal stance with respect to prevailing international norms."

Because Dzhokhar did not raise this issue below, we review for plain error—reversing only if (among other requirements) he can show an "indisputable" error, "given controlling precedent." See United States v. Correa-Osorio, 784 F.3d 11, 22 (1st Cir. 2015). This he cannot do, however, given Roper's square holding that 18 is "the age at which the line for death eligibility ought to rest." See 543 U.S. at 574. The change he proposes is certainly worthy of careful consideration. As members of what the Constitution calls an "inferior" court, see U.S. Const. art. III, § 1, we simply note that whether a change should occur is for the Supreme Court to say —not us, see Morey v. United States, 903 F.2d 880, 883 (1st Cir. 1990).

Crime of Violence

We end with Dzhokhar's challenge to five convictions for using a firearm during a "crime of violence."

Background

The jury convicted Dzhokhar of (among other crimes) multiple violations of 18 U.S.C. § 924(c). As relevant here, that section has two prongs: the "use or carry" prong and the "possession" prong. The first punishes anyone who "during and in relation to any *crime of violence* . . . uses or carries a firearm." Id. § 924(c)(1)(A) (emphasis added). The second punishes anyone who "in furtherance of *any such crime*[]

possesses a firearm." Id. (emphasis added).[65] The statute carries hefty minimum prison terms, especially for recidivists (and these sentences are over and above the ones they get for the underlying crime). See id. § 924(c)(1)(A)-(C). Another provision increases the maximum penalty to death if the defendant, "in the course of a violation of subsection (c)," kills "a person through the use of a firearm" and the killing is a murder as defined in the federal murder statute. See id. § 924(j)(1).

Section 924(c) defines "crime of violence" (a phrase we italicized above) as "an offense that is a felony" and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3). Courts commonly call subsection (A) the "elements clause" (sometimes also referred to as the "force clause") and subsection (B) the "residual clause." See, e.g., United States v. Davis, 139 S. Ct. 2319, 2324 (2019).

Two methods exist for deciding if a prior crime is a crime of violence: the "categorical approach" and the "modified categorical approach." See, e.g., United States v. Taylor, 848 F.3d 476, 491-92 (1st Cir. 2017).

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[65] Critically for present purposes, "firearm" includes "destructive device[s]" such as bombs. See 18 U.S.C. § 921(a)(3)-(4).

If the prior crime involved a violation of an "indivisible" statute—*i.e.*, one that "sets out a single . . . set of elements to define a single crime"—we apply the categorical approach. See Mathis, 136 S. Ct. at 2248. That means we see whether the prosecution had to prove that the defendant used, attempted to use, or threatened to use physical force against the person or property of another—not whether he actually did. See id. And because we care only whether the prior crime requires physical force—not whether his criminal conduct involved physical force—we focus on the least forceful conduct generally criminalized under the statute, knowing that there must be a realistic probability the statute would be used to criminalize the conduct. See United States v. Báez-Martínez, 950 F.3d 119, 124 (1st Cir. 2020). And "physical force" here means "force capable of causing physical pain or injury" to a person or physical damage to property. See Johnson v. United States, 559 U.S. 133, 138-40 (2010) ("Curtis Johnson"); see also Davis, 139 S. Ct. at 2325-26.

Alternatively, if the prior crime involved a violation of a "divisible" statute—*i.e.*, one that defines multiple crimes with distinct elements—we apply the modified categorical approach (if the statute simply lists different means of committing a single crime, then it is indivisible and we use the categorical approach). See Mathis, 136 S. Ct. at 2249. This approach allows us to look beyond the face of the statute to a limited set of documents—known as "Shepard documents," which include the indictment, jury instructions, and verdict forms—to see "what crime, with what elements," the defendant committed. See id. (discussing Shepard v. United States, 544 U.S. 13 (2005)); see also United States v. Delgado-

Sánchez, 849 F.3d 1, 8 (1st Cir. 2017). But the approach "serves a limited function," namely, to "help[] effectuate the categorical analysis" when we are faced with a divisible statute—in other words, after reviewing the relevant documents and identifying the specific crime underlying the defendant's conviction, we must then apply the categorical approach to that crime to see if it is a crime of violence. See Descamps v. United States, 570 U.S. 254, 260 (2013).

Days after the judge sentenced Dzhokhar—giving him death on some of the death-eligible counts and various concurrent and consecutive terms on the remaining counts (including 20 life terms)—the Supreme Court invalidated the Armed Career Criminal Act's similarly worded residual clause as unconstitutionally vague. See Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) ("Samuel Johnson"). For easy reading, we shorten Armed Career Criminal Act to "ACCA." The ACCA's residual clause defined "violent felony" as any crime punishable by a term of imprisonment exceeding one year that "involves conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. § 924(e)(2)(B). In tossing out that residual clause, Samuel Johnson (in brief) found "[t]wo features of the [ACCA's] residual clause" troublesome: it "leaves grave uncertainty about *how* to estimate the risk posed by a crime" and "about *how much* risk it takes for a crime to qualify as a violent felony." See 135 S. Ct. at 2557-58 (emphasis added).

Relying on Samuel Johnson, Dzhokhar moved for a judgment of acquittal on all of the § 924(c) counts. He also asked for a new penalty-phase trial as well. Ac-

cording to his motion, the judge had told the jury (without objection) that all of the "predicate" offenses—malicious destruction of property, for example, or conspiracies to use a weapon of mass destruction, to bomb a place of public use, and to maliciously destroy property—constituted crimes of violence as a matter of law. But, he noted, the judge did not say which of § 924(c)'s clauses applied to which predicate. Insisting that the government could no longer rely on the residual clause after Samuel Johnson, he also claimed that none of the predicates categorically qualified as a crime of violence under the elements clause.

Opposing the motion, the government argued first that Dzhokhar had waived his challenge to the § 924(c) counts by not raising it sooner. The government premised this argument on two theories: that Dzhokhar had to raise defects in the indictment before trial and that he had to object to the judge's crime-of-violence instructions either before or after the judge gave them. Waiver aside, the government also argued that the different wordings between § 924(c)'s residual clause and the ACCA's residual clause made Samuel Johnson's void-for-vagueness analysis inapplicable to Dzhokhar's case. And relying on Curtis Johnson, the government insisted that the predicates qualified as crimes of violence under the elements clause because they involved the use, attempted use, or threatened use of violent physical force against the person or property of another.

The judge denied Dzhokhar's motion, finding § 924(c)'s residual clause not impermissibly vague and each contested predicate a crime of violence under the elements clause. In a footnote, the judge theorized how Dzhokhar may have waived any argument that the predicates

failed to satisfy the elements clause. But the judge did not resolve the waiver issue because he found no error.

During the briefing phase of this appeal, the Supreme Court issued an opinion declaring § 924(c)'s residual clause overly vague. See Davis, 139 S. Ct. at 2336. With Davis on the books, that leaves only one potential path for treating the predicates as crime-of-violence offenses: the elements clause, a provision (as we said) that sweeps in crimes having "as an element the use, attempted use, or threatened use of physical force," see 18 U.S.C. § 924(c)(3)(A)—*i.e.*, "force capable of causing physical pain or injury" to a person or physical damage to property, see Curtis Johnson, 559 U.S. at 140.

Basic Appellate Arguments

On appeal Dzhokhar limits his challenge to five § 924(c) convictions involving Counts 13, 15, 16, 17, and 18. Counts 13 and 15 alleged as predicates the malicious destruction of property, colloquially known as arson, resulting in death (as charged in Counts 12 and 14, respectively). See 18 U.S.C. § 844(i). And Counts 16, 17, and 18 alleged as predicates conspiracies to use a weapon of mass destruction, to bomb a place of public use, and to maliciously destroy property, all resulting in death (as charged in Counts 1, 6, and 11, respectively). See 18 U.S.C. §§ 2332a(a)(2), 2332f(a)(1) and (2), 844(i) and (n).

In essence, Dzhokhar's position boils down to this. Arson—the predicate crime for Counts 13 and 15—fails to satisfy the elements clause because, first, one can commit the offense by maliciously destroying "any" property, including one's own and so does not require as an

element that force be used against the person or property of another, as the elements clause requires; and second, one can commit the crime with a reckless mental state but the elements clause demands intentional conduct. Arguing further, Dzhokhar contends that the challenged conspiracies—the predicate crimes for Counts 16, 17, and 18—fail to satisfy the elements clause because conspiracies criminalize mere agreements to commit an act and thus do not necessarily have as an element the actual, attempted, or threatened use of physical force.

The government responds, essentially, this way. It agrees that malicious destruction of property "simpliciter . . . is not categorically a crime of violence." It admits that under our current precedent "reckless conduct, as opposed to intentional conduct, cannot constitute the use of force against the person or property of another." It accepts that "conspiring to commit a violent act does not necessarily have as an element the use, attempted use, or threatened use of physical force." And it consents to our vacating of Count 18—predicated on conspiracy to commit arson—albeit on grounds different from those offered by Dzhokhar[66] (thus sparing us the need to discuss Count 18 further).

But the government insists that when the indictment charges arson as a capital crime, "the jury must find as an element" at least one of the FDPA's gateway-intent

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[66] Dzhokhar argues that Count 18 is not a valid predicate because conspiracy to commit an offense is simply an agreement to commit an offense, and such an agreement does not always require the actual, attempted, or threatened use of physical force. But the government insists Count 18 is invalid because the indictment did not charge the predicate conspiracy as a capital count.

factors—each of which "requires proof that the defendant engaged in intentional conduct that directly resulted in a victim's death," meaning he used a level of force required under the elements clause.[67] It also insists that the death-resulting allegations "independently require[] proof that the victim was subjected to 'physical force'" as used in the elements clause. And it takes a similar approach with the remaining conspiracy predicates, claiming that the death-resulting allegations establish the type of force needed to satisfy the elements clause.

Analysis

The parties spend some time addressing our standard of review. Dzhokhar argues for a de novo appraisal,

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[67] The gateway-intent factors require proof that the defendant

> (A) intentionally killed the victim;
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> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
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> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

18 U.S.C. § 3591(a)(2)(A)-(D). Because no one argues otherwise, we assume without deciding that the government is right in saying that each factor (including (D)) requires intentional conduct. See also Báez-Martínez, 950 F.3d at 124–28 (holding that the mens rea required for second-degree murder satisfies the ACCA's elements clause).

noting that we typically evaluate judgment-of-acquittal and crime-of-violence assessments without giving any deference to the district judge's views. See United States v. Santos-Soto, 799 F.3d 49, 56 (1st Cir. 2015) (judgment of acquittal); United States v. Turner, 501 F.3d 59, 67 (1st Cir. 2007) (crime of violence). The government pushes for plain-error review, repeating the waiver arguments it made in the district court: that Dzhokhar had to—but did not—raise the crime-of-violence issue pretrial or object to the crime-of-violence instructions either before or after the judge gave them.

We think Dzhokhar has the better of this standard-of-review exchange. United States v. Cruz-Rivera concluded that a defendant's judgment-of-acquittal motions preserved his § 924(c) predicate-offense challenge. 904 F.3d 63, 65 (1st Cir. 2018). And Cruz-Rivera did so even though the defendant had not moved to dismiss the indictment or objected to the jury charge instructing that the at-issue predicate constituted a crime of violence as a matter of law. See Br. for Appellee at 10, Cruz-Rivera, 904 F.3d 63 (No. 16-1321), 2018 WL 3035960, at *9-10; Br. for Appellant at 20, Cruz-Rivera, 904 F.3d 63 (No. 16-1321), 2018 WL 3261713, at *20. The government tries to downplay the importance of this decision by saying "Cruz-Rivera . . . did not definitively opine on" the waiver question because "the government never challenged the preservation of the claim." When we give de novo review to an unpreserved claim because the government failed to argue plain error to us, we say so. See, e.g., United States v. Blewitt, 920 F.3d 118, 122 n.2 (1st Cir. 2019) (quoting United States v. Encarnación-Ruiz, 787 F.3d 581, 586 (1st Cir. 2015)). But Cruz-Rivera said nothing of the sort—it only said that the defendant had "preserved this

issue below." 904 F.3d at 65. So de novo review is called for.

To the merits then.

First up is whether Dzhokhar's arson convictions (on Counts 12 and 14) satisfy the elements clause. The arson statute at issue punishes the use "of fire or an explosive" to "*maliciously* damage[] or destroy[] . . . any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (emphasis added). And the parties agree (or at least do not dispute) that "maliciously" there includes both intentional and reckless acts. See generally United States v. Grady, 746 F.3d 846, 848-49 (7th Cir. 2014) (adopting this definition and collecting circuit cases doing the same).

Our caselaw says that recklessness does *not* suffice the ACCA's materially identical elements clause. See Báez-Martínez, 950 F.3d at 126 (discussing our bright-line rule that "reckless conduct bereft of an intent to employ force against another falls short of the mens rea required under" the ACCA (emphasis removed and citation omitted)).[68] And our caselaw routinely uses deci-

[68] To give a rough sense of our caselaw's evolution: The Supreme Court has found recklessness sufficient to count as a crime that "has, as an element, the use or attempted use of physical force" under 18 U.S.C. § 921(a)(33)(A)—a statute barring persons convicted of a "misdemeanor crime of domestic violence" from possessing a gun. See Voisine v. United States, 136 S. Ct. 2272, 2280 (2016). Voisine said "use" refers to "the act of employing something." Id. at 2278 (quotation marks omitted). So, Voisine held, the "use of physical force" requires "volitional" but not "knowing or intentional" conduct. See id. at 2279-80. Voisine, though, left undecided whether this

sions interpreting the ACCA's elements clause in construing § 924(c)'s, see Taylor, 848 F.3d at 491—no surprise, since both clauses encompass "the use, attempted use, or threatened use of physical force against the person . . . of another," compare 18 U.S.C. § 924(e)(2)(B)(i), with id. § 924(c)(3)(A). Which perhaps explains why the government concedes that crimes requiring recklessness, as opposed to intent, do not

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statutory interpretation should apply in other contexts. See id. at 2280 n.4.

On the heels of Voisine, we decided Bennett v. United States, 868 F.3d 1 (1st Cir. 2017). Bennett noted that the ACCA requires a use of physical force "against the person of another," while the statute in Voisine requires a use of physical force without the "against the person of another" jargon. See 868 F.3d at 18. Bennett reasoned that "against" may require that "the perpetrator . . . knowingly or purposefully . . . caus[e] the victim's bodily injury." Id. But Bennett also found compelling the possibility that "against" does not change Voisine's analysis. Id. at 18-20. Finding a "grievous ambiguity" concerning whether recklessness suffices under the ACCA's elements clause, Bennett invoked the rule of lenity to hold in the defendant's favor that recklessness did not suffice. Id. at 23 (quotation marks omitted). We withdrew Bennett after the defendant died. See Bennett v. United States, 870 F.3d 34, 36 (1st Cir. 2017) (per curiam). But we adopted its reasoning in a later case. See United States v. Windley, 864 F.3d 36, 37 n.2 (1st Cir. 2017) (per curiam).

The government believes that we decided these cases wrongly. The Supreme Court granted certiorari to resolve a circuit split regarding whether a crime involving "ordinary recklessness can satisfy the ACCA's [elements] clause." Báez-Martínez, 950 F.3d at 125 n.5. The Court dismissed certiorari after the petitioner died, see Walker v. United States, 140 S. Ct. 953 (2020), but the Court recently granted certiorari in another case to address the same issue, see United States v. Borden, 769 F. App'x 266 (6th Cir. 2019), cert. granted, 140 S. Ct. 1262 (2020).

qualify as crimes of violence under § 924(c)'s elements clause—at least under existing circuit precedent.

Our caselaw is also clear about what happens next. Applying the minimum-conduct rule (as a reminder, the elements-based approach focuses on "the least culpable conduct" criminalized, Báez-Martínez, 950 F.3d at 124), we must presume that Dzhokhar acted with recklessness, see Taylor, 848 F.3d at 492. So—as counterintuitive as it might first seem—his arson convictions are not crimes of violence for purposes of § 924(c)'s elements clause.

And none of the government's responses alters this conclusion.

The government argues that "[w]here . . . arson is charged as a capital offense, the jury must find as an element at least one of the four 'gateway' special intent factors" in the FDPA. These factors, says the government, require proof that the defendant intentionally engaged in conduct that resulted in a victim's death and thus proof that he "intentionally used force sufficient to kill the victim."

This aspect of the government's response overlooks that the gateway factors are drawn from the FDPA, not § 844(i) itself. Under either the categorical or modified categorical approach, we generally look to the statute of conviction to determine the elements of the crime. See, e.g., Mathis, 136 S. Ct. at 2248. And nowhere in § 844(i) does there appear an intent element. The government has pointed us to no authority suggesting that we can look beyond the statute of conviction to an unrelated statutory scheme—like the FDPA—to add elements to a crime for these purposes. See Taylor, 848

F.3d at 491 (explaining that "'[e]lements' are the 'constituent parts' of a crime's legal definition" (alteration in original) (quoting Mathis, 136 S. Ct. at 2248)). To convict Dzhokhar on the arson offenses (Counts 12 and 14) —the predicates for the contested § 924(c) counts (Counts 13 and 15)—the jurors did not have to find any of the gateway-intent factors. Instead, they could convict even if he acted recklessly rather than intentionally. Had the penalty-phase jurors not found the gateway factors proven beyond a reasonable doubt as to the arson charges, Dzhokhar could not have gotten a judgment of acquittal on those counts (Counts 12 and 14); indeed, the indictment on those two counts does not reveal on its face that the government had to prove intent. Surely then those factors cannot be elements of the arson predicates.

The government next contends that the death-resulting allegations in Counts 12 and 14 provide an independent basis for us to conclude that the arson predicates satisfy § 924(c)'s elements clause. But even assuming without deciding that the death-resulting allegations are elements (the parties fight over whether they are), we know the minimum conduct necessary to commit arson resulting in death is still recklessness. See generally United States v. Gullett, 75 F.3d 941, 947-48 (4th Cir. 1996) (deeming evidence of malice sufficient to convict the defendant of violating the arson statute, § 844(i), specifically rejecting his argument that the jury had to find that he intended to damage the property). As we will discuss shortly, the fact that death results (when included as an element of the statute of conviction) may indicate the application of violent force. But it does not necessarily involve the *intentional* application of physical force (*i.e.*, a "use" in the language of the elements

clause) as our caselaw requires. See Bennett v. United States, 868 F.3d 1, 7-9 (1st Cir. 2017) (holding that recklessly causing bodily injury does not constitute the "use . . . of physical force against the person of another"), opinion withdrawn as moot, 870 F.3d 34, 36 (1st Cir. 2017), reasoning adopted by United States v. Windley, 864 F.3d 36, 37 n.2 (1st Cir. 2017). So the government's second basis for affirming these contested § 924(c) counts (Counts 13 and 15) is not compelling either.[69]

Next up is whether Dzhokhar's conspiracy convictions (on Counts 1 and 6) satisfy the elements clause. Recall that prosecutors predicated the relevant § 924(c) counts (Counts 16 and 17) on his allegedly conspiring to use a weapon of mass destruction (Count 1), see 18 U.S.C. § 2332a(a)(2), and to bomb a place of public use (Count 6), see id. § 2332f(a)(1) and (2), each resulting in death. Section 2332a(a)(2) criminalizes anyone "who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction . . . against any person . . . within the United States," provided the "threat, attempt, or conspiracy[] would have affected interstate or foreign commerce." Section 2332f(a)(1) applies to anyone who "unlawfully delivers, places, discharges, or detonates an explosive . . . in, into, or against a place of public use . . . with the intent to cause death or serious bodily injury, or . . . with the intent to cause extensive destruction of such a

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[69] Given our analysis, we need not address Dzhokhar's alternative claim: that the arson convictions cannot be predicates because § 844(i) punishes the destruction of one's own property, while § 924(c)'s elements clause covers the use of force against the property of the another. See generally PDK Labs. Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) (explaining that "if it is not necessary to decide more, it is necessary not to decide more").

place." Section 2332f(a)(2) prohibits "attempts or conspirac[ies] . . . under [§ 2332f(a)(1)]." And "if death results" from these crimes, the statutes provide for punishment "by death or imprison[ment] for any term of years or for life." See id. § 2332a(a); see also id. § 2332f(c).

Helpfully, the parties agree that the at-issue convictions concern conspiracies to use a weapon of mass destruction and to bomb a place of public use (not attempts to do either crime, for example), with death resulting.[70] Our "task" then "is to compare" the elements of those conspiracies "to the definition of a 'crime of violence' in the force clause." See United States v. García-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018) (using the categorical approach where the parties "agree[d]" that the defendant's "conviction concerned Hobbs Act robbery (not extortion)"). So the question is whether the at-issue conspiracy offenses have as an element the use, attempted use, or threatened use of "violent [physical] force—that is, force capable of causing physical pain or injury to another person." See Curtis Johnson, 559 U.S. at 140; see also Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013) (requiring courts to consider whether the least serious form of the relevant offense meets that standard). If it does, then the relevant conspiracies qualify categorically as crimes of violence—if not, then not.

A conspiracy is—as the parties concur—a knowing agreement between two or more people "to commit a

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[70] The government's brief does quote § 2332f(a)(1), which again punishes the bombing of a place of public use (we simplify slightly here). But the government tailors its arguments to the conspiracy context, which of course implicates § 2332f(a)(2).

crime, intending that the underlying offense be completed." See United States v. Ledée, 772 F.3d 21, 32 (1st Cir. 2014). The crime of conspiracy is the agreement rather than the completed offense. See Iannelli v. United States, 420 U.S. 770, 777 (1975) (explaining that "[c]onspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act").[71] So "conspiracy's elements are met as soon as the participants have made an agreement." Sessions v. Dimaya, 138 S. Ct. 1204, 1219 (2018). Thus—to borrow a line from the government's brief (emphasis omitted)—"simply conspiring to commit a violent act does not necessarily have as an element the use, attempted use, or threatened use of physical force," meaning "most conspiracies to commit what would otherwise be crimes of violence are not categorically crimes of violence under" § 924(c)'s elements clause.

But the "death results" element changes things. Báez-Martínez says that any crime for which "death results" (or any serious bodily injury results) is an element automatically satisfies the ACCA's "violent force" requirement. 950 F.3d at 132. So while most conspiracies are not crimes of violence, conspiracies that are categorically defined to result in death are (assuming the other requirements like intent are satisfied). And here, the statute makes "death results" an element of the crime. Section 2332a says that "if death results" from a violation of the at-issue conspiracy statutes, the punishment may be up to life in prison or death. 18 U.S.C. § 2332a(a).

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[71] Inchoate means "[p]artially completed or imperfectly formed; just begun." See *Inchoate*, Black's Law Dictionary (11th ed. 2019).

Section 2332f incorporates this penalty scheme. Id. § 2332f(c).

Dzhokhar argues that "death results" is not an element of § 2332a or § 2332f under the crime-of-violence categorical approach because, like the FDPA gateway factors, that element need only be proven to the jury at the penalty phase. But unlike the FDPA gateway factors, the "death results" element appears in the statute of conviction itself (or is incorporated into that statute, for § 2332f). True, as Dzhokhar suggests, a (guilt-phase) jury could have convicted him under § 2332a or § 2332f without deciding that anyone died, and those convictions would stand even if the (penalty-phase) jury found that no deaths resulted. But these statutes, it seems to us, are divisible into two branches: one in which there is no "death results" element (and the penalty is up to life in prison), and one in which "death results" is an element (and the penalty can be death). See Mathis, 136 S. Ct. at 2256 (noting that "[i]f statutory alternatives carry different punishments, then under Apprendi they must be elements"). Yet we know Dzhokhar's conduct falls into the latter branch. And this we know from the indictment—which for Counts 1 and 6 says that the conspiracy resulted in the death of at least one person; and from the jury's guilt-phase verdict—which found beyond a reasonable doubt that the conspiracies resulted in at least one death.[72] So un-

[72] The judge instructed the guilt-phase jurors that to convict Dzhokhar on the contested conspiracy counts (Counts 1 and 6), the government had to prove three elements beyond a reasonable doubt: first, that he agreed with another to use a weapon of mass destruction (Count 1) and to bomb a place of public use (Count 6); second,

der the modified categorical approach, the predicate offenses (Counts 1 and 6) are crimes of violence. And thus his convictions on Counts 16 and 17 must stand.

Our use of the modified categorical approach here aligns with the purpose behind that doctrine. The Supreme Court designed the categorical and modified categorical approaches to simplify the types of evidence we can look to in making a crime-of-violence assessment. See Taylor v. United States, 495 U.S. 575, 601 (1990) (recognizing the "practical difficulties and potential unfairness of a factual approach"); see also Shepard, 544 U.S. at 17. Were we to go beyond these Shepard documents, we could find ourselves lost in a sea of evidence presented at trial to the jury. And we might never be able to tell whether certain facts were proven beyond a reasonable doubt. But our analysis requires no guesswork, for (again) the Shepard-approved documents and the text of § 2332a and § 2332f indicate that at least one person died as a result of Dzhokhar's involvement in the conspiracy.

In a different context, we have noted that an indictment's death-resulting references "invoked" a statute's "sentencing regime," increasing "the maximum sentence available," and so is "pertinent *only to sentencing*." United States v. Hilario-Hilario, 529 F.3d 65, 69 (1st Cir. 2008) (emphasis added). And except for a fact of a prior conviction, any fact that boosts a crime's maximum sentence or minimum sentence must be established beyond a reasonable doubt to a jury's satisfaction

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that he knowingly joined these conspiracies, intending that the crimes be committed; and third, that these conspiracies "resulted in the death of a person named in the respective count of the indictment."

(unless the defendant agrees to a bench trial or formally admits the facts). See Apprendi, 530 U.S. at 490 (maximum); Alleyne v. United States, 570 U.S. 99, 103 (2013) (minimum); see also United States v. Gonzalez, 949 F.3d 30, 41-42 (1st Cir. 2020). See generally Burrage v. United States, 571 U.S. 204, 210 (2014) (stating that "[b]ecause the 'death results' enhancement [in 21 U.S.C. § 841(b)] increased the minimum and maximum sentences to which [the defendant] was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt"). Dzhokhar's reply brief touches on these points, at least inferentially. But while an additional sentencing element—like § 2332a's "death results"—would be "pertinent only to sentencing" for most purposes, see Hilario-Hilario, 529 F.3d at 69, for purposes of the modified categorical approach, we think here that it is right to consider this as an element of the crimes of conviction, see Mathis, 136 S. Ct. at 2256.[73]

CONCLUSION

Having completed our review, the net result is this: We reverse Dzhokhar's convictions on Counts 13, 15, and 18, with directions to acquit. And we vacate his death sentences on Counts 4, 5, 9, 10, and 14, with directions to hold a new penalty-phase trial consistent with this opinion and with Local Rule 40.1(k)(1) of the District of Massachusetts. But make no mistake: Dzhokhar will spend his remaining days locked up in prison,

[73] Not to put too fine a point on it, the government proved the death-resulting element beyond a reasonable doubt—something we know without looking beyond the Shepard documents.

with the only matter remaining being whether he will die by execution.

-Concurring Opinion Follows-

TORRUELLA, Circuit Judge (Concurring in part, Joining in part, Concurring in Judgment). I agree with the lion's share of the majority's reasoning and join all its holdings. I regretfully must write separately, however, to express my disagreement with its handling and tentative conclusion of Tsarnaev's claim that he could not receive a fair trial by an impartial jury in this venue.

Tsarnaev properly raised this issue with our blessing, and it therefore requires—and deserves—a straight answer. In my view, the district court's rulings on Tsarnaev's motions for transfer of the trial venue, affirmed on intermediate appeal by this court and tentatively adopted by the majority, was patently incorrect.[74] Furthermore, the issue of unduly prejudicial pretrial publicity is likely to recur with more frequency in this modern day of technology. If an accused's Fifth and Sixth Amendment rights are to be other than a hollow platitude, it is imperative that this court's jurisprudence establish a realistic standard for cases such as this one, in which a steady stream of information by way of myriad sources inundated an already deeply affected community. If this case did not present a sufficient basis for a change of venue, there are no set of circumstances that will meet this standard, at least not in the First Circuit.

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[74] The denials of Tsarnaev's mandamus petitions further reflect a long-standing circuit bias on the pretrial publicity issue, which required a panel of out-of-circuit judges to overcome. Compare United States v. Casellas-Toro, 807 F.3d 380 (1st Cir. 2015) with United States v. Moreno-Morales, 815 F.2d 725 (1st Cir. 1987).

Let me be clear that at the sentencing retrial of this case, if the issue of venue is again raised, Tsarnaev will have to allege and prove prejudicial circumstances at the time of his motion, likely nearly a decade after the crime was committed. But that is a horse of another color. The question before us that must be decided is whether Boston was the appropriate venue for Tsarnaev's trial in 2015.

I. Discussion

In denying Tsarnaev's second mandamus petition, the mandamus majority assured that it "reviewed the entire voir dire conducted to this point by the [district] court and the parties,"[75] and that "the process ha[d] been thorough and appropriately calibrated to expose bias, ignorance, and prevarication." In re Tsarnaev ("Tsarnaev II"), 780 F.3d 14, 24-25 (1st Cir. 2015); see id. at 24 (noting that "[t]he careful selection process and the trial judge's expressed confidence in finding sufficient jurors . . . is supported by the record," and that "[the voir dire process] is working to ferret out those jurors who should appropriately be excused for cause"), 26 (declaring that "the careful process employed by the district court . . . ha[s] afforded [it] 'a sturdy foundation to assess fitness for jury service.'" (quoting Skilling v. United States, 561 U.S. 358, 395 (2010))), 26-28 (describing the district court's efforts to "explore, and eliminate, any prejudice" as "rigorous," "extensive," and "careful"). Today, this court reverses

[75] This court denied Tsarnaev's second mandamus petition on February 27, 2015. The district court provisionally qualified seventy-five jurors as of February 25, 2015, after voir dire was completed. It was from these seventy-five jurors that the petit jury was chosen.

course and finds the district court's juror inquiry lacked adequate safeguards, a finding with which I fully agree.

The majority's reason for reaching that conclusion, however, misses the forest for the trees. Although I agree that jury selection in this case failed to comply with this court's mandate in Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968), the fact of the matter is that "[n]o amount of voir dire [could have] overcome th[e] pervasive prejudice" against Tsarnaev in the Eastern Division of the District of Massachusetts, "no matter how carefully it [was] conducted." Tsarnaev II, 780 F.3d at 30 (Torruella, J., dissenting). The district court's denials of Tsarnaev's motions for change of venue amount to an abuse of discretion and denied Tsarnaev the right to a fair trial and sentencing determination.

A. This Panel Should Address Venue

To decide this case on Patriarca grounds, the majority puts its weight on the mandamus majority's expectation that a searching voir dire would be conducted. See slip op. at 42, 72. Yet, this was not the only assurance that drove the mandamus majority's denial in Tsarnaev II. That venue-change-denial also heavily relied upon the assumption that, should Tsarnaev be convicted, he would "have the opportunity to raise a challenge based on a lack of a fair and impartial jury on direct appeal." 780 F.3d at 18. "Indeed, that is the customary mechanism by which such challenges are presented and assessed." Id. at 18-19; see also id. at 29 ("[M]ost importantly, . . . the petitioner remains able to raise claims of lack of an impartial jury on direct appeal."). Because this "double layer of review is itself a guarantee of due process," the mandamus majority concluded,

Tsarnaev could not make a showing of the "irreparable injury" necessary to warrant mandamus relief. Id. at 28-29.

The question of whether venue was proper in the Eastern Division *is a preliminary matter that precedes all others raised in this case*—be it jury selection, the exclusion of mitigating evidence, or any evidentiary challenge. This is so because the impropriety of venue is a primordial prejudicial error; should a presumption of prejudice be warranted, the district court should not have embarked in jury selection (or made any evidentiary rulings) in the first place. Cf. Rideau v. Louisiana, 373 U.S. 723, 727 (1963) (finding a presumption of prejudice "without pausing to examine a particularized transcript of the voir dire"); United States v. Casellas-Toro, 807 F.3d 380, 389 (1st Cir. 2015) (looking to jury selection only after assuming the presumption of prejudice is rebuttable). The administration of justice demands that the question of venue be resolved.

Despite claiming not to decide the venue issue, by one-sidedly laying out the government's arguments as to venue and then proceeding to find Patriarca error, see slip op. at 54-72, the majority implicitly and effectively resolves the issue in the government's favor—tacitly finding that venue would have been proper in the Eastern Division had the district court conducted an adequate voir dire. For the following reasons, I cannot agree.

B. Venue in the Eastern Division was Improper

The physical and emotional wake of the Boston Marathon bombings, and the events of the following week, flooded the residents of the Eastern Division with sorrow, fear, and anger. Few crimes have been as offensive and devastating to an entire community than those committed by the Tsarnaev brothers. But for even the most heinous of offenses, our system of justice demands vigorous protection—both in appearance and fact—of a defendant's right to a fair trial and sentencing. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of *impartial*, *indifferent* jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961) (emphasis added) (internal quotations marks omitted).

1. A Presumption of Prejudice was Warranted

Article III of the United States Constitution instructs that criminal trials "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 further directs that a criminal defendant be tried by a jury "of the State and district wherein the crime shall have been committed." U.S. Const. amend VI.

Sometimes in tension with this directive is a criminal defendant's Sixth Amendment right to an impartial jury and Fifth Amendment promise of fundamental fairness. One such circumstance is when "extraordinary local prejudice" will prevent a fair trial in the judicial district in which the crime was committed. Skilling, 561 U.S. at 378. Where these constitutional provisions collide,

Article III's venue dictate must give way. Accordingly, "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district 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." Fed. R. Crim. P. 21(a).

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Skilling, 561 U.S. at 378 (alteration in original) (quoting Patterson v. Colorado ex rel. Att'y Gen. of Colo., 205 U.S. 454, 462 (1907) (opinion for the Court by Holmes, J.)). Where "pervasive pretrial publicity has inflamed passions in the host community past the breaking point" and "permeat[es] the trial setting . . . [such] that a defendant cannot possibly receive an impartial trial," the district court must presume local prejudice and transfer the proceeding. United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012); see also Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). A presumption of prejudice is "reserved for those extreme cases where publicity is both extensive and sensational in nature." Quiles-Olivo, 684 F.3d at 182 (internal quotation marks omitted) (quoting United States v. Misla-Aldarando, 478 F.3d 52, 58 (1st Cir. 2007)).

We have once again been tasked with determining whether the effects of these tragic events, coupled with the unrelenting pretrial publicity, caused such extraordinary local prejudice that Tsarnaev could not receive a

fair trial and sentencing determination. In more than forty-five years on the bench at both the trial and appellate levels, and in my years of practice before that, I have never borne witness to a case with pretrial publicity more "extreme" or "extraordinary" than this one—with so great a potential for jury determinations induced by "outside influence."[76] A presumption of prejudice was warranted.

a. <u>The residents of the Eastern Division were neither impartial nor indifferent</u>

The impact on the residents of the Eastern Division of the defendant and his brother's week-long reign of terror, and the extraordinary outpouring of unity and resilience that followed, quite understandably left the residents of the Eastern Division neither impartial nor indifferent. The majority opinion has detailed but a fraction of heart-wrenching destruction, pain, and suffering inflicted by the Tsarnaev brothers through their

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[76] As an addition to the harm caused by the plethora of pretrial publicity, upon arrival at the courthouse, and during the jury selection process and later trial, prospective jurors were met not only by a building whose front sidewalk was mobbed by all kinds of press representatives and additaments, including several television towers, but by an atmosphere of intensive security. The courthouse was patrolled on all sides by numerous representatives of the Massachusetts State police, the Boston Police Department, the Federal Protective Service, the U.S. Marshals, and even the U.S. Coast Guard and Boston Harbor Police, the last two of whom manned boats on the courthouse's harbor side. This, of course, is not a comment on the need or adequacy of the security provided, but rather is meant only to call attention to a factor that I believe has relevance to the issue of whether an impartial jury was or could be selected when the issue of appropriate venue was raised.

crimes. I do not believe it necessary to further elaborate on these harrowing details. Suffice it to say, a detailed read of the record touches even the most detached of readers.

Although the impact of the defendant's crimes was felt nationally and internationally, the destruction was acutely felt by the residents of the Eastern Division. The prospective jurors and their loved ones, and the communities themselves, were all victims of these disturbing acts of terror. In addition to those killed and maimed by the bombings, millions in Greater Boston witnessed firsthand the carnage at the finish-line, knew someone directly impacted by the bombings, were ordered to shelter in place, had their houses searched by law enforcement with weapons drawn,[77] saw their neighborhoods occupied by military personnel, or were otherwise affected by the events.[78] The physical, psychological, and emotional trauma of these events was long felt locally. While others around the country may have viewed the marathon bombings "as an attack on all of America," slip op. at 58, to the residents of the Eastern

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[77] Radley Balko, Was the Police Response to the Boston Bombing Really Appropriate?, Wash. Post (Apr. 22, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/04/22/the-police-response-to-the-boston-marathon-bombing/ (last visited July 10, 2020).

[78] Indeed, eight residents of the Boston area, self-identified as "Republicans, Democrats and Independents," submitted to this court an amicus brief to this effect. See Brief for Robert Bloom et al. as Amici Curiae Supporting Appellant Dzhokhar Tsarnaev, United States v. Tsarnaev, No. 16-6001, at 1. Amici notes that "[t]he multiple violent terrorist acts and their aftermath profoundly affected our friends and neighbors," id. at 1, "every member of the great Boston community [was] deeply affected," id. at 2, and "many in our community . . . suffered from vicarious trauma," id. at 12.

Division, the Boston Marathon bombings were an attack on them.[79]

In the wake of that distressing April week, the residents of Greater Boston rallied together as never before to support each other. Immediately after the bombings, residents watching the marathon worked alongside first responders to treat the injured.[80] Runners that had finished the race and countless local citizens rushed to the hospitals to donate blood—so much so that hospitals had to turn people away.[81] Others cared for the injured for months and years following the bombings. And to a previously unparalleled extent, the community participated in the identification and capture of the two bombing suspects.[82]

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[79] "[T]he attack in this case was uniformly viewed as a communitywide event—a deliberate and purposeful attack *upon the greater Boston area itself*." Brief for Bloom et al, supra note 78, at 25 (emphasis added); see also Meghan E. Irons, Cambridge Tries to Heal from Marathon Horror, Boston Globe (May 13, 2013), https://www.bostonglobe.com/metro/2013/05/12/cambridge-tries-heal-make-sense-bombing-horror/uEyVs89m8tOrzICc1POeAJ/story.html ("The bombings have felt like a personal afront in this city.") (last visited July 10, 2020).

[80] Jessica Hartogs, Stories of Kindness Amid Tragedy in Boston Marathon Bombing, CBS News (Apr. 16, 2013), https://www.cbsnews.com/news/stories-of-kindness-amid-tragedy-in-boston-marathon-bombing/ (last visited July 10, 2020).

[81] Id.; Alexander Abad-Santos, This is What Boston Heroism Looks Like, The Atlantic (Apr. 16, 2013), https://www.theatlantic.com/national/archive/2013/04/boston-hero-stories/316222/ (last visited July 10, 2020).

[82] From Fear to Cheer; The Capture; Tsarnaev's Friends; Mystery Motive; A Tense 24 Hours; Boston Bombing Suspect in Custody, CNN (Apr. 20, 2013), http://transcripts.cnn.com/TRANSCRIPTS/1304/20/bn.09.html (last visited July 10, 2020) ("Officials are going to

Memorials, commemorations, and fundraisers to support the victims began soon after the finish-line attacks. Amongst many others, all four of Boston's major sports teams played host to these events. A week later, iconic Red Sox designated hitter David Ortiz exclaimed to a sold-out Fenway Park, "[t]his is our fucking city, and nobody is going to dictate our freedom. Stay strong."[83]

Perhaps enhanced by Ortiz's comments, the ubiquitous and inspiring "BOSTON STRONG" campaign grew rapidly as an impressive expression of "defiance, solidarity, and caring."[84] The blue background with yellow lettering (borrowing from the colors of the Boston Athletic Association, the organizers of the Boston Marathon race) was emblazoned on buildings, fences, fields, and bodies all over the Greater Boston metropolitan area. The campaign reflected a sense of compassion, unity, and recovery much needed in a community reeling from its upheaval. See Tsarnaev II, 780 F.3d at 25 n.13 ("[T]he Boston Strong theme [was] about civic resilience and recovery."). "BOSTON STRONG" reflected "all

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study this for quite some time because police officers up there did something that's never been quite done before. They essentially established a capture net for the suspect and enlisted the help of the 4.5 million people. The population of the whole city to help them.").

[83] See Major League Baseball, David Ortiz Rallies the Boston Crowd after Boston Marathon Tragedy, YouTube (Apr. 20, 2013), https://www.youtube.com/watch?v=1NttSTenyEk (last visited July 10, 2020).

[84] Ben Zimmer, "Boston Strong," the Phrase that Rallied a City, Boston Globe (May 12, 2013), https://www.ca1.uscourts.gov/sites/ca1/files/citations/%E2%80%9CBoston%20Strong%2C%E2%80%9D%20the%20phrase%20that%20rallied%20a%20city%20-%20The%20Boston%20Globe.pdf (last visited July 10, 2020).

of us coming together as a city," one member of the venire aptly noted. As then-Boston Police Commissioner Edward F. Davis, III, told Congress:

> These two terrorists tried to break us. What they accomplished was exactly the opposite. They strengthened our resolve, causing us to band together as a city and a Nation in time of crisis, to help one another during life changing moments, to allow heroes to emerge and to prove to Bostonians and to the world, that our city is, indeed Boston Strong.[85]

Prospective jurors (including those in the venire) purchased "BOSTON STRONG" merchandise, attended fundraisers and concerts to raise money for the victims, or donated directly to the One Fund Boston.[86] The slogan, and what it stood for, became forever ingrained in the community psyche.

Underlying this awesome showing of resilience was its root cause: "deep[] personal grief, [and] a sense of loss forged by years of Patriots Day celebrations and the

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[85] The Boston Bombings: A First Look: Hearing Before the H. Comm. On Homeland Sec., 113th Cong. 16 (May 9, 2013) (Testimony of Edward F. Davis, III, Commissioner, Boston Police), https://www.govinfo.gov/content/pkg/CHRG-113hhrg82590/html/CHRG-113hhrg82590.htm (last visited July 10, 2020).

[86] One Fund Boston was established by the then-Governor of Massachusetts Deval Patrick, and Boston's then-Mayor Thomas Menino, to provide monetary support to the victims of the Boston Marathon bombings and their families. Rande Iaboni & Zain Asher, One Fund Boston To Distribute Nearly $61 Million to Marathon Victims, CNN (June 29, 2013), https://www.cnn.com/2013/06/29/us/massachusetts-boston-victims-fund/index.html. The Fund raised and donated over $81 million. The One Fund Boston Will Close, WBUR (July 16, 2015), https://www.wbur.org/news/2015/07/16/one-fund-closing.

cherished ritual of cheering the runners on."[87] "From Hopkinton to Boston, . . . the bombings hit wrenchingly close to home and left many forlorn and adrift."[88] Residents struggled to make sense of what had happened, to themselves and their neighbors, loved ones, and communities. They knew that things would never be the same.[89] Widely shared amongst the Eastern Division was a feeling of sorrow, and that each day "[w]e are all just doing the best we can."[90]

Just as the victims of other crimes (and their loved ones) cannot be "indifferent" or "impartial" for purposes of their wrongdoer's trial, despite any declarations to the contrary, neither here were the residents of the Eastern Division. Thus, the Fifth and Sixth Amendments required that they not be seated on Tsarnaev's jury.

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[87] Lisa Kocian & Peter Schworm, Along Marathon Route, Grief and Anger Run Deep, Boston Globe (Apr. 17, 2013), https://www.bostonglobe.com/metro/2013/04/16/along-route-boston-marathon-grief-and-anger-run-deep/k8BHS5WwmFIyA9jImhoEvM/story.html (last visited July 10, 2020).

[88] Id.

[89] Id.; Davis, III, supra n.85 ("[T]he impact on Boston will last for years."). Indeed, five years later, Boston Mayor Martin Walsh noted that, "[o]n April 15, 2013, our city changed forever." Sarah Betancourt & Vaishnavee Sharma, Boston Marks 5 Years Since Marathon Bombings with Tributes, NBC San Diego (Apr. 15, 2018), https://www.nbcsandiego.com/news/sports/Boston-Marks-5th-Anniversary-of-Marathon-Bombings-479801993.html (last visited July 10, 2020).

[90] Irons, supra n.79.

b. Local pretrial publicity was both extensive and sensational

In a district still suffering physical and emotional trauma, the pretrial publicity enhanced its effects. Indisputably the volume, depth, and duration of the media coverage, from the bombings to Tsarnaev's capture, and well beyond, was nothing short of extraordinary. Nor can one challenge the sensational nature of the pretrial publicity—including the horrific sights and sounds at the marathon finish line, the ensuing manhunt and lockdown of a million people, and the removal of a bloodied Tsarnaev from a boat in Watertown. This coverage included photographic and video footage of the crime being committed, maimed victims with bones protruding from their bodies, and the marathon finish line covered in blood. Every moment of the search for the suspects was livestreamed. And newspapers and magazines documented Tsarnaev's confessions (both written in the boat and at the hospital, the latter of which he gave without the benefits of Miranda warnings, despite his request for a lawyer, and which thus would not be offered into evidence).

Coverage of the marathon bombings and its aftermath received international attention—the who, what, where, and when of the crimes themselves widely covered. For anyone exposed to the media spectacle (as 99.7% of the venire was), or anyone with a smartphone and social media account, the pretrial publicity was "in a very real sense" the guilt-phase of Tsarnaev's trial. See Rideau, 373 U.S. at 726. For those in the Eastern Division, however, the media coverage was amplified.

The disturbing images of maimed victims were broadcast on repeat.[91] Many local residents were confined to their homes during the Governor's lockdown order, watching live footage of law enforcement scouring the city for the Tsarnaevs. After viewing this news coverage, "[a]ny subsequent court proceedings [about Tsarnaev's guilt] . . . could be but a hollow formality." See id. Indeed, approximately two-thirds of prospective jurors admitted in court to having concluded that Tsarnaev was guilty of the charged crimes before seeing a single piece of evidence.

The majority adopts the government's view—unsupported by the record—that "this is not a case where almost everybody locally knows something and very few elsewhere know of it." Slip op. at 55. Tsarnaev submitted volumes of articles from local newspapers that belie this assertion. Despite its recognition of these articles in its recantation of the facts, see slip op. 24-25, the majority seemingly ignores this detail in its venue analysis.

Whereas nationwide coverage of the bombing gradually waned over the following weeks and months, the record reflects that local media coverage did not. In Greater Boston, the scope of that reporting shifted from the facts surrounding the bombing to a focus on "the city as a whole[,] . . . includ[ing] stories of the victims

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[91] See, e.g., The Associated Press, Marathon Bombing Aftermath Was Top Massachusetts Story of 2014, MassLive (Dec. 26, 2014), http://www.masslive.com/news/index.ssf/2014/12/marathon_bombing-aftermath_was.html (last visited July 10, 2020) ("The legal aftermath of the Boston Marathon attacks dominated headlines in Massachusetts in 2014, much as the attack itself did last year and the accused bomber's trial surely will in 2015.").

and their family and friends, those who bravely risked their lives to help the victims, and how the entire community came together." Tsarnaev II, 780 F.3d at 31 (Torruella, J., dissenting) (footnote omitted). News sources humanized the local victims and their families, describing in heart-wrenching and gruesome detail the emotional and physical struggles of the wounded surviving victims. Of the first responders, local newspapers (befittingly) wrote that "what every firefighter in the city[,] . . . every cop, every EMS worker did[] . . . was nothing short of heroic."[92] Other journalists described how the Greater Boston community came together to mourn the deceased, honor the injured, and begin the collective healing process. Many of the articles, (rightfully) pointing to the defendant as the cause of the community's suffering, took to the use of negative descriptors—including repeatedly calling him a "monster", a "terrorist," "depraved," "callous," "vile," "revile," and the "devil."

Tsarnaev's guilt preordained, reporters soon focused on whether Tsarnaev should be put to death—prior even to the government's announcement of its intention to seek this outcome. This despite the fact that Massachusetts abolished capital punishment in its state courts in 1984,[93] had not executed a criminal defendant for

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[92] Kevin Cullen, Answering the Call, in all its Poignant Horror, Boston Globe (Apr. 17, 2013), https://www.bostonglobe.com/metro/2013/04/16/when-doing-your-job-more-than-doing-job/QOdqUtt5oeZREmbUmhhbJI/story.html (last visited July 10, 2020).

[93] See Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass 1984); Mass. Gen. Laws ch. 265, § 2 (2020) (no longer providing for capital punishment).

nearly forty years prior,[94] and that the majority of residents of the Eastern Division had previously expressed general opposition to the death penalty.[95] In this case, the media reported, even those who had previously opposed capital punishment admitted to being conflicted.[96] Krystle Campbell's mother, Patricia Campbell, told the *Boston Globe* that she had been rethinking her longtime opposition to the death penalty because "an eye for an eye feels appropriate." Some of the amputees and their families were reported to have expressed similar sentiments. First responders and victims told reporters that a death sentence would "help everyone in their recovery." Mayor Menino, a proclaimed opponent of the death penalty, exclaimed, "in this one, I might think it's time . . . that this individual serves his time and

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[94] History of the Death Penalty, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/massachusetts (last visited July 16, 2020).

[95] See Massachusetts Isn't OK with the Death Penalty, but Dzhokhar Tsarnaev's Jurors Have To Be, PRI, The World (Jan. 5, 2015), https://www.pri.org/stories/2015-01-05/massachusetts-isnt-ok-death-penalty-dzhokhar-tsarnaevs-jurors-have-be (last visited July 10, 2020).

[96] See Jan Ransom & Jacqueline Tempera, Religious Leaders Conflicted on Tsarnaev death penalty, Boston Globe (May 18, 2015), https://www.bostonglobe.com/metro/2015/05/17/religious-leaders-struggle-with-feelings-over-tsarnaev-death-penalty/EO19cNhRQrGwBnkhTQAJAI/story.html?event=event12 (last visited July 10, 2020); Tara McKelvey, Boston in Shock over Tsarnaev death penalty, BBC News, Boston (May 16, 2015), https://www.bbc.com/news/world-us-canada-32762999 (last visited July 10, 2020); NBC News, Americans Divided Over Death for Boston Bomber Dzhokhar Tsarnaev, Poll Finds (Apr. 8, 2015), https://www.nbcnews.com/storyline/boston-bombing-trial/americans-divided-over-death-boston-bomber-dzhokhar-tsarnaev-poll-finds-n338076 (last visited July 10, 2020).

[gets] the death penalty."[97] After he assumed office in January 2014, Boston Mayor Martin J. Walsh—who had opposed the death penalty as a state representative—expressed his support of Attorney General Eric Holder's "process that . . . brought him to [the] decision" to seek capital punishment.[98] Other politicians did the same, including both United States Senators from Massachusetts.[99] In contrast to these more restrained endorsements, some expressed less hesitation about their support[100] for Tsarnaev's execution.[101] Former Boston

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[97] Mark Arsenault & Milton J. Valencia, Suspect Charged with Using a Weapon of Mass Destruction, Boston.com (Apr. 22, 2013), https://www.boston.com/news/local-news/2013/04/22/suspect-charged-with-using-weapon-of-mass-destruction (last visited July 10, 2020) (alteration in original).

[98] Matt Apuzzo, U.S. is Seeking Death Penalty in Boston Case, The N.Y. Times (Jan. 30, 2014), https://www.nytimes.com/2014/01/31/us/boston-marathon-bombing-case.html (last visited July 10, 2020).

[99] Shira Schoenberg, US prosecutors will seek the death penalty against alleged Boston Marathon bomber Dzhokhar Tsarnaev, Mass Live (Jan. 30, 2014), https://www.masslive.com/news/boston/2014/01/dzokhar_tsarnaev_us_will_seek_death_penalty.html (last visited July 10, 2020).

[100] I do not dispute that some, including public figures, also expressed their moral objection to the use of capital punishment. But only those individuals who voiced a willingness to consider recommending a death sentence, and whose views would not prevent them from doing so, could be (and were) sat on the jury. See Wainwright v. Witt, 469 U.S. 412, 424 (1985); Witherspoon v. Illinois, 391 U.S. 510, 518, 520 (1968).

[101] Tara McKelvey, Boston in Shock Over Tsarnaev Death Penalty, BBC News, Boston (May 16, 2015), https://www.bbc.com/news/world-us-canada-32762999 (quoting nearby employee as saying "[p]ut him in a cage and let wild animals tear him apart") (last visited July 10, 2020); Catherine E. Schoichet, For Boston Bombing Victims, Death Penalty Decision a 'Step Forward,'", CNN (Jan. 30,

Police Commissioners Edward F. Davis and William Evans,[102] and MIT Police Chief John DiFava, all expressed their approval.[103] And, although it was defeated in the Massachusetts House of Representatives, a bipartisan group of lawmakers used the bombing as support for a bill seeking to reinstate the death penalty.[104]

Perhaps because of the nature of the crime, or because of its impact on them and their communities, the

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2014), https://www.cnn.com/2014/01/30/justice/tsarnaev-death-penalty/index.html (last visited July 10, 2020); Brian MacQuarrie, In Globe Poll, Most Favor Life Term for Dzhokhar Tsarnaev, Boston Globe (Sept. 16, 2013), https://www.bostonglobe.com/metro/2013/09/15/most-boston-residents-favor-life-without-parole-for-tsarnaev-convicted-poll-shows/Ur6ivWIUiYCpEZLXBApHDL/story.html?event=event12 (last visited July 10, 2020) (quoting respondent to poll as saying "[l]ife without parole is insufficient").

[102] Boston Police Commissioner: Pursuing Death Penalty for Tsarnaev is "Appropriate", New England Cable News (March 1, 2014), https://www.necn.com/news/local/_necn__boston_police_commissioner_pursuing_death_penalty_for_tsarnaev_is__appropriate__necn/1916798/ (last visited July 10, 2020).

[103] Antonio Planas, John Zaremba, Laurel J. Sweet, MIT's Chief Calls for Death Penalty in Boston Bombing Case, The Boston Herald (July 11, 2013), https://www.bostonherald.com/2013/07/11/mits-chief-calls-for-death-penalty-in-boston-bombing-case/ (last visited July 10, 2020).

[104] Stephanie Ebbert, Mass. House Defeats Proposal to Restore Death Penalty, Boston Globe (Apr. 23, 2013), https://www.bostonglobe.com/metro/2013/04/23/lawmakers-citing-marathon-bombings-propose-restoring-death-penalty-massachusetts/72UOgtShrscd9pSFRv1YsN/story.html (last visited July 10, 2020).

residents of the Eastern Division were inundated with reporting about this case.[105]

c. Pride begets prejudice

Jury selection began in early January 2015. "BOSTON STRONG" continued to be proudly displayed throughout Greater Boston up to and through Tsarnaev's trial. Merchandise bearing the slogan continued to be sold at Boston Logan's International Airport. A banner displaying "BOSTON STRONG" was hung from a hotel nearby the courthouse, high above the surrounding buildings. And the drum of a cement truck parked directly across from the courthouse's visitor's entrance was decorated with "BOSTON STRONG" on one side and "THIS IS OUR CITY" on the other. A local Teamsters union continued to distribute "BOSTON STRONG" t-shirts and jackets to its members. Fundraising for the victims continued, and local road races placed the "BOSTON STRONG" logo on shirts distributed to its participants.

The district court dismissed the prevalence of these displays in various ways: although the defense team took the photographs of the banner and cement truck while jury selection was ongoing, the district court found the logo's appearances inconsequential because the cement truck photograph was taken on a day on which no

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[105] The crimes charged in this case involved one of the first major terrorist attacks in the United States in age of widespread social media. Although the parties have not outlined arguments over the impact of this technological advancement, I find it (again) worth highlighting the advanced speed at which information and opinions spread.

empaneled jurors attended court,[106] and the hotel banner was not visible at the juror's entrance to the courthouse or from the jury room[107]; that the association of "BOSTON STRONG" "weakened somewhat over time through overuse"; and that (quoting Skilling, 561 U.S. at 361), "the decibel level of media attention [had] diminished somewhat." As jury selection in this case began less than two years after the bombings, the district court ignored, however, that the continued displays of "BOSTON STRONG" reflected an enduring community sentiment which formed the base of the movement, and a well-deserved pride of accomplishment in the community's efforts to return to normalcy.[108] As one member of the venire put it, "BOSTON STRONG" was "the spirit of Boston, that despite whatever happens, . . . we will continue."

A coming together remarkably similar to this one emerged in the wake of the 1995 bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma, which killed 168 people, injured hundreds

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[106] The record does not reflect whether the cement truck was in the area on any days other than the one that the photograph was taken on.

[107] But it may have been visible during the jurors' commutes into and out of the courthouse.

[108] Nor did the sentiment end with this trial. It was announced in December of 2015 that a new park in honor of Martin Richard would be built less than two blocks from the courthouse. Lisa Creamer, A New Park Near Boston Children's Museum Will Honor Martin Richard, WBUR (Dec. 10, 2015), https://www.wbur.org/news/2015/12/10/martin-richard-new-boston-park (last visited July 10, 2020). And in September of that same year, Bridgewater State University, roughly 30 miles south of Boston, unveiled a life-sized sculpture of the 8-year-old victim. Id.

more, and damaged numerous federal buildings. See United States v. McVeigh, 918 F. Supp. 1467, 1471-72 (W.D. Okla. 1996). Like "BOSTON STRONG," "Oklahoma family" became "a common theme" amongst the Oklahoma media and political leaders, emphasizing "how the explosion shook the entire state, . . . how the state has pulled together . . . as a family," and that "the survival and recovery from this tragedy is 'Oklahoma's story.'" Id. at 1471. Finding that the values of due process and fairness required that the trial of the Oklahoma City bombing suspects be transferred to Denver,[109] Chief Judge Matsch pertinently described the profound potential for prejudice in this situation:

> Pride is defined as satisfaction in an achievement, and the people of Oklahoma are well deserving of it. But it is easy for those feeling pride to develop a prejudice . . . [t]he existence of [which] is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its

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[109] The defendant and government in McVeigh agreed that the trial could not take place in Oklahoma City, in part because "obtaining an impartial jury in Oklahoma City would be 'chancy.'" McVeigh, 918 F. Supp. At 1470. "The effects of the explosion on th[e] [Oklahoma City] community [were] so profound and pervasive" that no further consideration of that venue was necessary. Id. The district court was called upon to then resolve the parties' dispute about whether there was "so great a prejudice against the[] defendants in the [entire] State of Oklahoma that they [could not] obtain a fair and impartial trial anywhere in the state." Id.

> most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.

Id. at 1472 (internal quotation marks and citation omitted). Similarly, the Supreme Court has noted that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin, 366 U.S. at 727.

Such was the state of the Eastern Division. Amongst an entire community so deeply affected by these crimes, the "intensity of the humanization of the victims" by the media, McVeigh, 918 F. Supp. at 1472, the heavy emphasis on grief, and the powerful portrayals of people struggling to make sense of this calamity, imprinted a pervasive and insurmountable prejudice in the community psyche. In such circumstances, an individual juror "may have an interest in concealing his own bias . . . [or] may be unaware of it." Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring). And the unconscious nature of this impairment makes juror questionnaires and voir dire a poor means for assessing juror impartiality. See William H. Farmer, Presumed Prejudiced, But Fair?, 63 Vand. L. Rev. En Banc 5, 8 (2010).

The majority's "serious points against [Tsarnaev's] venue-change arguments" lean heavily on the pretrial polling data. See slip op. at 54-55. The majority finds this data convincing because the pollster did not "ask respondents to judge for themselves whether they are biased[]" and "[i]nstead . . . asked whether Tsarnaev should get the death penalty." Slip op. at 55. But, even though the pollster did not explicitly ask respond-

ents if they were biased,[110] it is the court's (and the majority's) dependence on this polling data to decide the venue challenge that leaves prospective jurors as the judges of their own impartiality. This is the very problem that the majority takes issue with in its Patriarca analysis. See slip op. at 62, 65, 67, 72. Further, the data cannot be relied upon to accurately identify local prejudice. Despite the majority's conclusory claim otherwise, see slip op. at 55, the survey does not—and cannot—account for the fact that the people who are most acutely affected by trauma and persistent media coverage thereof often lack awareness of the impact this exposure has to their decision-making capacity in the jury deliberation room—particularly when they are being asked to make a decision as high-stakes as the appropriate punishment for the individual that wreaked havoc on their lives and those of their neighbors and communities. See McVeigh, 918 F. Supp. at 1473. That over 92% of Boston residents admitted in the community poll that they believed Tsarnaev was "definitely" or "probably" guilty based on their exposure to pretrial publicity, whereas 25% less admitted prejudgment in their juror questionnaires, highlights the inadequacy of survey polling to determine local prejudice in circumstances such as existed in the Eastern Division, and the potential inability of jury selection to sufficiently weed out the prejudices in this venue.

This "impairment of the deliberative process," particularly during a moment such as jury deliberations in

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[110] A strange question indeed; most people asked during a vote-by-mail poll would not likely respond to such a question by stating that they are "biased," especially because most would not be aware that they may be so.

a case of such prominence, is not easily quantifiable. Again, I invoke Chief Judge Matsch:

> The possible prejudicial impact of this type of publicity is not something measurable by any objective standards. . . . [S]urveys are but crude measures of opinion at the time of the interviews. Human behavior is far less knowable and predictable than chemical reactions or other subjects of study by scientific methodology. There is no laboratory experiment that can come close to duplicating the trial of criminal charges.

Id.[111]

Given the unknowing nature of the prejudicial effect of inflammatory pretrial publicity on severely afflicted people, see Irvin, 366 U.S. at 727; McVeigh, 918 F. Supp. at 1472-73, and the great potential for equivocation by individual jurors impacted by these outside influences, see Smith, 455 U.S. at 221-22, it must be given little weight that polling data showed somewhat similar (but still lower) numbers regarding a proclivity for the death penalty in Springfield and New York than in Boston.[112]

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[111] I recognize that the district judge's exercise of discretion in McVeigh does not itself mean that the district court's decision not to move Tsarnaev's trial was necessarily an abuse. But, given its similarity to our situation, it certainly cannot be ignored in the exercise of our review.

[112] The majority strangely and misleadingly finds convincing that "fewer [survey] respondents preferred life without parole in Springfield (45.4%) than in Boston (51.2%)." See slip op. at 55. But the lower percentage of Springfield respondents preferring life without parole does not mean that a higher percentage of Springfield respondents preferred the death penalty than in Boston. In fact, the opposite is true: a higher percentage of respondents preferred the

The majority next declares, again without record support, that "most of the publicity was true." Slip op. at 55. Much of the local publicity included not only factual narrations of the events that transpired but also commentary and opinions, such as the aforesaid references to him as a "monster," "terrorist," "evil," the "devil," and other similar derogations. I have no doubt that other media sources either did the same or quoted others who did.[113] Even if these are appropriate adjectives to describe Tsarnaev, this does not mean the descriptors did not have a prejudicial impact on the venire's ability to make decisions based solely on what was presented in court. See, e.g., Rideau, 373 U.S. at 725-26 (televised confession was factual but prejudicial). The same is true of the reports that public officials believed Tsarnaev should die, and the detailed chronicling of the pain of the survivors and decedents' families. These reports may reflect reality, but the media's emphasis of these topics carried a significant risk of disturbing potential jurors' impartiality. This publicity was anything but "trivial."

I do not mean to imply that every juror was being disingenuous or deceitful in their self-declared impartiality. But our "[t]rust in their ability" to disregard this prejudicial information "diminishes when the prior exposure . . . evokes strong emotional responses or

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death penalty in Boston than in Springfield, Manhattan, or Washington, D.C. The fact that fewer respondents in Springfield stated a preference for life without parole than in Boston is explained by the fact that a higher percentage of respondents in Springfield (19.5%) refused to provide an answer to the question than in Boston (12.1%).

[113] See, e.g., Planas et al., supra n.103 (calling Tsarnaev a "punk" and a "bad guy").

such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome." McVeigh, 918 F. Supp. at 1473. Our own biases often go unrecognized or ignored. The risk of implicit biases in this case was impermissibly high, particularly with the defendant's life on the line.

d. The "Skilling" factors

The majority suggests that an application of the eponymous Skilling factors counsels against an abuse-of-discretion finding. See slip op. at 56-58. As I noted in my mandamus dissent, I find the comparison between this case and Skilling to be inapposite. See Tsarnaev II, 780 F.3d at 42 (Torruella, J., dissenting). Skilling involved "neither heinous nor sensational" facts, but rather white-collar economic crimes which impacted only a minority of potential jurors in the Eastern District of Texas. 561 U.S. at 370, 384 (noting that the "jurors' links to Enron were either nonexistent or attenuated"); see also United States v. Skilling, 554 F.3d 529, 560 n.47 (5th Cir. 2009), aff'd in part, vacated in part, 561 U.S. 358 (2010) (noting an opinion poll that found that one in three Houstonians knew someone harmed by what happened at Enron). Contrast that with the facts in this case: a terrorist attack with explosives at the iconic Boston Marathon; a widespread and crowdsourced search for the suspects; the execution of a police officer; a carjacking; a shootout on a suburban street; a shelter-in-place order; a televised manhunt; a standoff around the Watertown boat; the televised removal of a bloodied defendant from that boat; and a traumatized Eastern Division.

Even assuming *arguendo* the applicability of the Skilling factors to this terrorism case, I would find that

they weigh in Tsarnaev's favor. First, the Skilling Court looked to the "size and characteristics of the community in which the crime occurred," noting that Houston was the fourth most populous city in the United States with a "large, diverse pool of potential jurors." 561 U.S. at 382. Boston is not even in the top twenty in terms of population size. See United States Census Bureau, Population Division, Annual Estimates of *City and Town Population Totals: 2010-2019 (May 21, 2020).*

Equally if not more important are the characteristics of the community. *See* Casellas-Toro, 807 F.3d at 387 (commenting that, although Puerto Rico has a population of approximately three million, it is an "insular community that is highly susceptible to the impact of local media" and "seem[s] to be a small island" (internal quotation marks and citation omitted)). The Court in Skilling noted that only 12.3% of Houstonians were able to name Skilling as an Enron executive they believed guilty of crimes, and 43% had never heard of him. This case is again easily distinguishable. Here, "Tsarnaev and the Boston Marathon bombings [were] one and the same." Tsarnaev II, 780 F.3d at 42 (Torruella, J., dissenting); see also Def.'s Reply to Opp'n to Mot. to Change Venue at 4, United States v. Tsarnaev, No. 13-cr-10200-GAO (D. Mass. filed Aug. 7, 2014), ECF No. 461-23 (showing that approximately 90% of survey participants in Boston recognized the name Dzhokhar Tsarnaev, as opposed to 58% in Springfield, MA, 44% in Manhattan, and 34% in Washington, D.C.). For instance, 99.7% of the voir dire had been exposed to pretrial publicity about the case as every local news sources reported about it, and two thirds admitted in their juror questionnaires that they believed Tsarnaev to be guilty.

Moreover, terrorism targets the very fabric of the community, seeking to tear it apart. We should thus be especially sensitive to the community response here as being indicative of its sense of communal victimhood—a marker perhaps of its tightness as a judicial division. The Greater Boston area "band[ed] together"[114] in response to this crisis, a "close-knit place" where "we grieve for [our neighbors]."[115] At that moment, the Eastern Division was "BOSTON STRONG."[116]

Second, the news stories in Skilling "contained no confession or other blatantly prejudicial information." 561 U.S. at 382. This case involved both. Not only did the media print Tsarnaev's message in the boat admitting his crimes, it also reported information about his non-Mirandized hospital confession to the FBI. The news stories also contained blatantly prejudicial opinions that Tsarnaev should die.

Third, the Skilling Court looked to the media attention surrounding Skilling's crime and trial, noting that "the decibel level . . . diminished somewhat" over the four years between Skilling's crime and his trial. Here, although there was a slight diminution of pretrial publicity over the twenty-one months between the

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[114] Davis, III, supra n.85.

[115] Jeff Brady, 8-Year-Old Boy Among Those Killed in Boston Bombing, NPR (Apr. 16, 2013, 3:00 PM), https://www.npr.org/2013/04/16/177507497/8-year-oldboy-among-those-killed-in-boston-bombing (last visited July 10, 2020 (reporting about speech by then-Mayor Menino on the day after the bombing).

[116] My intention is not to cast the "BOSTON STRONG" campaign in a negative light. Quite the opposite, the community's recovery efforts have my highest admiration.

bombings and the commencement of jury selection, the reporting continued to be omnipresent.[117]

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[117] The majority finds the time that elapsed between the bombings and Tsarnaev's trial to be "closer in magnitude to the four years in Skilling (a point cutting against a venue change) than the two months in Casellas-Toro (a point favoring a venue change)." Slip op. at 57. But the majority misconstrues our precedents. Casellas's trial did not occur two months after his crime was committed, but rather two and a half months after the major event that kept him in the media spotlight—his televised sentencing for the murder of his wife. Casellas-Toro, 807 F.3d at 383. Like Tsarnaev, Casellas allegedly lied to the FBI almost two years prior to his trial for that crime. Id. at 382 (noting that Casellas made a false report to the FBI on June 17, 2012), 384 (stating that voir dire began on April 7, 2014).

Like Casellas, Tsarnaev remained a focal point for the media since he committed these crimes. Several well-publicized events ensured that he remained at center stage. In January 2014, the government announced that it would seek the death penalty, which drew an enormous media response. In April 2014, on the one-year anniversary of the marathon bombings (the week preceding the 2014 running of the Boston Marathon—which itself garnered extraordinary attention), the City of Boston held a ceremony to pay tribute to the Boston Marathon bombing victims. The event featured local and national politicians, clergymen, and the victims and their families. Amongst the attendees (and speakers) was Vice President Joe Biden. See John R. Ellement & Martin Finucane, At Tribute, Marathon Bombing Victims, Survivors Honored, Boston Globe (Apr. 15, 2014), https://www.bostonglobe.com/metro/2014/04/15/tribute-boston-marathon-victims-underway/xIxOSTNzhaPDpRXlaiXnrN/story.html (last visited July 10, 2020).

The focus on Tsarnaev continued into the next year. In early January 2015, gunmen attacked the Paris office of satirical newspaper Charlie Hebdo. The media took the opportunity to draw comparisons between that attack and the Boston Marathon bombings. See, e.g., Kevin Johnson, Paris and Boston Attacks Pose Striking Parallels, USA Today, Jan. 9, 2015, http://www.usatoday.com/story/news/nation/2015/01/08/paris-boston-attacks/21445461/ (last visited July

Finally, the Skilling Court looked to the jury verdict, finding that the jury's not-guilty findings on nine of the twenty-eight counts in the case "yielded no overwhelming victory for the government." 561 U.S. at 375, 383. Here, because Tsarnaev's counsel admitted Tsarnaev's guilt during opening and closing statements, the jury verdict finding Tsarnaev guilty on all thirty counts neither supports nor refutes a presumption of impartiality. See, e.g., Luong v. State, 199 So. 3d 139, 148 (Ala. 2014) ("[I]n light of the facts of this case, in particular Luong's admission that he threw each of his children off the bridge, the fact that Luong was not acquitted of any of the charged offenses does not either support or rebut a presumption of jury bias or impartiality.").

10, 2020). That same month, pictures went viral of a man clearing snow off of the Boston Marathon finish line following a blizzard. Eastern Division residents hailed him as a "hero." Anastasia Williams & Michele McPhee, Blizzard Mystery Solved: Man Who Shoveled Marathon Finish Line Revealed, ABC News (Jan. 28, 2015), https://abcnews.go.com/US/boston-blizzard-mystery-solved-man-shoveled-marathon-finish/story?id=28550626 (last visited July 10, 2020). Also that month, Tsarnaev's friend pled guilty to charges related to the destruction of evidence in this case and lying to the FBI. See, e.g., Milton J. Valencia, Tsarnaev Friend to Plead Guilty, Boston Globe (Jan. 13, 2015), http://www.bostonglobe.com/metro/2015/01/13/judge-sets-jan-plea-hearing-for-friend-boston-marathon-bombers/SPbRARYlkYS5XYJMrZNFcM/story.html (last visited July 10, 2020).

Finally, on the first morning of jury selection, the press reported that Tsarnaev unsuccessfully offered to plead guilty in exchange for the government's agreement not to seek the death penalty. See, e.g., Evan Perez, Boston Bombing Trial Lawyers Fail to Reach Plea Deal, CNN (Jan. 5, 2015), https://www.cnn.com/2015/01/05/politics/dzhokhar-tsarnaev-trial-plea-deal-fails/index.html (last visited July 10, 2020).

The majority's comparison of the nine acquittals in Skilling to Tsarnaev's jury's decision to recommend death for six of the seventeen death-eligible counts is mind-boggling. See slip op. at 57-58. There is a monumental distinction between the full acquittals in Skilling—resulting in no punishment for that defendant, and this jury's decision about which of the two most extreme punishments in our criminal justice system to recommend for each count. The jury's decision to recommend that Tsarnaev receive six death sentences and serve eleven life sentences, instead of recommending that Tsarnaev be killed on seventeen separate counts, does not indicate a lack of prejudice. Far from it. A criminal defendant can only be put to death once. The Supreme Court has noted that the decision of whether to recommend a death sentence "is mostly a question of mercy." Kansas v. Carr, 136 S. Ct. 633, 642 (2016). As Tsarnaev points out, "six separate death sentences can hardly be considered an act of mercy such as to establish that jurors were either unaffected by the pretrial publicity or willing to ignore the community sentiment."

Tsarnaev was entitled to a presumption of prejudice.

2. The Government Cannot Overcome the Presumption of Prejudice

The parties quarrel over whether the presumption of prejudice is rebuttable. In Casellas-Toro, this court assumed without deciding that the presumption was rebuttable, and I follow the same track. 807 F.3d at 388-90. Yet, even under this assumption, the government cannot prevail.

The government argues that it can rebut that presumption by showing that the district court was able to

ascertain the effects of the potential jurors' exposure to extensive pretrial publicity and excuse those that were incapable of setting any prejudice aside. Not so. As today's majority has explained, by refusing to ask prospective jurors content-specific questions about what they had read and heard, the district court was unable to identify biases or prejudices that may have resulted from that exposure. See Patriarca, 402 F.3d at 318. The district court relied on the venire's self-declarations of impartiality, an error of law and an abuse of discretion.

The government also cannot show that the district court seated an impartial jury because the district court failed to investigate Tsarnaev's "colorable" and "plausible" claims of juror-misconduct. When a defendant raises such a claim, regardless of timing, the district court has the "unflagging duty" to investigate. See United States v. French, 904 F.3d 111, 117 (1st Cir. 2018), cert. denied sub nom. Russell v. United States, 139 S. Ct. 949 (2019) (quoting United States v. Zimny, 846 F.3d 458, 464 (1st Cir. 2017)). The district court need not hold a full evidentiary hearing, but it must fashion and "even-handedly implement . . . a sensible procedure reasonably calculated to determine whether something untoward had occurred." United States v. Paniagua-Ramos, 251 F.3d 242, 249-50 (1st Cir. 2001). The court's procedural discretion does not include a refusal to conduct any inquiry whatsoever. Zimny, 846 F.3d at 465.

But that is precisely what the district court did. Tsarnaev presented a colorable claim that Juror 286 knowingly withheld from the court the fact that she posted twenty-two online comments mourning the death

of Martin Richard, praising law enforcement officers (three of whom would later testify at trial), expressing "BOSTON STRONG" civic pride, and calling Tsarnaev a "piece of garbage." Tsarnaev further showed that Juror 286 may have lied on her juror questionnaire and during voir dire about sheltering in place with her family. And Tsarnaev presented a second plausible claim that Juror 138 both refused to follow simple but important court rules and intentionally withheld from the court his participation in social media conversations. In the comments thread on his Facebook page, on which he continued to engage, his friend urged him to "[p]lay the part so u get on the jury then send [Tsarnaev] to jail where he will be taken care of." The district court's refusal to inquire—at the government's behest—left much to be desired in the way of certainty about these jurors' impartiality.

Finally, a review of the seated jurors' questionnaires and voir dire transcripts confirms that the government cannot rebut the presumption in this case. The government admits that there is a statistically significant correlation between the prospective jurors' media exposure and their opinions to guilt, and ten of the twelve seated jurors had been exposed to "a moderate amount" or "a lot" of publicity. Prior to trial, three of the twelve voting jurors admitted to having predetermined Tsarnaev's guilt, and another two stated that they believed Tsarnaev participated in the bombings. See Juror 83: "obviously he was involved in something"; Juror 229: "[f]rom the media" "I suppose that we knew that he was involved"; Juror 349: marked on juror questionnaire belief that Tsarnaev was guilty, and stated on voir dire that from "so much media coverage" "anybody would think that [Tsarnaev was involved]"; Juror 395: marked

on juror questionnaire belief that Tsarnaev was guilty; Juror 487: marked on juror questionnaire belief that Tsarnaev was guilty, and explained on voir dire that this belief came from what he had seen on the news. Likewise, three of the six alternate jurors stated that they believed that Tsarnaev was involved. See Juror 552: "[F]rom the videos I saw, it appeared that he was part and parcel of perhaps depositing those devices"; Juror 567: "I do believe that he was somewhat involved"; Juror 588: "I believe there's some involvement somewhere, but I don't know what it is." And, as just discussed, two seated jurors were at least inconsistent—if not deliberately untruthful—in their responses during jury selection, calling into question their declarations that they had not yet formed an opinion about Tsarnaev's guilt. See Sampson v. United States, 724 F.3d 150, 164 (1st Cir. 2013) ("The voir dire process . . . is frustrated when a prospective juror is dishonest. Both the juror's dishonesty and her motivation for that dishonesty may cast doubt upon her impartiality.").

Although all the seated jurors declared that they could be fair and impartial and decide the case solely on the evidence presented in court, little weight can be given to such declarations by community members so impacted by the crimes and the subsequent pretrial publicity. "Natural human pride would suggest a negative answer to [a question of] whether there was a reason the juror could not be fair and impartial." United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972); see also Irvin, 366 U.S. at 728 ("[The] psychological impact requiring such a declaration before one's fellows is often its father."). In sum, the government cannot show that the jury that convicted Tsarnaev and recommended that

he be put to death was impartial. The government has therefore failed to rebut the presumption of prejudice.

C. Harmless as to Guilt, Not as to Sentencing

I agree with the majority that the district court's abuse of discretion was harmless as to Tsarnaev's guilt but not as to his sentence. See slip op. at 72-73, 74 n.33. Tsarnaev's counsel admitted his participation in these crimes during both opening and closing statements, and he does not contend on appeal that he would not have made these admissions had his trial taken place elsewhere. Sitting in its expanded role under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-99, a sentencing jury was required "to make a moral judgment . . . after consideration of aggravating and mitigating circumstances" about whether Tsarnaev deserved to live out his natural life in custody or be killed by the government. See McVeigh, 918 F. Supp. at 1474. The question of whether these aggravating circumstances outweigh the mitigating factors is one of "mercy" for the sentencing jury. See Carr, 136 S. Ct. at 642.

With a jury so intensely impacted by the charged crimes, and so exposed to inflammatory pretrial publicity —including reports detailing the extreme anguish of their neighbors and repeated calls for Tsarnaev to be sentenced to death—I cannot say with any degree of certainty that the jurors did not possess a "predilection toward that penalty." McVeigh, 918 F. Supp. at 1474.

"With his life at stake, it is not requiring too much that [a criminal defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion. . . . " Irvin, 366 U.S. at 728. The government cannot show that the district court's abuse of discretion was harmless

beyond a reasonable doubt as to Tsarnaev's sentence. See 18 U.S.C. § 3595(c)(2), (c)(2)(C). For this reason, I agree that Tsarnaev's death sentences must be vacated and the case remanded to the district court for a sentencing retrial.

II. Closing Remarks

In dissent on Tsarnaev's second mandamus petition, I expressed my concern that—in a case having this magnitude of press coverage and widespread dissemination of information—a subsequent jury on retrial would have been exposed to the evidence (and results) of the first trial and would know that the new trial was the result of a post-conviction reversal. Tsarnaev II, 780 F.3d at 46 (Torruella, J., dissenting). My concern has and very likely will come to fruition.[118] Because the majority rules in the manner in which it does on the issue of venue, I also maintain these concerns for future cases. The majority's reasoning cripples Rule 21(a) of the Federal Rules of Criminal Procedure and undermines the due process and impartiality principles of the Fifth and Sixth Amendments. I asked a simple question in 2015 that is still fitting, and I repeat it today: "If not here, when?" Id. at 45.

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[118] Again, I make no judgment about whether Boston is a proper venue for a subsequent sentencing retrial. That determination is time and place specific and must be made by the district court in the first instance at that retrial.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Filed: Apr. 17, 2014

ORDER

O'TOOLE, D.J.

The defendant's discovery motions (dkt. nos. 233, 235) are DENIED with the exception that reports of Ibragim Todashev's statements to the FBI are to be submitted to the Court for in camera review in a way that indicates: (a) what will be produced to the defendant, and (b) what the government seeks to withhold from production.

It is SO ORDERED.

/s/ GEORGE A. O'TOOLE, JR.
GEORGE A. O'TOOLE, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Sept. 24, 2014

OPINION AND ORDER

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.

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[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").

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 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 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 atten-

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

tion. 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.

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[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.

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 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.
GEORGE A. O'TOOLE, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Filed: Jan. 2, 2015

OPINION AND ORDER

O'TOOLE, D.J.

I. Defendant's Second Motion for Change of Venue

A. Relevant Background

At a status conference on September 23, 2013, the Court first raised the issue of venue with the defendant. At that time, defense counsel stated that they had not yet considered whether to contest venue in this District. Two months later, at a further status conference on November 12, 2013, the Court set February 28, 2014 as the deadline for the defense filing of a motion to change venue. About a month later, on December 16, 2013, the defendant moved to vacate that deadline for a motion to change venue, stating that it would be impossible to investigate whether a motion to change venue was warranted, determine whether a motion should be filed, and

file an adequately briefed and supported motion by February 2014. (Mot. to Vacate Filing Deadline for Mot. to Change Venue (dkt. no. 154).) The government opposed the motion. On January 14, 2014, the Court granted the defendant's motion and vacated the filing deadline. At a status conference on February 12, 2014, the Court extended the deadline by four additional months to June 18, 2014, just slightly less than a year after the return of the indictment and nine months after the Court first raised the question.

On June 11, 2014, one week before the defendant's motion to change venue was due, the defendant filed a two-page motion for extension of time, requesting that the Court extend the deadline for six additional weeks to August 3, 2014. The government opposed the further extension. The Court denied the defendant's request for additional time.

On June 18, 2014, the defendant filed his Motion for Change of Venue. The motion relied only on a "preliminary review of still-to-be-finalized survey data," was not supported by any declarations or exhibits, and concluded with a request that the Court grant him additional time to prepare his venue-change submission. (Mot. for Change of Venue (dkt. no. 376).) The government timely opposed the motion.

Two weeks later, on July 15, 2014, the defendant sought leave to file a reply to the government's opposition and to submit supplementary material in support. He did not append the proposed reply brief or supporting materials to the motion, but instead requested to be allowed to file the materials on August 7, 2014. On July 22, 2014, the Court granted the defendant's motion over the government's opposition.

On August 7, 2014, pursuant to the leave granted, the defendant filed his "reply" brief and supporting documents. The material, which totaled 9,580 pages, set forth new arguments with new evidentiary support, including a 37-page declaration by an expert, Edward J. Bronson. In order to permit the government to respond to the matter raised for the first time in the defendant's "reply," the Court permitted the government to file a sur-reply, which it did on August 25, 2014.

On August 29, 2014, the defendant filed a motion for leave to respond to the government's sur-reply, essentially asking for a third round of briefing on a motion that the defendant had already received multiple extensions of time to file. The defendant actually filed the proposed reply to the sur-reply and an affidavit from a new expert, Neil Vidmar, without waiting for a decision from the Court on the motion for leave, in contravention of the Local Rules. L.R. 7.1(B)(3), D. Mass. That same day, the government opposed the defendant's motion, arguing that the third round of briefing was unwarranted and that, "[b]y ignoring deadlines and filing unauthorized briefs without first obtaining permission, Tsarnaev has indicated that he does not believe the rules apply to him." (Gov't's Opp'n to Def.'s Mot. for Leave to File Resp. and Mot. to Strike Def.'s Resp. (dkt. no. 519).) The Court granted the government's motion to strike the defendant's inappropriately filed materials and denied the defendant's motion for leave to file.

Despite the Court's denial of his motion for leave to file the materials, the defendant filed yet another motion on September 4, 2014 to "supplement" the record by responding to the government's sur-reply and to enter into

the record the just-stricken Vidmar declaration. Unsurprisingly, the government opposed the defendant's renewed request. On September 18, 2014, the Court denied the defendant's motion to supplement the record, stating that "[t]he record is complete." (Status Conf. Tr. at 4 (dkt. no. 580).)

The Court denied the motion to change venue in an order entered September 24, 2014 (dkt. no. 577). There were no further filings on the issue of venue until the defendant filed his Second Motion for Change of Venue, the subject of this Order. The second motion relies largely on previously argued grounds but seeks to expand the supporting materials by, among other things, including the Vidmar affidavit which the Court already twice rejected. The government moved to strike Vidmar's affidavit and related material and, after receiving leave from Court, filed a late opposition to the defendant's second motion to change venue. The defendant opposed the motion to strike and, with leave, filed a reply to the government's opposition.

On December 31, 2014, having signaled the decision to both parties at a jury selection-related lobby conference on December 30, the Court denied the defendant's motion to change venue, stating that this explanatory opinion would be issued shortly.

B. Discussion

i. Opportunity to Develop Argument and Supporting Evidence

As the chronology described above makes clear, the defendant had ample time and opportunity to develop and present a venue change motion. It was the Court, rather than the defendant, who first raised the issue of

venue in this case. When the first deadline appeared to set too tight a schedule, the Court granted a considerable extension. When the first motion was filed, it was summary and unsupported by affidavits or other evidentiary materials. Nevertheless, even though it is generally inappropriate for a moving party to advance new arguments and supporting facts in a reply brief, the Court permitted the defendant the opportunity to expand on his opening brief in his reply to the government's opposition. In substance, the reply brief became the main motion. And in effect, the defendant gave himself the extension of time the Court had denied him in June.

The defendant now justifies his late submission of supporting materials in August and again in December by complaining of what he calls "bifurcated funding for Prof. Bronson's work." (See, e.g., Opp'n to Mot. to Strike Exhibits to Def.'s Second Mot. for Change of Venue at 3 n.1 (dkt. no. 774).) Because of the confidential nature of a criminal defendant's requests for funds for expert services and in order to limit the risk of divulging any defense work product, the Court will not address the merits of the argument in detail. It is sufficient to say that the Court rejects the defendant's explanation. After the Court raised the issue of venue, the defendant waited several months to seek funds for a venue expert and once funds were certified, waited a further period of time to request continued funding. In any event, the Court permitted him the time and opportunity to submit Bronson's material as his "reply" to the government's opposition to his first venue motion.

ii. Procedural Impropriety of Present Motion

Although it is not styled as such, the defendant's second motion for a change of venue is essentially a motion for reconsideration. It does not advance new or different arguments, but seeks instead to bolster former, unsuccessful arguments with additional information.

Although motions for reconsideration in criminal cases are not specifically authorized by either statute or rule, they may be considered in the exercise of the Court's inherent authority to revisit its own orders. See United States v. Ortiz, 741 F.3d 288, 292 n.2 (1st Cir. 2014); see also United States v. Iacaboni, 667 F. Supp. 2d 215, 216 (D. Mass. 2009) (noting that courts which have considered motions to reconsider in criminal cases "generally borrow standards either from civil cases or from the local rules"). As a general matter, under those standards motions for reconsideration are "not to be used as 'a vehicle for a party to undo its own procedural failures [or] allow a party to advance arguments that could and should have been presented' earlier." United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009) (quoting Iverson v. City of Boston, 452 F.3d 94, 104 (1st Cir. 2006)). Rather, such motions "are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was based on a manifest error of law or was clearly unjust." Id. (citing Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005)).

As to the first circumstance, the defendant does not present newly discovered evidence within the relevant

meaning of the term. The "new evidence" the defendant proffers is comprised of (a) the already-twice rejected Vidmar declaration and (b) a declaration by Josie Smith and accompanying exhibits concerning the extent of publicity about the case updated since similar exhibits were submitted and considered last summer. As explained below in Section B(iii), although the new survey covers publicity in recent months since the ruling on the prior motion, it does not advance anything genuinely "new." Additionally, several paragraphs in Smith's declaration purport to respond to the government's surreply to the defendant's first motion to change venue. Having previously found the record complete and denied the defendant's multiple attempts to initiate a third round of briefing, the Court does not now consider those paragraphs. Similarly, the Court rejects the defendant's third attempt to insert Vidmar's declaration into the record.

As to the second and third circumstances in which a reconsideration motion may be entertained, the defendant does not point to any intervening change in the law since the Court decided the defendant's first motion to change venue and does not appear to argue that the decision was a manifest error or law or was clearly unjust under the circumstances. Rather, it is plain that he does not agree with the Court's decision on the first motion and seeks to relitigate the same matter with what he presumably hopes is a more convincing showing. That is not recognized as an appropriate ground for reconsideration, which has never been considered a mechanism for serial relitigation of decided issues.

Consequently, the motion is procedurally deficient.

iii. Substantive Merits of Motion

Even were the Court to overlook the procedural deficiency, the defendant has not presented anything that would persuade it that the denial of the first motion to transfer venue, for the reasons explained in that Opinion and Order, was wrong.

In support of his renewed motion, the defendant again focuses on pretrial publicity. As the Court recognized in its previous opinion, media coverage of the case has been extensive. Although the defendant proffers a new media "analysis" based on the number of search hits in the Boston Globe and Boston Herald between July and November, he does not actually offer anything that is genuinely "new." The survey continues to be flawed for the same reasons the Court explained before. For instance, the search terms, some of which are overbroad, hit on articles that sometimes have little (or nothing) to do with the case. More importantly, it also does not distinguish between articles which might be deemed inflammatory and those that are largely factual in nature.

The defendant again argues that the jury pool has been so tainted that a change of venue is required, this time on a theory of "nearly universal local victimization." (See Mem. Supp. Second Mot. for Change of Venue at 8-10 (dkt. no. 686).) In summary, the defendant appears to suggest that it would not be possible to find 18 qualified and capable jurors out of the millions who reside in the Eastern Division of the District because "victims" in this case should be construed broadly to include the Boston Marathon; the entire cities of Boston, Watertown, and Cambridge, including their residents and those involved in the events in those locations;

the Marathon spectators and their families, friends, and acquaintances; and those who treated and cared for the injured. The defendant bases his argument on the disclosure by the government of an expert witness who may testify as to injury to the local population. The disclosure, however, was made on August 1, 2014, prior to the defendant's filing of his important reply brief of his first motion to transfer venue, and the defendant's argument should be rejected for that reason alone. The argument was plainly available to be made in the prior motion, and it is therefore an inappropriate basis for reconsideration.

Further, as previously emphasized by the Court, the Eastern Division is large and diverse. It certainly includes Boston, Cambridge, and Watertown—each of which contains a "diverse cross-section of ethnicities, backgrounds, and experiences"—but it is also a large district expanding significantly beyond those specific communities. See, e.g., United States v. Awadallah, 457 F. Supp. 2d 246, 253 (S.D.N.Y. 2006) (internal quotation marks and citation omitted); United States v. Salim, 151 F. Supp. 2d 281, 284 (S.D.N.Y. 2001); United States v. Yousef, No. S12 93 CR. 180 (KTD), 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997); United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993).

The defendant also argues that the Court should not base its analysis of the issues on the teachings of Skilling v. United States, 561 U.S. 358 (2010), and instead adopt the analysis utilized in United States v. McVeigh. (See Mem. Supp. Second Mot. for Change of Venue at 11 ("The defense submits that the analysis employed by the court in United States v. McVeigh is more appropriate

[than Skilling] to the facts of this case.") (internal citation omitted).) The Court, however, regards Supreme Court precedent as the more authoritative source of guidance.

Finally, the defendant reargues claims that Bronson's declaration from the defendant's first venue motion supports a change of venue. As already noted, the Court rejects the defendant's attempt simply to reargue matters already considered and rejected.

In sum, the Court adheres to the reasons previously expressed in concluding that the defendant has not shown that a presumption of inevitable prejudice arises so as to support a change of venue. See Skilling, 561 U.S. at 381; United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012).

iv. Upcoming Voir Dire Procedures

The defendant requests the Court to revisit its prior comment that a "thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection." (Sept. 24, 2014 Opinion and Order at 6 (dkt. no. 577).) The Court declines to do so.

First, the purported support the defendant advances in furtherance of his attack against the voir dire process is not new. The Bronson declaration supported his first venue motion, the Vidmar declaration has been twice (and now thrice) rejected, and the proffered Studebaker and Penrod article is from 1997. Evidence is not "new" if it "in the exercise of due diligence[] could have been presented earlier." Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25, 426 F.3d 416, 422 (1st Cir. 2005).

Second, since the Court's opinion citing recent District experience with high-profile cases, another case generating wide publicity has been tried to verdict here. On October 28, 2014, a jury returned a mixed verdict in the case of Robel Phillipos, who was charged with making false statements in connection with the Boston Marathon bombing investigation. Verdict, United States v. Phillipos, Cr. No. 13-10238-DPW (Oct. 28, 2014) (ECF No. 510). The verdict, which reflects a careful evaluation of the trial evidence in the face of widespread media coverage, supports the Court's previous observation regarding the capacity to empanel a fair and partial jury in the District.

Finally, voir dire has long been recognized as an "effective method for rooting out such [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner." Correia v. Fitzgerald, 354 F.3d 47, 52 (1st Cir. 2003) (citing Patton v. Yount, 467 U.S. 1025, 1038 & n.13) (1984)). It "is a singularly important means of safeguarding the right to an impartial jury. A probing voir dire examination is '[t]he best way to ensure that jurors do not harbor biases for or against the parties.'" Sampson v. United States, 724 F.3d 150, 163-64 (1st Cir. 2013) (quoting Correia, 354 F.3d at 52)).[1]

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[1] See also United States v. Mitchell, 752 F. Supp. 2d 1216, 1227 (D. Utah 2010) (concluding that defendant's poll did not support a finding of presumed prejudice and that defendant "failed to demonstrate that his concerns regarding community impact [could not] be adequately addressed and ameliorated through an extensive juror questionnaire and voir dire"); Salim, 189 F. Supp. 2d at 97 ("Precautions can function to assure the selection of an unbiased jury. Specifically, careful voir dire questioning on this topic, accompanied by the assembling of a jury pool significantly larger than the normal size, will be sufficient in detecting and eliminating any prospective

In this case, the parties and the Court have been working diligently to develop a comprehensive juror questionnaire that every qualified juror, culled from the initially summonsed group of 3,000, will complete.[2] The questionnaire contains approximately 100 questions, and many of them are designed to determine the extent to which potential jurors have been affected in the ways in which the defendant is concerned. The questionnaire will be followed by oral voir dire examination of all prospective jurors who were not excused for cause based on the questionnaire alone. The parties will be asked to submit to the Court questions they would like each potential juror to be asked during individual voir dire, particularly based on the questionnaire answers, and while the Court anticipates itself primarily conducting the voir dire, counsel-led follow-up may be permitted as appropriate.

The process is designed to screen out jurors who would be unable to conscientiously perform the impartial and fair assessment of the evidence at trial. "[T]he

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jurors prejudiced by their personal connection to [the terrorist attack]."); United States v. Lindh, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002) (volume of pretrial publicity alone was insufficient as "[n]o juror will be qualified to serve unless the Court is satisfied that the juror (i) is able to put aside any previously formed opinions or impressions, (ii) is prepared to pay careful and close attention to the evidence as it is presented in the case and finally (iii) is able to render a fair and impartial verdict based solely on the evidence adduced at trial and the Court's instructions of law").

[2] Indeed, the Court is implementing several protective voir dire procedures recommended by the defendant's expert, Edward Bronson, in at least one case, including a comprehensive jury questionnaire, an expanded jury pool, individualized voir dire when indicated, and attorney input on the content of the voir dire. See Salim, 189 F. Supp. 2d at 97 n.7.

proof of this pudding will be the voir dire results; only those prospective jurors found to be capable of fair and impartial jury service after careful voir dire will be declared eligible to serve as jurors." See United States v. Lindh, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002). The Court has confidence that a sufficient number of qualified, impartial jurors will be identified and ultimately sworn as jurors. Should the process of voir dire prove otherwise, the question of transfer can obviously be revisited. See id. at 549-50 & n.7.

II. Government's Motion to Strike Exhibits

In response to the defendant's Second Motion for Change of Venue, the government has moved to strike certain paragraphs of Exhibit 1 (Declaration of Josie Smith) and all of Exhibit 2, the Vidmar declaration. The government argues that their inclusion in the defendant's motion papers constitute an attempt to reopen a record the Court previously declared complete. For the reasons articulated by the government and also described in Sections B(i) and B(ii) of this Opinion, the Court agrees. Paragraphs 11 through 14 of Exhibit 1 and all of Exhibit 2 to the defendant's Second Motion for Change of Venue are hereby STRICKEN.

III. Conclusion

As previously ordered, the defendant's Second Motion for Change of Venue (dkt. no. 684) is DENIED. The government's Motion to Strike Exhibits to Defendant's Second Motion for Change of Venue (dkt. no. 760) is GRANTED.

It is SO ORDERED.

/s/ GEORGE A. O'TOOLE, JR.
GEORGE A. O'TOOLE, JR.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 14-2362

IN RE DZHOKHAR TSARNAEV, PETITIONER

Entered: Jan. 3, 2015

JUDGMENT

Before: LYNCH, Chief Judge, TORRUELLA and HOWARD, Circuit Judges.

We have carefully reviewed petitioner's application for a writ of mandamus. Even assuming that the district court's order denying petitioner's second motion for change of venue would be subject to review by mandamus, see In re Kouri-Perez, 134 F.3d 361 (1st Cir. 1998) (unpublished per curiam), we deny the petition and hold only that petitioner has not made the extraordinary showing required to justify mandamus relief. See In re Bulger, 710 F.3d 42, 45 (1st Cir. 2013) (before mandamus will issue, petitioner must satisfy burden of showing right to issuance of writ is clear and indisputable, that he has no adequate source of relief, and that equities favor issuance of the writ). Petitioner's emergency motion to stay jury selection and trial in the district court is denied.

The judges in the majority regret the incorrect statement in the dissent suggesting that this matter has been

under consideration for only six hours. The petition for writ of mandamus and emergency motion to stay jury selection and trial in the district court were filed on December 31. However, counsel for petitioner provided notice in advance that the filing would be forthcoming. The court thereupon immediately began a careful and painstaking review of the publicly available filings on the district court docket. The government filed its response, and the district court issued its decision, in the midst of that ongoing review. The judges in the majority are satisfied that full consideration has been given to the issues raised by the petition, and it is clear that the petition falls far short of meeting the requirements for issuing the extraordinary writ of mandamus.

TORRUELLA, Circuit Judge, dissenting. I regret that I am unable to join my colleagues in issuing today's order in this case, which is of profound importance not only for Tsarnaev but also for the people of Boston and for all of us who cherish the guarantee of constitutional rights for all litigants before this Court. My colleagues begin their order by stating they have "carefully reviewed petitioner's application for a writ of mandamus." Although I cannot speak for the majority on this point, due to the complexity of the issues raised, the mountains of documents and exhibits that need to be read (which the government has described as over 9,500 pages long), and the logistical difficulties we have had in receiving this evidence, I have found it impossible to read even a small part of all of this evidence, much less give it the careful consideration a case involving the death penalty deserves.

On the afternoon of New Years Eve, the district court entered an electronic order denying Tsarnaev's second motion to change venue—which had been filed a month earlier on December 1st[1]—stating simply that an explanation of its decision "will be issued shortly." Within hours of that order, Tsarnaev filed a motion to stay the jury selection and trial, scheduled to begin on Monday, January 5, 2015, pending the disposition of the mandamus petition now being rejected by my colleagues. We afforded the government twenty-four hours to respond, and then extended this period by another two hours. It was not until yesterday afternoon, January 2, 2015, that the district court finally explained its grounds for denying the second motion for change of venue. Thus, we have had all of the relevant materials—the current mandamus petition, the government's opposition, the district court's denial, and all previous venue-related filings, which comprise exhibits totalling thousands of pages of polling data of potential jurors, of news, of media articles, and of studies published since the tragic events of April 15, 2013—before us for less than six hours.

Because of these difficulties, I am not in a position to intelligently opine as to whether the standard for mandamus relief has been satisfied. What I do know is that Tsarnaev's argument that the entire city of Boston and its surrounding areas were victimized—as evidenced by the city's virtual lockdown and the images of SWAT team members roaming the streets and knocking door-to-door in Watertown—is compelling. At first glance, Tsarnaev makes a much stronger case for change of

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[1] The government was initially given two weeks to respond but did not file its opposition until December 22, 2014.

venue here than there was in Skilling, where a change of venue was found to be unwarranted, and McVeigh, where a change of venue was granted. Cf. Skilling v. United States, 561 U.S. 358, 370, 383 (2010) (crediting that "the facts of the case were 'neither heinous nor sensational'" and there was "[n]o evidence of the smoking-gun" of his guilt); United States v. McVeigh, 918 F. Supp. 1467, 1472, 1474 (W.D. Okla. 1996) (finding that the "emotional burden of the explosion and its consequences" on those who lived in the area but were personally unaffected created "so great a prejudice against [the] defendants in the State of Oklahoma that they cannot obtain a fair and impartial trial"); cf. also United States v. Awadallah, 457 F. Supp. 2d 246, 252 (S.D.N.Y. 2006) ("If Awadallah was actually charged with participating in the September 11 attacks, it is possible to imagine that the prejudice in this case would be comparable to the community scrutiny and outrage that justified a change of venue in McVeigh.")

Yet, due to the artificial time constraints placed upon us, it is impossible to do more than take this quick glance. Regardless of whom you want to blame, be it Tsarnaev for waiting until less than a month before trial to file his second motion for a change of venue or the district court for waiting until the 11th hour to issue its denial, such a rushed and frenetic process is the antithesis of due process. It is unrealistic at best to presume that there is no irreparable harm in having the jury selection and trial begin since there will be another opportunity to consider this matter in the future. Considering the time and cost commitment of composing a venire and conducting voir dire—something both the government and the district court emphasize heavily—once jury selection begins, it will not only cause irreparable harm to

Tsarnaev, but it will also set an irreversible and unstoppable process in motion. Thus, I strongly believe that a stay should have been granted to allow a full, fair, and reasoned analysis of this extremely important issue that goes to the heart of our constitutional guarantees of "an impartial jury" and "due process of law."

I respectfully dissent.

By the Court:

/s/ MARGARET CARTER, Clerk
MARGARET CARTER

cc: Hon. George A. O'Toole, Mr. Robert M. Farrell, Clerk, United States District Court for the District of Massachusetts, Ms. Judith Mizner, Ms. Miriam Conrad, Mr. David I. Bruck, Mr. Timothy G. Watkins, Mr. William W. Fick, Ms. Judy Clarke, Mr. William D. Weinreb, Ms. Dina Michael Chaitowitz, Mr. Aloke Shankar Chakravarty, Mr. Donald L. Cabell, Ms. Nadine Pellegrini, Mr. Steven D. Mellin, Mr. Matthew R Segal.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Filed: Feb. 6, 2015

OPINION AND ORDER

O'TOOLE, D.J.

On January 22, 2015, the defendant filed his third motion for a change of venue.[1] On January 28, the motion was opposed by the government. That same day, the defendant moved to file a reply to the government's opposition (without attaching the requested reply brief) and on January 30, filed a motion for leave to file under seal a reply brief with a proposed reply. On February 2, the next business day, operations in the courthouse were limited due to weather. Then, at the end of the day on February 3, the defendant filed a motion to stay jury selection pending the disposition of a second petition for mandamus apparently filed that same day.

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[1] The relevant procedural history regarding the defendant's prior motions to change venue is fully described in the Court's January 2, 2015 Opinion and Order (dkt. no. 887).

I. Defendant's Motions for Leave to File a Reply Brief

As an initial matter, the motions for leave to file a reply (dkt. nos. 993, 996) are DENIED. The venue issues have been thoroughly briefed and rebriefed. In his motion to file a reply, the defendant points to the government's use of "features of the ongoing voir dire procedure" and seeks to file a reply in order to "similarly cite" material from voir dire. (Mot. for Leave to File Reply to Gov't's Opp'n to Third Mot. for Change of Venue at 1 (dkt. no. 993).)

First, the defendant filed his third venue motion while the conduct of individual voir dire was ongoing, but chose to focus exclusively on data from the juror questionnaires. A reply brief is not the proper place to raise new arguments which could have been advanced in the supporting memorandum. Cf. United States v. Bradstreet, 207 F.3d 76, 80 n.1 (1st Cir. 2000) (citing United States v. Brennan, 994 F.2d 918, 922 n.7 (1st Cir. 1993)). Second, as voir dire advances on a daily basis, new data will also emerge on a daily basis. Permitting the defendant to add select quotes from the transcript of the ongoing voir dire process will only serve to encourage unhelpful serial briefing as the process develops daily. Third, having reviewed the defendant's proposed reply brief, I find that permitting the defendant to file it would not materially change my analysis, chiefly because the defendant's strategic selections of quotes and specific experiences with a few jurors during voir

dire are misleading and not representative of the process as a whole.[2]

II. Defendant's Third Motion for Change of Venue

The third motion for a change of venue is denied, for reasons both old and new. The old reasons are essentially the same reasons the prior motions were denied, and those opinions are hereby incorporated by reference.[3]

The new reason is that, contrary to the defendant's assertions, the voir dire process is successfully identifying potential jurors who are capable of serving as fair and impartial jurors in this case. In light of that ongoing experience, the third motion to change venue has even less, not more, merit than the prior ones.

That the voir dire process has been time-consuming is not an indication that a proper jury cannot be selected for this case. It is rather in the main a consequence of the careful inquiry that the Court and counsel are making into the suitability of prospective jurors. That takes time, and we have been taking it.

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[2] To the contrary, the experience of voir dire suggests instead that the full process—including summonsing an expanded jury pool; utilizing a lengthy questionnaire jointly developed by the parties and the Court; giving the parties ample time to review questionnaires, research jurors, and consult with their jury selection advisers; and permitting both the Court and the parties to conduct thorough voir dire—is working to ferret out those jurors who should appropriately be excused for cause.

[3] I again reject the defendant's attempt to rely upon the declaration of Neil Vidmar, which has now been disallowed four times, and the portions of the Josie Smith declaration which have already been stricken.

It is also necessary to have a large pool of qualified jurors available for the next phase of jury selection, which is the exercise of peremptory challenges. Because this is a death penalty case, both sides have significantly more peremptory challenges than they would in other criminal cases. Whereas in a typical non-capital federal case the parties might have between them a total of 18 to 22 peremptory challenges (depending on the number of alternates seated), in this case they each have 23, for a possible total of 46. That requires that we clear for possible service a minimum of 64 potential jurors, many more than commonly necessary. Indeed, if this were a typical criminal case of the sort tried routinely in this Court, we would likely already be finished. We have made substantial progress toward achieving the goal of the ongoing voir dire process. There is no reason to expect that such progress will cease, and there is no reason to halt a process that is doing what it is intended to do.

At base, the defendant's argument purports to be based on an examination of the written questionnaires completed by prospective jurors in early January. While the questionnaires remain an important source of information about jurors and their attitudes, they are no longer the only source, nor for some matters the best source. Some questions on the written form asked jurors to answer by selecting from various options presented, usually by checking a box. Other questions asked jurors to respond in their own words. Checking a box may result in answers that appear more clear and unambiguous than the juror may have intended or than is actually true. On the other hand, answers in the jurors' own words can often be unclear, inapposite, or incomplete. In the voir dire that is underway, the Court and

the parties have been able to follow up on the written answers as appropriate to try to clarify what may be ambiguous, to explore whether a juror would qualify or amplify an apparently unambiguous answer, and to probe matters not expressly addressed in the questionnaire. In other words, at this stage the questionnaire answers are only a starting point. Decisions to qualify or excuse any prospective juror will be made on the basis of all the information available, but especially on the individual interviews of each of the jurors, face to face. It is therefore a fundamental flaw in the defendant's argument in support of his motion that it relies primarily on the questionnaire answers. As pointed out above regarding the motion to file a reply, when the defendant filed his motion it was open to him to support it by reference to what emerged during voir dire, but he apparently chose not to do so. The technique of saving main arguments for a reply brief is one the defendant has previously sought to employ on this issue.

The defendant is correct that in answering the questionnaire a substantial number of jurors checked the box "yes" in responding to a question whether, based on media reports or other information, they had formed an opinion that the defendant is guilty.[4] The government is likewise correct in pointing out that a substantial number of those jurors also indicated, again by checking

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[4] To this point, it is worth noting that the percentage the defendant claims checked the box (68%) was substantially smaller than the percentage of poll respondents who thought the defendant was clearly or probably guilty in the four jurisdictions previously surveyed by the defendant. (Reply to Gov't's Opp'n to Def.'s Mot. for Change of Venue and Submission of Supplemental Material in Supp., Decl. of Edward J. Bronson, Ex. 4f at 5 (dkt. no. 461-23) (92% in Boston, 84% in Springfield, 92% in Manhattan, and 86% in Washington, D.C.).)

a box, that they would be "able" to set such an opinion aside and decide the issues in the case based solely on the evidence presented at trial. Neither answer needs or deserves to be accepted at face value, and voir dire has afforded an opportunity, participated in by counsel for both parties, to explore the issues further with jurors. Some jurors who said on the form they would be "able" to put a prior opinion aside and decide issues solely on the trial evidence backed off from that position when questioned during voir dire and said they would not be able to do so. Other jurors confirmed their answer, usually explaining why they thought they would be able to decide the case only on the trial evidence. For example, one human resources professional explained that it was a common occurrence in her experience for her initial impression of the merits of a workplace controversy to be altered or even reversed when she had information from a fuller or more careful investigation, and so she had learned to keep her judgment suspended until she had all the necessary information. Other jurors have said that as citizens they understand and are committed to the principles of the presumption of innocence and proof beyond a reasonable doubt. Others have said they do not always accept media coverage as reliable. Neither such reversals of position nor added explanations can appear from examination of the questionnaires alone. They are the product of the voir dire process that the defendant seeks to interrupt.

The defendant also contends that there are too many jurors who have some "connection" to the Marathon events. There are many different kinds of possible "connections," from participation in the race itself to presence as a spectator to relationships with victims to donations to charitable funds to possession of "Boston

Strong" merchandise. To understand whether any such "connection" should disqualify a juror otherwise qualified to serve requires going beyond the face of the questionnaire and asking jurors directly about it. That also is happening in the voir dire process and permits the development of additional, and thus helpful, information about the nature and strength of any "connection" in a face-to-face, give-and-take with a juror.

It must also be noted that the defendant's presentation of a series of selective quotations from the 1300-plus questionnaires is misleading because the quotations are not fairly representative of the content of the questionnaires generally. It is possible to match the defendant's selection with a different group of quotations that, considered by themselves, would lead to opposite conclusions. The selected quotations are attention-getting, and they have gotten attention from the media. After putting them in a public filing and thus having effectively invited the media to give them publicity, the defendant now piously complains about the level of media coverage.[5]

When I learned that the defendant's memorandum included quotations from the confidential juror questionnaires, on my own motion I ordered the unredacted memorandum to be placed under seal. In that brief electronic order, I described the public filing of contents of the questionnaire as improper, and I adhere to that characterization. (See infra Part IV.) At the time jurors filled out the questionnaires, I told each panel of jurors that the completed questionnaires would initially

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[5] During the voir dire process, interviewed jurors have assured me that they have followed my instructions to avoid media stories about this case.

be reviewed only by the participants in the case and by the Court, and that they would not become part of the public record unless and until I determined whether they include any sensitive information that should be kept confidential permanently. All parties were aware of that advice to jurors. Notwithstanding, the defendant made parts of completed questionnaires part of the public record without leave of Court, and that is unfortunate. It not only nullified the assurance I had given the jurors, but it also invited further public discussion of matters to be raised in the voir dire process, creating a possible impediment to the success of that process.

Concerns about jurors who have fixed opinions or emotional connections to events, or who are vulnerable to improper influence from media coverage, are legitimate concerns. The Court and the parties are diligently addressing them through the voir dire process.

The defendant's third motion for a change of venue (dkt. no. 980) is DENIED.

III. Defendant's Motion to Stay

On February 3, the defendant apparently filed with the Court of Appeals a second petition for mandamus, and in connection with that filed at 5:19 p.m. a motion with this Court to stay proceedings pending resolution of the petition. The motion for a stay (dkt. no. 1003) is DENIED.

IV. Defendant's Motion to Amend Electronic Order re: Change of Venue Filing

The defendant asks the Court to amend the electronic order finding as improper the defendant's memoran-

dum copying specific quotes from prospective juror questionnaires. For the reasons described above, the defendant's request (dkt. no. 984) is DENIED.

It is SO ORDERED.

/s/ GEORGE A. O'TOOLE, JR.
GEORGE A. O'TOOLE, JR.
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 15-1170

IN RE DZHOKHAR TSARNAEV, PETITIONER

Feb. 27, 2015

Before: LYNCH, Chief Judge, TORRUELLA and HOWARD, Circuit Judges.

Per Curiam. Petitioner Dzhokhar A. Tsarnaev asks this court to compel the district court to grant a change of venue because of widespread pretrial publicity that he alleges has so tainted the potential jury pool that he will be unable to receive a trial before a fair and impartial jury in Boston. See generally Second Petition for Writ of Mandamus. We deny the Second Mandamus Petition because petitioner has not met the well-established standards for such relief and so we are forbidden by law from granting it.

The Supreme Court's admonition over a century ago is true today:

> The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every 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, 155-56 (1878).

Thus, any high-profile case will receive significant media attention. It is no surprise that people in general, and especially the well-informed, will be aware of it. Knowledge, however, does not equate to disqualifying prejudice. Distinguishing between the two is at the heart of the jury selection process.

Trials have taken place in other high-profile cases in the communities where the underlying events occurred. After the 1993 World Trade Center bombing, which killed six and injured over a thousand people and inflicted hundreds of millions of dollars in damage, the six conspirators charged were each tried in the Southern District of New York. The district court denied change-of-venue motions in each case, the first less than a year after the bombing. See United States v. Yousef, No. S12 93-Cr.0180, 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997); United States v. Salameh, No. S5 93-Cr.0180, 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993) (finding less than a year after the bombing that a jury in New York would be "willing to try this case with an open mind" and able to "render a decision based solely upon the evidence, or lack thereof," even if the jurors had heard of the bombing before). After the conviction in Yousef, the Second Circuit affirmed. United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003).

Indeed, after the September 11 terrorist attacks in 2001, the prosecution of Zacharias Moussaoui was

brought in the Eastern District of Virginia, minutes by car from the Pentagon. The district court denied a change of venue motion, and the Fourth Circuit dismissed Moussaoui's interlocutory appeal. United States v. Moussaoui, 43 F. App'x 612, 613 (4th Cir. 2002).

Further, the events here, like the 1993 bombing of the World Trade Center and the September 11, 2001 attacks, received national and international attention. Petitioner does not deny that a jury anywhere in the country will have been exposed to some level of media attention. Indeed, his own polling data shows that, in his preferred venue, Washington D.C., 96.5% of survey respondents had heard of the bombings at the Boston Marathon.

The mandamus relief sought is an extraordinary remedy, rarely granted, and has stringent requirements. To convince an appellate court to intervene is to employ "one of the most potent weapons in the judicial arsenal." Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted). To compel the district court to change course, a petitioner must show not only that the district court was manifestly wrong, but also that the petitioner's right to relief is clear and indisputable, irreparable harm will result, and the equities favor such drastic relief. Id. at 380-81, 390. In the case before us, we cannot say petitioner has met these onerous standards and so relief must be denied.

I.

Petitioner is charged with multiple crimes arising out of the bombings at the Boston Marathon on April 15, 2013, killing three and injuring over 200. Some of

these crimes potentially carry the death penalty. On June 18, 2014, petitioner filed his first motion to change venue claiming that pretrial publicity and the attendant public attitudes were so hostile and inflammatory that a presumption of prejudice had arisen requiring that he be tried in a different district. On September 24, 2014, the district court denied the motion in a thorough and detailed order. In its order, the court addressed the evidence used by petitioner in support of his motion and, applying the standards set out in Skilling v. United States, 561 U.S. 358 (2010), concluded that petitioner had failed to demonstrate that pretrial publicity rendered it impossible to empanel a fair and impartial jury in the District of Massachusetts. Petitioner did not seek mandamus at the time of the first motion's denial.

On December 1, 2014, petitioner filed a second motion to change venue, arguing that the need for a change of venue had become more acute because of continuing prejudicial publicity in the media and alleged leaks of information by government sources. On December 31, 2014, without waiting for the district court's written decision on the second motion, petitioner filed his first mandamus petition with this court. On January 2, 2015, while that petition before us remained under consideration, the district court issued its written decision on the second venue motion, noting that the new motion did not raise any genuinely new issues apart from those in the first motion and concluding that no presumption of prejudice had arisen that would justify a change of venue. On January 3, 2015, this court denied the motion to stay jury selection and the first petition, concluding that petitioner had "not made the extraordinary showing required to justify mandamus relief." In re Tsarnaev, 775 F.3d 457 (1st Cir. 2015).

Jury selection commenced on January 5, 2015, and continues to date. On January 22, 2015, petitioner filed in the district court his third motion to change venue in which he asserted that the detailed and extensive questionnaires completed by the 1,373 prospective jurors comprising the venire, combined with the record of individual voir dire compiled to date, mandated a change of venue because of pervasive bias and prejudgment uncovered during that process. After petitioner filed this Petition, the district court denied the Third Motion for Change of Venue, in part for the reasons set forth in its earlier decisions, and in part because "the voir dire process is successfully identifying potential jurors who are capable of serving as fair and impartial jurors in this case." United States v. Tsarnaev, No. 13-CR-10200-GAO (D. Mass. Feb. 6, 2015). "In light of that ongoing experience," the district court concluded, "the third motion to change venue has even less, not more, merit than the prior ones." Id. The court further maintained that "[c]oncerns about jurors who have fixed opinions or emotional connections to events, or who are vulnerable to improper influence from media coverage, are legitimate concerns. The [c]ourt and the parties are diligently addressing them through the voir dire process." Id.

This court held a hearing on the Second Petition for Mandamus on February 19, 2015, and allowed supplemental filings.

The Second Petition for Mandamus before us largely makes the same claims and relies on the same types of data as the Third Motion for Change of Venue which the district court denied. Petitioner argues that a presumption of prejudice exists here because aggregated

data shows too many in the community and in the jury pool have expressed the opinion he is guilty and that those jurors have been affected by, or have connections to, the crime. He claims the continuing media attention exacerbates these problems. He argues that the judge erred in rejecting his claim that presumed prejudice has been established. From this, he argues, voir dire cannot succeed in finding a fair and impartial jury. This is so, he argues, even if the trial judge after voir dire qualifies a jury after determining the jurors so qualified to be fair and impartial. At this point, the trial judge has not sat a jury, but rather has identified over sixty provisionally qualified jurors who are still subject to peremptory challenges.[1] We conclude that petitioner fails to demonstrate a clear and indisputable right to relief.

II.

The writ of mandamus is a "drastic" remedy; given its potential "to spawn piecemeal litigation and disrupt the orderly processes of the justice system," mandamus "must be used sparingly and only in extraordinary situations." In re Pearson, 990 F.2d 653, 656 (1st Cir. 1993) (citations and internal quotation marks omitted). It is reserved for the "immediate correction of acts or omissions" by the district court "amounting to an usurpation of power." Id. (citation and internal quotation marks omitted). Indeed, "mandamus is generally thought an inappropriate prism through which to inspect exercises of judicial discretion," In re Bushkin Assocs.,

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[1] The parties have each received twenty-three peremptory challenges, three more than required by the applicable rule. Fed. R. Crim. P. 24(b)(1).

Inc., 864 F.2d 241, 245 (1st Cir. 1989), and the jury selection process involves some measure of discretion. "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense.'" Skilling, 561 U.S. at 386 (alteration in original) (quoting Mu'Min v. Virginia, 500 U.S. 415, 427 (1991)). We are unable to conclude that the district court's reasoned conclusion based on the facts and the law in this case warrants issuance of such extraordinary relief.

A. The Mandamus Standard Applicable Here.

The intersection of two constitutional mandates lie at the heart of resolution of petitioner's mandamus claim. First, both Article III and the Sixth Amendment provide that a criminal defendant shall be tried in "the State where the . . . Crimes . . . have been committed." U.S. Const. art. III, § 2, cl. 3; see also id. amend. VI (right to trial by "jury of the State and district wherein the crime shall have been committed").

Second, the Sixth Amendment "secures to criminal defendants the right to trial by an impartial jury." Skilling, 561 U.S. at 377; see also U.S. Const. amend. VI. This right, ensuring the defendant "a fair trial," has also been characterized as "a basic requirement of due process." Skilling, 561 U.S. at 378 (citation and internal quotation marks omitted). In some situations, these constitutional mandates may be in tension. Notwithstanding the constitutional command that trials take place where crimes are committed, the defendant's rights to an impartial jury and a fair trial may require that in extreme cases the trial be moved to a venue other than where the crime was committed. We have described such cases as those where "there is an ever-prevalent

risk that the level of prejudice permeating the trial setting is so dense that a defendant cannot possibly receive an impartial trial." United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012).[2] In those rare, extreme circumstances it may be "a denial of due process of law to refuse the request for a change of venue." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

Importantly, if petitioner goes to trial without a change of venue now and is convicted, he will have the opportunity to raise a challenge based on lack of a fair and impartial jury on direct appeal. Indeed, that is the customary mechanism by which such challenges are presented and assessed. See, e.g., Quiles-Olivo, 684 F.3d at 182-84.[3]

Instead of traveling that typical route, petitioner asks this court for a writ of mandamus at this pretrial

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[2] Rule 21(a) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district 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." "Generally, a presumption of prejudice is reserved for those extreme cases where publicity is both extensive and sensational in nature. Stated differently, Rule 21(a)'s requirements tend to almost exclusively apply in cases in which pervasive pretrial publicity has inflamed passions in the host community past the breaking point." Quiles-Olivo, 684 F.3d at 182 (1st Cir. 2012) (citations, internal quotation marks, and alteration omitted).

[3] At oral argument, it was the position of petitioner that denials of motions to change venue are reviewed for abuse of discretion and that a clear abuse of discretion would give rise to a clear entitlement to relief. Petitioner characterized "the change of venue in this case" as being "at the heart of the Sixth Amendment" right to trial by an impartial jury.

stage. And the mandamus petition in this case is particularly unusual. It came in the process of ongoing jury selection and is an attempt to prevent a trial in this jurisdiction from going forward. Petitioner urges this appellate court to intervene and halt that juror selection process in the trial court. He does so despite the fact that, the district court, sitting in the "locale where the publicity is said to have had its effect," necessarily and properly under the law draws on its "own perception of the depth and extent of news stories that might influence a juror." Mu'Min, 500 U.S. at 427. The district court has not yet completed that process, and we are mindful that an appellate court's "after-the-fact assessments of the media's impact on jurors . . . lack the on-the-spot comprehension of the situation possessed" by the trial judge. Skilling, 561 U.S. at 386; see id. at 378 n.11 ("[D]istrict-court calls on the necessity of transfer are granted a healthy measure of appellate-court respect.").

Because petitioner's venue claim "arises not on direct appeal after trial but on petition for a writ of mandamus," it is subject to "an even more exacting burden" than it would be on direct appeal. In re Bulger, 710 F.3d 42, 45 (1st Cir. 2013).[4] The petitioner must "satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." Id. (citations, internal quotation marks, and alteration omitted). That standard of review is extraordinarily deferential to the

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[4] For purposes of this opinion, we will assume that the petitioner can prove his argument that the district court's denial of the pretrial Third Motion for Change of Venue is subject to mandamus review at all, see In re Kouri-Perez, 134 F.3d 361 (1st Cir. 1998) (unpublished per curiam), though not all circuit courts agree.

ruling of the trial judge. In our cases, "mandamus has customarily been granted only when the lower court was clearly without jurisdiction, or exceeded its discretion to such a degree that its actions amount to a usurpation of power." In re Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1988) (internal quotation marks, citations, and alteration omitted). As we explain below, neither of those conditions is true here.

In addition to overcoming the daunting first requirement, petitioner must also meet two other standards. First, he must demonstrate that he has no other adequate source of relief; in other words, he must show irreparable harm. In re Bulger, 710 F.3d at 45 (citation omitted). This condition is "designed to ensure that the writ will not be used as a substitute for the regular appeals process," Cheney, 542 U.S. at 380-81 (citation omitted), which, as we have noted, remains open to petitioner after trial should he be convicted. Petitioner does not rely on an argument that he will suffer irreparable injury, but argues a failure to accept his argument is so obviously wrong, the irreparable injury is to the reputation of the federal judicial system. And, second, "a petitioner must demonstrate that, on balance, the equities favor issuance of the writ." In re Bulger, 710 F.3d at 45.

Together, these standards mean that, when considering a petition for the extraordinary writ of mandamus, an appeals court is bound to employ an extraordinarily deferential form of review. Relief may be allowed here only (1) if it is clear and indisputable that the district court erred in denying petitioner's Third Motion for Change of Venue, (2) petitioner would suffer irreparable harm if the district court were not ordered to change

venue, and (3) the equities clearly favor the petitioner. See id. at 45-46. These onerous standards have not been met here.

B. It is not Clear and Indisputable that Pretrial Publicity Requires a Change of Venue.

We are bound by the Supreme Court's decision in Skilling, a case in which the venue question was examined after conviction. This case, by contrast, is an attempt to force a trial judge to change venue despite his findings that no presumption of prejudice has arisen, and that there are jurors provisionally qualified to date[5] capable of providing defendant with a fair trial. Skilling involved the criminal prosecution of Jeffrey Skilling, a former Enron executive, for certain crimes committed prior to Enron's much-publicized collapse which badly harmed the city of Houston. Skilling twice moved to change venue from Houston, Enron's home city, and the district judge denied both motions.[6] After Skilling was convicted of some, but not all, of the charges against him, he appealed, asserting, inter alia, a fair-trial claim which encompassed two questions: first, whether the district court erred by failing to move the trial to a different venue based on a presumption of prejudice and, second, whether actual prejudice contaminated the jury which convicted him.

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[5] The "provisionally qualified" jurors are still to be subject to peremptory challenges.

[6] Skilling first moved for change of venue four months after he was indicted; he renewed the motion three weeks before trial, shortly after a co-defendant pleaded guilty. See Skilling, 561 U.S. at 369, 372. Skilling's trial did take place without changing venue and his claims were thereafter considered and rejected on direct appeal.

The Supreme Court first surveyed and distinguished its earlier cases, including Rideau v. Louisiana, 373 U.S. 723 (1963), and discussed the differences between those cases and Skilling. The Court then discussed several considerations that informed its conclusion that the publicity in Houston had not produced a presumption of prejudice. First, the Court examined the size and characteristics of the community in which the crimes occurred. Out of Houston's population, 4.5 million people were eligible for jury service, a much greater number than the small area the Court considered in Rideau. Second, while there was a widespread community impact from the crimes, Skilling held that with careful identification and inspection of prospective jurors' connections to Enron, a jury with non-existent or attenuated links to Enron could be seated. The Court considered the "widespread community impact" of Enron's failure and the guilty plea of a co-defendant shortly before trial, and concluded in each instance that the "extensive screening questionnaire and follow-up voir dire were well suited" to the task of identifying and inspecting the possible effects of these influences. Skilling, 561 U.S. at 384-85. Third, while the press coverage of Skilling was "not kind," the Court found it significant that the news stories about him "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." Id. at 382. Fourth, the Court noted that several years' time passed between Enron's collapse and Skilling's trial during which the "decibel level" of media attention dropped. Id. at 383. Considering all of these factors, the Court held that no presumption of prejudice arose and that the district court did not violate

constitutional limitations in declining to change venue. Id. at 385.

It is apparent that petitioner cannot meet the high bar set for mandamus relief, based on the parties' submissions and the parts of the record the parties have relied on in their arguments to us. Petitioner argues that the bombings have so impacted the entire Boston-area community that we must presume prejudice for any jury drawn from the Eastern Division of Massachusetts.[7] Yet his own statistics reveal that hundreds of members of the venire have not formed an opinion that he is guilty. The voir dire responses have confirmed this. Petitioner's selective quotations from the sealed materials are, as the district court said, misleading. Our own review of those materials shows that the district court is in fact identifying provisionally qualified jurors with no or few and, at most, attenuated claimed connections to the bombings.

Boston, like Houston in Skilling, is a large, diverse metropolitan area. Boston-area residents obtain their news from a vast array of sources. By contrast, in Rideau, a 1963 case from Louisiana, the Court found it

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[7] We have a different view than the dissent's description of the courthouse and its environs. While jury selection has been going on there was not a courthouse view of a dump truck or a view of a construction site showing a Boston Strong banner. Presumably the dissent is referring to a photograph taken of a banner on a partially constructed building from early 2014, which has not been present during jury selection in 2015. Nothing can be seen from the courthouse of any banner at this time. Nor has the petitioner claimed that any members of the jury pool present at the courthouse were exposed to the cement mixer on the single day it was present in the area. Even if these assertions were true, that does not show presumed prejudice of any sort.

was a denial of due process to have refused a request for change of venue where at least 50,000 people in an area of 150,000 saw the video of a staged interview by the Sheriff resulting in a "confession" by defendant, who had not been advised of his right to counsel. 373 U.S. at 724-26. The Supreme Court characterized this as a "kangaroo court." Id. at 726.[8]

While there has been extensive publicity in this case, the atmosphere here is not to be characterized as disruptive to the ability of the petitioner to be adjudged by a fair and impartial jury. This case is in sharp contrast with Estes v. Texas, 381 U.S. 532, 536 (1965), where pretrial publicity and the televising of proceedings in a notorious criminal case resulted in setting aside the conviction despite absence of showing of prejudice. This case is unlike the atmosphere of "bedlam," in Sheppard v. Maxwell, 384 U.S. 333, 355, 363 (1966), where the trial judge did not fulfill his duty to protect a murder defendant from inherently prejudicial publicity which saturated the community or to control disruptive influences in the courtroom during trial. Nor is this case marred by the repeated broadcast of a defendant's questionable taped confession two months before trial in a small area of 150,000 people, as in Rideau, 373 U.S. at 724. As petitioner's counsel has admitted, there is no confession at all here. Indeed, much of what petitioner calls "publicity" consists of factual news media accounts of the events of that period. The publicity petitioner has received, while "not kind," Skilling, 561 U.S. at 382, has not been

[8] Indeed, the Court relied on prior cases in which so-called "voluntary confessions" were extracted by brutal force. Rideau, 373 U.S. at 726.

of the grossly prejudicial character that attended Rideau.

The nearly two years that have passed since the Marathon bombings has allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish. See Patton v. Yount, 467 U.S. 1025, 1034 (1984). It is true that there has been ongoing media coverage of the advent of the trial and petitioner's pre-trial motions, both locally and nationally. But that would be true wherever trial is held, and the reporting has largely been factual. These factors persuade us that petitioner has not demonstrated a clear and indisputable right to relief based on a presumption of prejudice from pretrial publicity.

Petitioner's heavy reliance on Irvin v. Dowd, 366 U.S. 717 (1961), does not assist him. The facts are very different. Irvin must also be understood in light of later caselaw such as Skilling and Patton. In Irvin, a state habeas case, the defendant was suspected of committing six murders near Evansville, Indiana. He was arrested and thereafter a barrage of highly personalized publicity "was unleashed against him during the six or seven months preceding his trial," id. at 725, including a statement by the police and prosecutor that he had confessed to all six murders. Id. at 719-20. Indeed, many of the press references described the defendant as the "confessed slayer of six, a parole violator and fraudulent-check artist." Id. at 726 (internal quotation marks omitted). In addition to the reported confession, there were stories about Irvin's criminal history, his police line-up identification, that he faced a lie detector test, and that he had been placed at the scene of the crime.

The press reported Irvin's "offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the modus operandi of these robberies was compared to that of the murders and the similarity noted)." Id. at 725-26. The very day before the trial, the newspapers reported that Irvin had admitted to all six murders. Id. at 726.

After venue was moved to an adjoining county for his trial on one murder charge, the voir dire commenced only eleven months after the murder was committed and eight months after he was arrested and confessed. In that very small community of 30,000, in which the local newspapers containing the inflammatory articles were delivered to 95% of the households, the details of defendant's confession and offer to plead guilty if promised a 99-year sentence, combined with the details of his criminal history, required vacation of the lower court judgments. The trial court itself excluded 62% of the venire "for cause as having fixed opinions as to" defendant's guilt. Id. at 727. Ninety percent of those prospective jurors undergoing voir dire—conducted, incidentally, "in front of all those remaining in the panel," Patton v. Yount, 467 U.S. 1025, 1034 n.10 (1984)—"entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty." Irvin, 366 U.S. at 727. The voir dire of the jurors who actually sat in judgment of the defendant revealed that eight of twelve thought he was guilty at the outset. Id. That is a far cry from the situation before this court.

Irvin, in fact, was followed twenty-three years later by Patton, where the Supreme Court found no denial of the defendant's right to an impartial jury. There,

> [t]he voir dire showed that all but 2 of 163 veniremen questioned about the case had heard of it, and that, 126, or 77%, admitted they would carry an opinion into the jury box. This was a higher percentage than in Irvin, where 62% of the 430 veniremen were dismissed for cause because they had fixed opinions concerning the petitioner's guilt. Finally, . . . 8 of the 14 jurors and alternates actually seated admitted that at some time they had formed an opinion as to Yount's guilt.

Patton, 467 U.S. at 1029-30 (footnotes omitted). The Court emphasized the passage of time and its effect on the fixedness of prospective jurors' opinions, saying some had forgotten and others "would need to be persuaded again." Id. at 1034 (footnote omitted). It was thus not simply the existence of opinions among prospective jurors, but the degree of their fixedness, that was critical to the Court. As the Court emphasized, "[p]rospective jurors represent a cross section of the community, and their education and experience vary widely. . . . Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." Id. at 1039. This admonition undercuts petitioner's key argument that poll percentages and jury questionnaire answers decide the question of a presumption of prejudice.

Here, we cannot say that the district court clearly and indisputably erred in concluding that the publicity surrounding petitioner's pretrial proceedings—and the community's knowledge about the Boston Marathon

bombings—has not crossed from familiarity, as in Patton, to the prejudice evidenced in a case like Irvin.

Petitioner and the dissent also compare this case to a district court's exercise of discretion to change venue in United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).[9] The issue in McVeigh was not whether the venue of the Oklahoma City bombing trial should be moved from Oklahoma City, where the crime was committed. The parties—including the government—agreed to move the trial. Id. at 1470. There is no such agreement here. The question in McVeigh, instead, was whether to move the trial elsewhere in Oklahoma or out of the state entirely.

That trial judge's exercise of discretion in McVeigh to move the trial to Denver says nothing about how the trial judge here should exercise his discretion. Nor was it meant to. As the judge in McVeigh wrote, "[t]here are so many variables involved that no two trials can be compared regardless of apparent similarities." Id. at 1473. Insofar as the cases are similar, the McVeigh judge's decision to move the trial to Denver does not suggest that a decision to keep this trial in Boston is an abuse of discretion—much less a clear and indisputable one.

The dissent asks the rhetorical question "if not here, when?" The Supreme Court answered that question in Rideau, where an unrepresented defendant's twenty-minute, in-depth confession in the form of an "interview" with the Sheriff was recorded and broadcast multiple times in a small Louisiana parish. That interview and

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[9] In footnote 36 of the dissent, our dissenting colleague has made an unfounded argument that not even petitioner has made.

not the later trial, the Court found, "in a very real sense was Rideau's trial--at which he pleaded guilty to murder." Rideau, 373 U.S. at 726. Three of the jurors had viewed the interview at least once, and two members of the jury were deputy sheriffs. Id. at 725. Here, by contrast, no such thing occurred.[10]

C. The Ongoing Jury Selection Process Does Not Suggest Pervasive Prejudice.

Beyond the publicity itself, petitioner also relies on the responses to jury questionnaires and the content of the voir dire as a basis for finding prejudice. He asserts that what we have seen from the juror selection process confirms that pretrial publicity has indisputably raised a presumption of prejudice sufficient to mandate that his trial be moved. Petitioner's essential claim is thus that the prejudice against him is so great that nothing the district court can do will offset it. Every potential juror in the Eastern Division of Massachusetts is automatically disqualified, he maintains. That alone is a remarkable assumption about the five million people in the Eastern Division and one much to be doubted. Our dissenting colleague, too, argues that this "second analytical route," based on the course of the jury selection to date, reveals an irrefutable presumption of prejudice among the jury pool. The careful selection process and

[10] The dissent's remarkable statement that the image of the petitioner being taken from a boat was "quite likely seen by nearly 100% of the Eastern Division of Massachusetts population" is completely unfounded; we can find no basis in the record for that contention.

the trial judge's expressed confidence in finding sufficient jurors, however, is supported by the record and persuasively undercuts this argument.[11]

First, it is necessary to describe the ongoing jury selection process that has been underway in the district court. In doing so, we observe that our caselaw says that "[a] guiding beacon . . . is the trial judge, who is responsible for conducting the voir dire and to whom we defer from our more distant appellate position." Quiles-Olivo, 684 F.3d at 183. The process utilized here in many ways mirrors the one which the Supreme Court found appropriate in Skilling. See 561 U.S. at 387-89. Here, the district judge summoned over a thousand prospective jurors, divided those jurors into six panels, and requested that they fill out a long and detailed one-hundred-question questionnaire under oath. The parties were permitted to confer and file under seal a report with respect to each panel, listing the persons whom the parties agreed should be excused for cause. Thereafter, the parties were ordered to file separately under seal a report suggesting specific follow-up issues

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[11] Petitioner does not make an argument that his jury will suffer from actual prejudice. Nor could he. A post-trial finding of "[a]ctual prejudice hinges on whether the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside." Quiles-Olivo, 684 F.3d at 183 (citation and internal quotation marks omitted). At this point, a jury is in the process of being selected and has not been seated for trial. There can be no viable claim that the yet unseated and not even finally qualified jurors would result in a jury which suffers from actual prejudice. To the extent petitioner now claims that all of the provisionally qualified jurors suffer from presumed or actual prejudice, our review of the entire record satisfied us that it is not clear and indisputable the provisionally qualified jurors are biased or that the district court erred.

or questions to be pursued in the course of individual voir dire.

Smaller groups of twenty to twenty-five prospective jurors have come to the Boston courthouse,[12] and, one by one, have been questioned first by the court and then with follow-up from the parties. At the end of each day, counsel have conferred and agreed that certain jurors should be struck for cause or for hardship. The court has heard argument on contested jurors and reached a decision about which prospective jurors in the day's group may be deemed provisionally qualified.

We have reviewed the entire voir dire conducted to this point by the court and the parties and the process has been thorough and appropriately calibrated to expose bias, ignorance, and prevarication.[13] As the district court noted in denying the Third Motion for Change of Venue,

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[12] Petitioner has never made the claims now made by the dissent that security arrangements at the Boston courthouse as to the trial have somehow contaminated the potential jury pool, such that the jurors eventually picked cannot be fair and impartial. Indeed, we reject the dissent's "impression" that security is necessary because petitioner is "extraordinarily dangerous." Security, to the contrary, no doubt will contribute to the safe and orderly conduct of the trial. Further, the dissent cannot and does not purport to describe the security arrangements for the jurors who will sit. Importantly, even if this case were transferred to a federal courthouse in another place, appropriately high security arrangements would be in place. This simply is not an appropriate consideration in this case.

[13] The bombings in Boston, the murder of a policeman, and the other criminal events charged did in fact take place and were heavily covered by the media around the world. As Reynolds instructs, that is a separate matter from the matter of whether petitioner is guilty of the crimes charged. See 98 U.S. at 155-56. Seeing media

> the experience of voir dire suggests . . . that the full process—including summonsing an expanded jury pool; utilizing a lengthy questionnaire jointly developed by the parties and the [c]ourt; giving the parties ample time to review questionnaires, research jurors, and consult with their jury selection advisers; and permitting both the [c]ourt and the parties to conduct thorough voir dire—is working to ferret out those jurors who should appropriately be excused for cause.

Our dissenting colleague comes to the opposite conclusion, claiming that the length of the jury selection process and the responses of the venire thus far indicate pervasive prejudice. In doing so, however, the dissent confuses mere exposure to publicity with "disqualifying prejudice"—only the second of which, when widespread throughout the jury pool, is particularly relevant to a presumption of prejudice. See United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990) ("Where a high percentage of the venire admits to a disqualifying prejudice, a court may properly question the remaining jurors' avowals of impartiality. . . . " (emphasis added)).

As an initial matter, the dissent contends that the length of the jury selection process in this case has its genesis in the pervasive prejudice permeating through

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coverage of the former does not mean the viewer is prejudiced. Further, many in the provisionally qualified pool did not follow that coverage. Similarly, the Boston Strong theme is about civic resilience and recovery. It is not about whether petitioner is guilty or not of the crimes charged. That someone buys a Boston Strong T-shirt is not proof that he or she could not be fair and impartial if selected as a potential juror on the question of guilt.

the jury pool. But a jury selection process of several weeks in length is not unusual in either contemporary or historical terms.[14] "[M]ajor cases have been known to require six weeks or more before the jury is seated." David W. Neubauer & Stephen S. Meinhold, Judicial Process: Law, Courts, and Politics in the United States 358 (6th ed. 2013). Despite all the hay the dissent makes of petitioner's eligibility for the death penalty, that reality all but guarantees a longer, more detailed selection process.[15] In fact, the jury selection process in this case is perfectly comparable in length with the only other recent capital jury selection processes in the District of Massachusetts. See United

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[14] Jury selection can sometimes take weeks, particularly in complicated or high-profile cases. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (noting that jury selection in capital murder case took five weeks); State v. Addison, 87 A.3d 1, 57 (N.H. 2013) (explaining that jury selection, from "a larger than usual jury pool," took "approximately seventeen days" during which time "over 300 prospective jurors reported to the courthouse for jury selection"); Davis v. State, 611 A.2d 1008, 1010 (Md. Ct. Spec. App. 1992) (noting that in "states such as California and Florida and New York . . . jury selection in celebrity cases may consume three or four weeks"). And, historically, a lengthy jury selection process is nothing novel. See William H. Levit et al., Expediting Voir Dire: An Empirical Study, 44 S. Cal. L. Rev. 916, 923 & n.28 (1971). For example, jury selection for the trial of Black Panther Bobby Seale took thirteen weeks and required the examination of 1550 potential jurors. Id. at 923 n.28. And the murder trial of Charles Manson featured a six week voir dire process. Id.

[15] See Bill Hawkins, Capital Punishment and the Administration of Justice: A Trial Prosecutor's Perspective, 89 Judicature 258, 259 (2006) (noting that, in Texas, selection in counties that often handle death-penalty cases typically takes three weeks, while in locales where the death penalty is a "rare instance" selection "may last much longer").

States v. Sampson, No. 1:01-cr-10384 (D. Mass.) (seventeen days of jury selection running from September 18, 2003 to October 27, 2003); United States v. Gilbert, No. 3:98-cr-30044 (D. Mass.) (nineteen days of jury selection running from October 16, 2000 through November 17, 2000, provisionally qualifying only approximately two to seven jurors per day).

Moreover, it defies logic to count the efforts the district court has taken to carefully explore, and eliminate, any prejudice as showing the existence of the same.[16] In this case, it is entirely unsurprising that the district court, and the parties, have taken ample time to carefully differentiate between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those who have developed an opinion they cannot put aside. Together, the careful process employed by the district court, including the "face-to-face opportunity to gauge demeanor and credibility," and the "information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news" have afforded the district court "a sturdy foundation to assess fitness for jury service." Skilling, 561 U.S. at 395. We should commend, not decry, district courts' rigorous efforts to ensure defendants are guaranteed a trial commensurate with their Sixth Amendment rights.

Our dissenting colleague also quotes a variety of allegedly "representative" juror responses in an effort to demonstrate that the jury pool is rife with disqualifying prejudice that requires us to doubt the avowals of im-

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[16] The dissent makes the argument that any jury found to be unbiased during voir dire in fact then cannot be "indifferent." This is topsy turvy.

partiality from all members of the venire. But the reality of the record is that those comments, selectively plucked from the questionnaire responses or voir dire testimony of over 1,300 jurors, are nothing close to representative.[17] It is a disservice to the judicial system to claim otherwise.

The majority of the quoted statements in the dissent regarding views of Tsarnaev's guilt, and all of the most extreme, come from the questionnaires of jurors who the parties agreed to excuse and were excused without individual questioning. In that sense, the parties and the court have plainly acknowledged that those members of the pool are not representative of the more than 250 pool members who, by contrast, have thus far been called back for individual questioning. Still other quotes involve statements made to potential jurors by acquaintances or coworkers which are hardly probative of the potential juror's own attitudes. In any event, those jurors were never provisionally qualified. They were either not called back for individual voir dire or struck for cause after the district judge was able to assess their

[17] We explain the limited relevance of these statements specific to each category the dissent lists. However, it is worth describing them in the aggregate and mentioning what the dissent does not. Of the thirty-two selective quotations the dissent presents in bullet-point fashion, see Dissenting op. at 48-51, twenty-one come from jurors who were stricken by the district court, or by agreement of the parties, for cause. Eight more come from the questionnaires of jurors whose panels have not yet been individually questioned. Given the results of the voir dire process thus far, nothing in the record suggests that any of those jurors expressing bias will nevertheless be provisionally qualified. Finally, while three quotes do come from the voir dire of two provisionally qualified jurors, taken in the context of those jurors' entire voir dire, there is no indication that those jurors are biased.

demeanor in person. While a single juror has been provisionally qualified among the group whom the dissent discusses as having expressed views on guilt, the full context of his or her mild statement made clear that he or she was able to put aside any initial impressions he or she may hold—and, we note, the defense also did not object to that juror for cause.[18]

Nor do we think such statements are so common among the pool of excused jurors that a court must infer bias among others who have been provisionally qualified. It is not surprising that in a pool of over a thousand jurors with varying opinions, some will make strong statements that disqualify them from jury service. Others have expressed their ability to be fair and impartial. The honesty of their answers, conscious and subconscious, has been probed by extensive voir dire, as the Supreme Court approved in Skilling.

The putative "personal connections" proffered by the dissent also are mischaracterizations of the record. Many of the connections attributed to prospective jurors are, clearly, attenuated or tangential. And all but two of those quoted come from the questionnaires of jurors whose panels have not yet been questioned. The record gives us no reason to doubt that, like their congeners

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[18] The dissent notes, in passing, that one of the provisionally qualified jurors selected on his or her questionnaire that he or she would be "unable" to put aside his or her opinion regarding the defendant's guilt. But the parties expressed no concern about this juror and, any concern that may have been warranted by the juror's initial selection on the questionnaire, was eliminated by voir dire. During questioning the juror evidenced a clear and unequivocal ability to base his or her decision solely on the evidence presented during trial. Indeed, the defense neither asked about this juror's questionnaire answer nor objected to the juror's qualification for cause.

from the first several panels, those with the closest connections will be struck on the agreement of the parties or by the court for cause. Of the three quotations presented by the dissent that are among the panels already questioned, one juror was not called for individual questioning and the other two were struck for cause following questioning.

Finally, as for the exposure to publicity, we emphasize again that "juror impartiality . . . does not require ignorance." Skilling, 561 U.S. at 381 (emphasis in original). The fact that many of the jurors have been exposed to some measure of publicity, alone, is not probative of any "pervasive prejudice" in the jury pool. In addition, four of the dissent's nine selective statements are from the statements of a single juror during voir dire; a juror, moreover, who was struck on the government's motion for cause. It is, in any event, black letter law that "extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair." Dobbert v. Florida, 432 U.S. 282, 303 (1977) (emphasis added). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Irvin, 366 U.S. at 723.

Ultimately, rather than a voir dire taking a total of five hours, as in Skilling, the voir dire in this case has taken—appropriately we think—several weeks. To the extent that the dissent suggests that this lengthy voir dire, and the sentiment it has demonstrated, indicates that a presumption of prejudice exists which cannot be overcome, we disagree. We cannot say that the

procedures put in place by the trial judge are either insufficient on their face or so inadequately implemented as to justify an interruption of the process and a change of venue. Nor are we convinced that the results thus far compel such a drastic step. Indeed, as the district court noted, "the defendant's presentation of a series of selective quotations from the 1300-plus questionnaires is misleading because the quotations are not fairly representative of the content of the questionnaires generally." So too, in the filings before us and in the dissent. In sum, neither the length of the district court's careful selection process nor the sentiments of the venire as a whole provide any basis for concluding, on mandamus, that pervasive prejudice taints the entire jury pool.

D. Petitioner Has Not Demonstrated Irreparable Harm.

Petitioner has not established a clear and indisputable right to relief but we address irreparable injury in any event. The law is designed to prevent use of mandamus to circumvent normal post-trial appellate review, as petitioner attempts here. Cheney, 542 U.S. at 380. In the event that petitioner is convicted on one or more of the charges against him, he will have the right to appeal his conviction and sentence to this court and may raise the venue argument again. That double layer of review is itself a guarantee of due process.[19] For that

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[19] The dissent's claims to the contrary are confusing and contradictory, to say the least. Despite maintaining throughout his opinion that the decibel of publicity in the Boston area has been much greater, and more consistent, while the coverage nationwide has slowly dwindled, see Dissenting op. at 39-41, 45, 66-67, our dissenting colleague suddenly claims exactly the opposite. He contends that a case of this magnitude will face unique difficulties for retrial

reason petitioner will not suffer irreparable injury nor can he show irreparable injury to the courts.

Petitioner relies heavily on our decision in Bulger to argue that both he and the reputation of the legal system will suffer irreparable injury if he does not prevail on his pretrial petition. Bulger involved a very different question and different standards. There the question was whether a reasonable member of the public might question the judge's ability to preside impartially, due to the nature of his prior employment. In re Bulger, 710 F.3d at 49. No such issue is presented here. In Bulger, as well, the other conditions for mandamus were met. Here, they have not been met.

E. The Balance of Equities do not Favor Granting Mandamus.

Given petitioner's failure to meet the prior two standards, he is not entitled to test the balance of the equities. But even then, the balance of the equities does not favor petitioner, whose arguments insufficiently credit the Constitution's provisions that the trial be held where the crimes were committed. Tsarnaev's peers in the Boston area will constitute the jury. Members of the community will have access to the trial and to the court room and spillover courtrooms. The victims and witnesses

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elsewhere because any subsequent jury—presumably one outside of Massachusetts, if any conviction is overturned on venue grounds—will be "exposed to the daily events of the first trial," "the testimony given by the victims, the witnesses, and the experts," and "all the evidence presented by the government." Dissenting op. at 71. Yet, we are puzzled at how the dissent can conclude such publicity, and irreparable harm, will be produced in locations that, the dissent so vigorously contends pages earlier, have paid far less attention to this case.

are located here and will not be forced to undertake the burdens of travel elsewhere. The same is true of those who have known petitioner as a resident and member of the community.

Moreover and most importantly, this Petition requests that we interfere in the careful jury selection process that has been ongoing in the district court, despite the fact that the petitioner remains able to raise claims of lack of an impartial jury on direct appeal. Such direct interference in an ongoing trial matter by an appellate court is inimical to our process of justice and our respect for the reasoned decisions of district court judges. Just as we are unable to conclude that it is clear and indisputable that the petitioner cannot receive a fair trial by an impartial jury in the Eastern Division of Massachusetts, the relevant interests weigh in favor of allowing the jury selection process to continue. And they weigh against taking the unprecedented step of abandoning our "primary reliance on the judgment of the trial court." Skilling, 561 U.S. at 386 (quoting Mu'Min, 500 U.S. at 427) (internal quotation marks omitted).

III.

The Second Petition for Mandamus is denied.

—Dissenting Opinion Follows—

TORRUELLA, Circuit Judge (Dissenting). "'[R]egardless of the heinousness of the crime charged, the apparent guilt of the offender[,] or the station in life which he occupies,' our system of justice demands trials that are fair in both appearance and fact." Skilling v. United States, 561 U.S. 358 (2010) (Sotomayor, J., concurring in part and dissenting in part) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). The actions taken by this court today pave the way for a trial that is fair neither in fact nor in appearance.

The press coverage of this case—beginning with the bombing itself and the subsequent manhunt culminating with the shelter-in-place order, continuing thereafter with stories of the victims, Boston's coming together and healing as one united city, and the coverage of the pretrial events—is unparalleled in American legal history. Given the impact of the bombing and subsequent press coverage on the entire city, it is absurd to suggest that Tsarnaev will receive a fair and impartial trial in the Eastern Division of the District of Massachusetts. There is no sound basis for refusing to apply a presumption of prejudice to a high-profile, omnipresent, emotionally-charged case like this—particularly where the entire Boston community has been terrorized, victimized, and brutalized by such a horrendous act of violence. No amount of voir dire can overcome this pervasive prejudice, no matter how carefully it is conducted.

The whole world is watching to see how the American legal system treats Tsarnaev, even if he is allegedly the most dreadful of defendants. Every move taken is scrutinized to see if the bedrock American rights of "innocent until proven guilty" and the "right to a fair trial

by an impartial jury" are given to a foreign-born defendant accused of terrorism—among the most heinous of crimes. Unfortunately, both the district court and majority fail to uphold these rights, and this failure damages the credibility of the American judicial system.

I do not dispute that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 402 (1976). But in my forty years on the bench, both as a trial judge and as an appellate judge, I am unaware of a situation more "extraordinary" than this one. The district court has demonstrated a clear abuse of discretion. Contrary to the district court's assessment and the decision of the majority today, mandamus relief is not only appropriate, but also necessary to assure that Tsarnaev receives the fair trial that is mandated by our Constitution. Therefore, for the reasons explained herein, I respectfully—but vehemently—dissent.

I. Background[20]

On April 15, 2013, two bombs exploded near the finish line of the Boston Marathon on Boylston Street in downtown Boston. Three people were killed and approximately 264 others were injured. Countless others ran from the scene in terror. Over the next four days, a massive manhunt for those responsible ensued. On the

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[20] This section contains a brief summary of the events surrounding the bombing and subsequent manhunt. For a minute-by-minute recap of those four days, see Sara Morrison and Ellen O'Leary, Timeline of Boston Marathon Bombing Events, Boston.com (Jan. 5, 2015), http://www.boston.com/news/local/massachusetts/2015/01/05/timeline-boston-marathon-bombing-events/qiYJmANm6DYxqsusVq66yK/story.html.

third day, April 18, authorities released video surveillance and photos of the suspects: Tamerlan and Dzhokhar Tsarnaev. That night, while the brothers were trying to flee Boston, they allegedly carjacked an SUV and killed an MIT police officer. In a subsequent shootout with police, Tamerlan Tsarnaev was seriously injured. Dzhokhar Tsarnaev (hereinafter, "Tsarnaev") was able to temporarily escape, in part by allegedly driving over his brother.

Finally, on April 19, the search had narrowed to the Boston suburb of Watertown. In an unprecedented move, authorities called for a "shelter-in-place" advisory, effectively placing the city in lockdown: residents in Watertown and the surrounding areas—Boston proper, Cambridge, Newton, Belmont, and Waltham—were ordered not to leave their homes. The T (Boston's public transportation system) was shut down, as were most businesses and public offices. While residents were confined to their homes, FBI agents, local police officers, and SWAT team members went door-to-door in a twenty-block radius of Watertown searching for Tsarnaev. Hours later, he was found hiding in a boat in a resident's backyard. Tsarnaev was bloodied from a firefight with authorities and had written a note on the boat claiming that "[w]hen you attack one Muslim, you attack all Muslims" and that the Marathon victims were collateral damage.[21] Immediately upon his arrest, Boston Mayor Thomas Menino tweeted "We got

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[21] Maria Cramer & Peter Schworm, Note May Offer Details on Bomb Motive, Boston Globe, May 16, 2013, http://www.bostonglobe.com/metro/2013/05/16/sources-bomb-suspect-dzhokhar-tsarnaev-took-responsibility-for-marathon-attacks-note-scrawled-boat/UhBOmEByeWVxGd1RAxzOtO/story.html.

him"; the Boston Police Department tweeted "CAPTURED!!! The hunt is over. The search is done. The terror is over. And justice has won."[22] Meanwhile, Watertown residents "flooded the streets, cheering every passing police car and armored vehicle in an impromptu parade" and residents "danced in the streets outside Fenway Park."[23]

Most—if not all—of this four-day ordeal was shown live on television and reported real-time on the internet. Print newspapers, meanwhile, published daily recaps of the previous day's events, including the pictures of a bloodied Tsarnaev.[24]

Over the next few weeks, nationwide coverage continued, slowly dwindled, and, with the exception of the occasional story here-and-there, eventually ended. In

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[22] See "We got him!": Boston Bombing Suspect Captured Alive, NBC News (Apr. 19, 2013), http://usnews.nbcnews.com/-news/2013/04/20/17823265-we-got-him-boston-bombing-suspect-captured-alive? lite.

[23] Id.

[24] See, e.g., Live Blog: Bombings at the Boston Marathon, http://live.boston.com/Event/Live_blog_Explosion_in_Copley_Square?Page=0 (last visited Feb. 20, 2015); Boston Bombing Manhunt: Watch the Live Streaming Video, Inquisitir (Apr. 19, 2013), http://www.inquisitr.com/625705/boston-bombing-manhunt-watch-the-live-streaming-video/ ("Developments in this active and intense search are rapidly unfolding minute by minute. Live feeds to the local television media coverage of the Boston bombing manhunt are embedded below."); Boston Transit Shut Down, Nearly 1 Million Sheltering in Place amid Terror Hunt, NBC News (Apr. 19, 2013), http://usnews.nbcnews.com/_news/2013/04/19/17822687-boston-transit-shut-down-nearly-1-million-sheltering-in-place-amid-terror-hunt?lite (embedding a video with the caption "Video of firefight between suspects and police").

Massachusetts, however, the story did not end. Instead, the local news (both television and print) continued to cover all the details of the bombing and its aftermath. The reporting focused not only on Tsarnaev, but on the city as a whole. Coverage included stories of the victims and their family and friends, those who bravely risked their lives to help the victims, and how the entire community came together.[25] This phenomenon and sentiment were embodied in the "Boston Strong" campaign which "rallied a city," became "shorthand for defiance, solidarity, and caring," and "present[ed] a unified front in the face of [a] threat."[26] Indeed, one could not go anywhere in Boston in the bombing's aftermath without seeing the slogan on a car, t-shirt, bracelet, tattoo, or even mowed into the outfield of Fenway Park. It spurred concerts, fundraisers, and rallies throughout

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[25] See, e.g., Eric Moskowitz, Long After Marathon Blasts, Survivor Loses Leg, Boston Globe, Nov. 11, 2014, http://www.bostonglobe.com/metro/2014/11/11/long-after-marathon-bombings-survivor-loses-leg/urutULO5K3H33jlOGoLiNI/story.html; Boston Marathon Bombings - One Year Later, Boston Globe, http://www.bostonglobe.com/metro/specials/boston-marathon-bombings-year-later (last visited Feb. 20, 2015) (detailing numerous stories about the city's recovery and the victims over the year since the marathon); Bella English & Sarah Schweitzer, Some Affected by Bombing Will Be at Race, but Others Won't, Boston Globe, Mar. 30, 2014, http://www.bostonglobe.com/metro/2014/03/29/marathon-victims-ponder-returning-marathon/SkxPd1RkvCHZp5YDweJ64K/story.html; Jaclyn Reiss, Unease Lingers a Year After Manhunt, Boston Globe, Mar. 9, 2014, http://www.bostonglobe.com/metro/regionals/west/2014/03/09/watertown-residents-question-police-tactics-manhunt-for-bombing-suspects/V2cAugxzqcNvlsP82pLZ2L/story.html.

[26] Ben Zimmer, "Boston Strong," the Phrase that Rallied a City, Boston Globe, May 12, 2013, http://www.bostonglobe.com/ideas/2013/05/11/boston-strong-phrase-that-rallied-city/uNPFaI8Mv4QxsWqpjXBOQO/story.html.

the city. A website, onefundboston.org, was also formed "with the purpose of helping those most affected by the tragic Boston Marathon bombings" by raising money and providing a forum to "gather[] encouraging stories of strength, recovery, and hope from survivors."

These stories and the "Boston Strong" campaign continue to this day, almost two years later. Just over four weeks ago, as Boston was slammed with a massive blizzard leaving approximately two feet of snow, a man took it upon himself to shovel the finish line of the Marathon. This man was referred to by many in the community as a "hero" and a "snowmaritan," and led to the viral "#WhoShoveledTheFinishLine" hashtag on social media.[27] And as this case has proceeded, a dump truck has parked outside the courthouse bearing a "Boston Strong" logo and a building currently being constructed across the street from the courthouse has hung a "Boston Strong" banner.

There is no doubt that Boston has, quite laudably, emerged from this attack stronger and more united than it was before. However, these events also show that Boston has not yet fully recovered, and that every resident—whether or not they were at the marathon that day, knew a victim, or were subject to the shelter-in-place order[28]—was deeply and personally affected by the tragedy.

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[27] See, e.g., Twitter Chatter, UPDATE: The Man Who Shoveled the Marathon Finish Line Has Been Found, BDCwire (Jan. 28, 2015), http://www.bdcwire.com/who-shoveled-the-marathon-finish-line/.

[28] Indeed, some even thought April 19, the day of the shelter-in-place order, was "so much scarier" than April 15, the day of the

We are now tasked with deciding whether the effects of these tragic events and the unrelenting media coverage that followed and continues to this day have affected Tsarnaev's constitutional right to a trial by a jury that is fair, impartial, and indifferent, and if so, whether we should apply our mandamus power to intervene.

II. Discussion

Courts throughout the country have found mandamus to be an appropriate, albeit rarely implemented, vehicle to challenge a district court's change-of-venue decision. See, e.g., In re Volkswagen of Am., Inc., 545 F.3d 304, 308-09; (5th Cir. 2008); Matter of Balsimo, 68 F.3d 185, 187 (7th Cir. 1995); In re Briscoe, 976 F.2d 1425, 1429 (D.C. Cir. 1992); United States v. McManus, 535 F.2d 460, 464 (8th Cir. 1976).[29] As in all mandamus cases, a petitioner must establish the following before the writ will issue: (1) that his "'right to issuance of the writ is clear and indisputable'"; (2) that he "has no other

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bombing itself. See Alan GreenBlatt, Boston on Lockdown: "Today Is So Much Scarier", (Apr. 19, 2013), http://www.npr.org/blogs/thetwo-way/2013/04/19/177934915/The-Scene-In-Boston-Today-Is-So-Much-Scarier (quoting a resident).

[29] These cases involved either Rule 21(b) of the Federal Rules of Criminal Procedure or 28 U.S.C. § 1404(a). While the present petition invokes Rule 21(a), this distinction is irrelevant. All three provisions involve a request to change venue. If mandamus is appropriate for convenience purposes, or in the civil context, it must surely be available when the change of venue is due to a prejudiced jury, where the constitutional implications are magnified. In fact, the government conceded at the hearing that if a presumption of prejudice was established, and the district court still refused to transfer venue, then mandamus relief would be appropriate, assuming the other mandamus factors were satisfied.

adequate source of relief; that is, he must show 'irreparable harm'"; and (3) that "on balance, the equities favor issuance of the writ." In re Bulger, 710 F.3d 42, 45 (1st Cir. 2013) (quoting Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 381 (2004) and In re Vázquez-Botet, 464 F.3d 54, 57 (1st Cir. 2006), respectively). Tsarnaev is the rare litigant who has satisfied all three requirements.

A. Tsarnaev Is Entitled to a Change of Venue

While Article III of the Constitution provides that criminal trials "shall be held in the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2, cl. 3, that requirement is far from absolute. The Sixth Amendment requires that the trial take place "by an impartial jury of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI (emphasis added), and the Fifth Amendment's Due Process Clause requires fundamental fairness in trials, see U.S. Const. amend. V. See also Skilling, 561 U.S. at 378-79; United States v. McVeigh, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996). To that end, Rule 21 of the Federal Rules of Criminal Procedure requires that a "court must transfer the proceeding against the defendant to another district 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." Fed. R. Crim. P. 21(a).

1. A Presumption of Prejudice Exists Which Cannot Be Overcome

"In determining whether sufficient prejudice exist[s] to require a change of venue, we must conduct two inquiries: 1) whether jury prejudice should be presumed given the facts before us; or 2) if prejudice should not be presumed, whether the jury was actually prejudiced." United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990). Here we are dealing with the first inquiry. There are two ways in which prejudice can be presumed. First, "prejudice may properly be presumed where 'prejudicial, inflammatory publicity about [a] case so saturated the community from which [the defendant's] jury was drawn as to render it virtually impossible to obtain an impartial jury.'" Id. (quoting United States v. McNeill, 728 F.2d 5, 9 (1st Cir. 1984) (alterations in the original). The publicity "must be both extensive and sensational in nature." Id. Second, it can also be shown when "so many jurors admit to a disqualifying prejudice that the trial court may legitimately doubt the avowals of impartiality made by the remaining jurors." United States v. Rodríguez-Cardona, 924 F.2d 1148, 1158 (1st Cir. 1991). When prejudice is presumed, "no inquiry need be made as to the actual effect of the publicity on the petit jury." United States v. Brien, 617 F.2d 299, 313 (1st Cir. 1980) (citing Sheppard v. Maxwell, 384 U.S. 333, 352-55 (1966)). Regardless of which route is taken, Tsarnaev has established a presumption of prejudice.

As to the first, there is little doubt in my mind that the pretrial publicity—which has been pervasive, prejudicial, and inflammatory—has so saturated the Eastern Division of the District of Massachusetts and persists to

this day such that we must presume Tsarnaev cannot obtain a fair and impartial trial here. As explained above, the city of Boston[30] was itself victimized, and the coverage of the attacks and the ensuing manhunt was shown live on television and the internet for four days. I expect most people were following it intently, especially those in Boston and Watertown who were locked in their homes unable to do much else. The spectacle of seeing a bloodied Tsarnaev taken out of the boat and arrested is not something a potential juror in the Eastern Division of the District of Massachusetts can easily forget or put aside; nor can one easily forget Tsarnaev's subsequently released alleged "confession," claiming that all of the victims were collateral damage. These images, which may have been shown once or twice nationwide, were shown repeatedly in Massachusetts.[31] As the Supreme Court acknowledged in Rideau v. Louisiana, "[f]or anyone who has ever watched television[,] the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense" was the actual trial. 373 U.S. 723, 726 (1963) (finding change of venue was required where

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[30] When I refer to Boston, I am referring not only to the city of Boston but also to the surrounding neighborhoods and suburbs which make up the greater Boston metropolitan area and from which the jury pool is being drawn.

[31] See, e.g., The Associated Press, Marathon Bombing Aftermath Was Top Massachusetts Story of 2014, MassLive (Dec. 26, 2014), http://www.masslive.com/news/index.ssf/2014/12/marathon_bombing_aftermath_was.html ("The legal aftermath of the Boston Marathon attacks dominated headlines in Massachusetts in 2014, much as the attack itself did last year and the accused bomber's trial surely will in 2015.").

a twenty minute jail house "interview" was aired on television for three consecutive days). For the people of the Eastern Division of the District of Massachusetts, "a community so pervasively exposed to such a spectacle," "[a]ny subsequent court proceedings . . . could be but a hollow formality." Id.; see also Irvin, 366 U.S. at 719-20 (requiring change of venue where six murders were "extensively covered by news media in the locality, aroused great excitement and indignation" in the area, and involved "officials issu[ing] press releases, which were intensively publicized, stating that the petitioner had confessed"); Brien, 617 F.2d at 313 (transferring one defendant to Springfield, Massachusetts and another to Arizona in a mail and wire fraud case where most investors lost everything because the "sensational activities of [the defendant corporation] precipitated extensive critical comment in the press in New England and the Eastern seaboard" and "the possible effect of that publicity on the defendants' right to a fair trial" required a change of venue). This is especially true here, where the vast majority of the prospective jurors have personal connections to the events.

One reaches the same conclusion under the second analytical route, which involves examining the jury selection to date. "[T]he 'length to which the trial court must go in order to select jurors who appear to be impartial'" can also "support a presumption of prejudice." Angiulo, 897 F.2d at 1181 (quoting Murphy v. Florida, 421 U.S. 794, 802 (1975)). Here, the district court summonsed 1,373 jurors and required them to fill out a 101-question questionnaire which explored, among other things: their backgrounds; their personal connections to Boston, the Marathon, the bombings, and the victims; their views on Tsarnaev's innocence; and their views on

the death penalty. These prospective jurors were divided into six jury panels and, assuming they were not struck for cause based solely on the questionnaires, were then subject to individual voir dire by the district court and the parties. On Wednesday, February 25, 2015, the twenty-fourth day of jury selection, seventy-five jurors were provisionally qualified.[32] The reason for this lengthy process is the pervasive prejudice permeating throughout the pool. To get a sense of the kinds of views that are representative of both the jury pool and the community, I include below a mere sample of the comments that have been made by prospective jurors, broken into three categories—the prospective jurors' views on Tsarnaev's guilt, their personal connections to the bombings, and their exposure to publicity about the case:

Prospective Jurors' Views on Tsarnaev's Guilt

- "[H]ow could I possibly find the defendant not guilty with all the news information. I have trouble accepting him getting housing & living assistance from the state of MA, education without paying, taking the oath of citizenship and then committing crimes against innocent everyday people who are also citizens of USA. Not to mention taxpayers[‘] $$$"
- "He does not deserve a trial."

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[32] Because this is a death penalty case, each party has been allotted twenty-three peremptory challenges. Thus, to seat the twelve jurors and six alternates, sixty-four jurors need to be qualified. The district court, however, has opted to qualify more than the necessary sixty-four "to be safe."

- "Caught redhanded should not waste the $ on the trial."
- "[T]hey shouldn't waste the bulits [sic] or poison; hang them."
- "[W]e all know he's guilty so quit wasting everybody's time with a jury and string him up."
- "People told me the defendant is overwhelmingly guilty."
- "[M]ost commented on the fact that we should skip the trial & go right to sentencing b/c of the assumed guilt of the heinous crimes that he's accused of."
- "[It's] hard to understand how someone can defend a murderer."
- "I have formed the opinion that a convicted terrorist should receive the death penalty. They're the enemy of my country."
- "Yeah, I think when I first checked the guilty [box], you know, if I felt that he was guilty box, I realized after, I don't know what all the charges are, so I can't know that he's guilty, because I don't know what the charges are or what the evidence is and all of that. But I think that there's involvement. There was so much media coverage, even just the shootout in Watertown. I watched it on TV. And so I feel like there's involvement there, like I think it's—anybody would think that."
- The juror's knowledge of graphic pictures, "especially the little boy," would affect the juror's ability to serve because the juror "ha[s] a son."

- "I truly believe that in a sense that [the death penalty] could be the easy way out for the defendant. He could may [sic] want that. So that's why I said that. But as far as this next part, again, at the time I said—I thought about it a lot since I did this questionnaire. I don't know if I would be able to say he's not guilty. I think, no matter what, he's guilty, no matter what. As far as the death penalty, though, I still—I wouldn't have an issue, you know, agreeing to the death penalty, but, yeah, it's the easy-way-out thing. I'm not sure. that's the main thing for me."
- "[F]or this case I think a public execution would be appropriate, preferably by bomb at the finish line of the marathon."
- When the prospective juror's coworkers heard she might be picked for this trial, "[t]hey basically said, 'Fry him.'"
- "I haven't heard both sides of the story, but on the other side, I'm supposed to hear the not guilty side louder first than the guilty side. So I guess I should be going in with an assumption of not guilty, but I'm not."

Prospective Jurors' Personal Connections to the Bombings

- "You don't [sic] want to know [what I thought when I received my summons]! I have close friends that work the emergency room at MA General! What I really thought? We give you home, money eduat [sic] & this is how you pay us back? I'm sorry I'm all for the death penity [sic]

on this—my friends still have nightmare [sic] of that day!"

- "I think we all were effected [sic] by the death of that little boy (Martin) from Dorchester."
- "It does [affect my ability to be fair and impartial]. The Boston Strong bumper sticker . . . represents to me the way the city came together and helped, and just show[s] the unity of Boston. . . . "
- "We know many people that ran and watched the marathon that day so it was always being discussed."
- "I knew 11 people running that day."
- "I feel anyone near the Boston area was effected [sic] by this event."
- "My children were horrified, and even when we thought things were under control, we went into lock-down. It was a horrible week of fear, anger, confusion that we lived through."
- One prospective juror could not put aside a belief that Tsarnaev was guilty because a close friend who was at the Marathon's finish line has had to undergo "multiple surgeries" to her leg due to shrapnel from one of the bombs.

Prospective Jurors' Exposure to Publicity About the Case

- "Well, I read the paper every day, and I watch the news two hours every day. So over the course of the past year, I've obviously seen and read and heard quite a bit."

- "My husband and I watched the events on TV [live], including lockdown and capture—it was very upsetting, traumatizing, made you feel not safe in your own 'back yard.'"
- "It's kind of like saying erase everything you have in your head from something. I don't know that I would be able to erase my memory of everything that I've read, seen, and heard."
- "Absolutely. How could you not [have followed events during the week of the bombing]."
- "I remember seeing some raw footage that day which I'll never forget. Yeah, there was a lot going on that day, and it really struck me deeply."
- "Well, I mean, from seeing and seeing all the evidence that was publicly available, you know, and the having all the casualty that occurred during that, yes, I feel that he is guilty, and I think the punishment should be, you know, death, because personally I think that this is something that—I feel takes a greater weight as 9/11, you know, where there were so many lives affected, you know, with, you know, legs or whatnot, you know, that they live every single day now. . . . "
- "I think there's a lot [of concern about the media arrangement], there were questions and there's a lot of conversation, and if you were a potential juror, you'd need to be avoiding the media, and it's so front and center, it's difficult. And, you know, just even driving in the car, the news comes on, and, you know, I've heard, you know, you try to switch it, but you hear things. . . . "

- "In terms of the feelings on guilt, I think that just comes from the initial things in the news when the event happened and seeing all that. So that's kind of formed that perspective."
- "Actually, I think I could be fair, but I do have this image in my mind that I can't deny, to be perfectly honest. . . . The image of him putting the backpack behind that little boy."

After reading these comments, it is clear to me that the jury pool is not composed of unbiased, indifferent individuals.[33] This should come as no surprise—the attitudes of the jury pool, as evidenced by statements like those excerpted above, reflect the understandable and altogether human reaction of neighbors traumatized by the horrific violence inflicted upon them and their entire community. Indeed, in no small part and in very real terms, the members of the jury pool were themselves victims of the perpetrators' chilling act of terror. Acknowledging that fact is by no means an indictment of the jury pool or the people of Boston, who have shown such courage and resilience in the face of tragedy and terror. While we may thus understand and empathize with the prospective jurors' reaction, such empathy and

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[33] The majority accuses Tsarnaev, and me, of choosing "selective quotations" which are "misleading," ante, at 32. It also notes that its "own review of those materials shows that the district court is in fact identifying provisionally qualified jurors with no or few and, at most, attenuated claimed connections to the bombings." ante, at 16. Yet, of the seventy-five provisionally qualified jurors, forty-two self-identified as having some connection to the events, people, and/or places at issue. And twenty-three stated in their questionnaires that they had formed the opinion that Tsarnaev is guilty; of those twenty-three, one even stated that he would be unable to set that belief aside.

understanding cannot convert a biased jury pool into a constitutionally impartial jury of Tsarnaev's peers. Rather, our duty as honest arbiters requires us to uphold the Constitution and to ensure that those strong feelings shared by the greater Boston community do not deny Tsarnaev his right to a fair trial. If the particular facts and circumstances of this case—together with the emotionally-charged comments of the jury pool excerpted above—do not establish a presumption of prejudice, it is hard to fathom what would.

This prejudice is only highlighted and magnified by the surroundings in which jury selection is occurring. Each day, when jurors report to the John Joseph Moakley United States Courthouse, they cannot help but observe an overwhelming display of official government force. A secure perimeter has been established for several blocks in each direction of the Courthouse; authorized vehicles may be admitted, but only after first being inspected by bomb-sniffing dogs. Anyone who makes it past the perimeter must then navigate crowd-control barriers, only to then be greeted by a phalanx of armed Federal Protective Service officers standing guard at the entrance to the Courthouse. Meanwhile, the roads are lined with Boston Police cars, Department of Homeland Security vans, and vehicles from the U.S. Marshals Service. Upon entering the Courthouse, if one looks out past the garden to the Inner Harbor, one sees that at least two U.S. Coast Guard "Defender" Class Small Response Boats, each armed with a high caliber machine gun, are patrolling the waters behind the Courthouse.

It likely goes without saying that much of this security dissipates when Tsarnaev is not in court. While I

cannot evaluate whether such security is actually necessary or reasonable, the impression it gives off is clear: the proceedings in this case are taking place in a fortress-like atmosphere because Tsarnaev must be extraordinarily dangerous. As a result, prospective jurors are inundated with the message that Tsarnaev is a threat who requires the full force of the U.S. Military and civilian security apparatus in response. I do not fault the many security personnel for doing their duty; nor do I fault their superiors for taking precautions regarding the security of the court. Still, I am troubled by how such a conspicuous show of force outside the Courthouse may influence the proceedings within it, especially to a jury pool already so deeply affected by the events. Many of those previously traumatized by the shelter-in-place order and area-wide manhunt might understandably relive that trauma when triggered by such a similar show of force. This is especially true considering the Marathon's finish line is only mere miles from the situs of the these proceedings and that the two-year anniversary of the bombing will take place in the middle of Tsarnaev's trial.

The government, district court, and majority see things differently. In rejecting Tsarnaev's third motion for a change of venue, it points to the jurors already qualified, concluding that the initial questionnaires and individual voir dire have done their job to effectively weed out prejudiced jurors and allow the court to find impartial jurors. But, under these unique circumstances, it strains credulity to assume that mere questionnaires and voir dire can effectively weed out biased residents and find seventy-five qualified jurors who are impartial and indifferent. As the Supreme Court explained in Irvin:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see."[34]

366 U.S. at 728. The District Court for the Western District of Oklahoma made a similar point in McVeigh:

> The existence of . . . prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence.

918 F. Supp. at 1472. We echoed that sentiment in Angiulo:

> Where a high percentage of the venire admits to a disqualifying prejudice, a court may properly question the remaining jurors' avowals of impartiality, and choose to presume prejudice.

897 F.2d at 1181-82. Indeed, in comparable cases of such severe and pervasive prejudice, the Supreme Court found that there was no need "to examine a particularized transcript of the voir dire examination of the members of the jury." Rideau, 373 U.S. at 727; cf. United

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[34] Indeed, that is precisely what one prospective juror in this case said during voir dire: "I can't unforget what I already know."

States v. Moreno Morales, 815 F.2d 725, 735 (1st Cir. 1987) (finding no presumption of prejudice where twenty-five percent of the venire admitted believing that the defendants were guilty).

Finally, even if it were possible to overcome the presumption of prejudice and find truly impartial and unbiased jurors, these jurors would certainly not be "indifferent," as almost every prospective juror has some connection to the events. See Irvin, 366 U.S. at 722 ("The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). Nor would they be representative of either the jury pool as a whole or the community at-large. See id. at 727 ("Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. . . . With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." (internal citations omitted)).

There is no doubt in my mind that the circumstances surrounding this case—which, it cannot be emphasized enough, is a death penalty case—create a presumption of prejudice. I have seen nothing in either the questionnaires or the voir dire to suggest otherwise. Indeed, the government is unable to point to a single instance in any of the 463 criminal jury cases heard in this Circuit (188 of which were in the District of Massachu-

setts) in the past five years where statements made during jury selection came even close to approximating the quite understandable level of bias, hate, disgust, and outrage manifested by so many of the prospective jurors here. For all these reasons, the district court's decision to thrice deny Tsarnaev's motion for a change of venue is a clear abuse of discretion.

2. This Case Is Comparable to *McVeigh*, *Rideau*, and *Irvin*

It is extremely disappointing that both the district court and the majority fail to appreciate the similarities to United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996), and the other cases cited by Tsarnaev. McVeigh concerned the trial of those responsible for the Oklahoma City bombing which killed 168 people, injured hundreds more, completely destroyed the Alfred P. Murrah Federal Office Building, and damaged many other buildings, including the federal courthouse. Id. at 1469. In McVeigh, the parties agreed that venue had to be moved outside of Oklahoma City because "[t]he effects of the explosion on that community are so profound and pervasive."[35] Id. at 1470. The dispute was over

[35] The argument advanced by the government distinguishing McVeigh on the grounds that the trial had to be moved because of the damage to the courthouse is disingenuous. A simple reading of the opinion makes clear that while the courthouse was damaged, that was not the reason for the venue change. Moreover, the contention that McVeigh is different because in that case the parties agreed the trial should not occur in Oklahoma City only supports the argument that trial in Boston is inappropriate. With almost identical facts, the government and the district court judge in McVeigh acknowledged on their own accord that a trial in Oklahoma City would be fundamentally and unconstitutionally unfair.

whether to keep the trial in Oklahoma, specifically Tulsa, or to move it to Denver. Id. at 1470, 1474.

The court concluded "that there is so great a prejudice against these two defendants in the State of Oklahoma that they cannot obtain a fair and impartial trial at any place fixed by law for holding court in that state." Id. at 1474 (emphasis added). Specifically, the district court relied on the following factors. First, while initially there was "extremely comprehensive" national media coverage, "[a]s time passed, differences developed in both the volume and focus of the media coverage in Oklahoma compared with local coverage outside of Oklahoma and with national news coverage." Id. at 1470-71. While national coverage dwindled, local coverage continued for months after the explosion and focused on "more personal" coverage "of the victims and their families" and of "individual stories of grief and recovery." Id. at 1471. Second, "Oklahomans [were] united as a family with a spirit unique to the state. Indeed, the 'Oklahoma family' ha[d] been a common theme in the Oklahoma media coverage, with numerous reports of how the explosion shook the entire state, and how the state ha[d] pulled together in response." Id. Third, "[t]he possible prejudicial impact of this type of publicity [wa]s not something measurable by any objective standards." Id. at 1473.

These considerations are identical to those in the present case.[36] As described above, the ongoing Massachusetts coverage has been significantly more in-depth

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[36] The only real difference between the two cases is that Tsarnaev, though a naturalized citizen, is foreign-born and may have been influenced by overseas terrorist organizations while McVeigh is often referred to as a "home-grown" terrorist. Given that distinguishing

and personal than the national coverage which has, for the most part, been sporadic and general. Moreover, like the "Oklahoma Family" slogan, "Boston Strong" has taken hold (and continues to be used) throughout Massachusetts.[37] And, as the media reports, juror questionnaires, and voir dire make clear, there is strong prejudice amongst prospective jurors, the full extent of which is almost impossible to gauge.

Four other cases are also worth mentioning. In Rideau v. Louisiana, 373 U.S. 723 (1963), the defendant was arrested and charged with bank robbery, kidnapping, and murder. Id. at 724. Following his arrest, he was "interviewed" by the country sheriff and allegedly admitted his guilt. Id. For three consecutive days, the recording of this "interview" was broadcast on television and was seen by an estimated 97,000 people (or approximately 65% of the Calcasieu Parish). Id. In reversing the defendant's conviction, the Supreme Court explained that

> it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in

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the two cases on the basis of national origin would likely be constitutionally impermissible, we must presume that the government and district court are relying on some other, unnamed distinction. However, they have failed to present another persuasive, material distinction between the two cases, and I can find none.

[37] The majority's contention that the Boston Strong theme is irrelevant because it "is about civic resilience and recovery" and "is not about whether petitioner is guilty or not" or whether a prospective juror "could not be fair and impartial," ante, at 25, n.13, is struthious. The very fact that a prospective juror needs to express "resilience" and "recovery" is eloquent evidence that he or she was affected by the events.

> depth to the spectacle of Rideau personally confessing in detail. . . . For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial.

Id. at 726. The repeatedly broadcast image of Tsarnaev being taken from a boat, covered in blood from a firefight with police—an image which was quite likely seen by nearly 100% of the Eastern Division of the District of Massachusetts population[38]—is just as damaging a "confession" and spectacle, particularly when paired with the incriminating and incendiary statements allegedly written by him in the boat.

Similarly, in Irvin v. Dowd, 366 U.S. 717 (1961), the defendant was charged with murdering six individuals near Evansville, Indiana in a four-month span. Id. at 719. Shortly after his arrest, "officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders."[39] Id.

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[38] The majority contends that this is a "remarkable statement" which is "completely unfounded," ante, at 22, n.10. But "'common sense should not be left at the courthouse door.'" District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 135 n.3 (1992) (Stevens, J., dissenting) (quoting Schultz v. Nat'l Coal. of Hispanic Mental Health & Human Servs. Orgs., 678 F. Supp. 936, 938 (D.D.C. 1988)). Indeed, 94% of potential jurors who filled out a questionnaire stated that they had been exposed to "moderate" or "a lot" of publicity. To suggest that this exposure did not include the bloodied image of Tsarnaev belies common sense.

[39] The majority places too much emphasis on the fact that "95% of the dwellings in Gibson County" received the local newspapers carrying the prejudicial information, Irvin, 366 U.S. at 725, whereas the subscription rates for the local newspapers in the Eastern Division

at 719-20. In requiring a change of venue, the Supreme Court noted that the "build-up of prejudice is clear and convincing." Id. at 725. It pointed to the "then current community pattern of thought" and the "curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive," which were solicited and broadcast over local stations. Id. The tweets by Mayor Menino and the Boston Police Department, the opinions expressed in the local media, the surveys of Massachusetts residents as to their views on the case, and the prospective jurors' comments (some of which are detailed above) are analogous to the same kind of prejudicial actions found to be impermissible when they occurred in Evansville in connection with Irvin.[40]

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of the District of Massachusetts are significantly lower. In today's media-saturated environment, physical newspapers are obviously not the sole source of news and information. Instead, people receive their information from a wide variety of sources—newspapers, local news broadcasts, twenty-four-hour cable television, the Internet, etc. Indeed, many people access the newspaper online, which in many cases obviates the need for a subscription.

[40] Contrary to the majority's implications, recent Supreme Court caselaw has not cast doubt on Irvin. The main case the majority relies on, Patton v. Yount, 1467 U.S. 1025 (1984), is readily distinguishable on its facts. Yount involved the publicity surrounding a retrial which was "greatly diminished" due to the "lapse in time" between the events and the second trial. Id. at 1032, 1033. Moreover, the "community sentiment had softened" from the "extensive adverse publicity and the community's sense of outrage [which] were at their height prior to Yount's first trial in 1966." Id. That the Supreme Court ruled that the facts in a subsequent case did not warrant a change of venue is a far cry from suggesting that Irvin is no longer good law. Irvin has not been overruled, either explicitly or implicitly. If it had, it would be quite odd for Justice Sotomayor to rely on it so heavily in her Skilling dissent. Thus, Irvin still provides valuable and on-point precedent.

Finally, venue challenges were raised in the state court trials of both Lee Boyd Malvo and John Allen Muhammad—better known as the Beltway Snipers who terrorized Virginia, Maryland, and Washington, D.C. in late 2002. Though the procedural postures and media coverage are not identical to the present case, it is telling that their trials were moved over 200 miles away from the site of the attacks to ensure they, too, would receive fair trials.[41]

In all of these cases, each involving the death penalty and three involving similar acts of terrorism,[42] a change

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[41] See, e.g., Lloyd Vries, 2nd Sniper Trial Venue Changed, CBS News (July 24, 2003), http://www.cbsnews.com/news/2nd-sniper-trial-venue-changed/ ("The trial of sniper suspect John Allen Muhammad will be moved 200 miles from Prince William County to Virginia Beach, a judge ruled Wednesday. Circuit Judge LeRoy Millette said it 'has been clearly shown that such a change of venue is necessary to ensure a fair and impartial jury."); Stephen Braun, Judge Changes Sniper Trial Venue, L.A. Times, July 3, 2003, http://articles.latimes.com/2003/jul/03/nation/na-sniper3 ("Citing concerns that pretrial publicity would make it impossible to select an impartial jury, a Virginia judge Wednesday ordered the Washington-area serial sniper murder trial of Lee Boyd Malvo moved 200 miles south of the capital suburbs.").

[42] The majority cites to cases involving the 1993 World Trade Center bombing to suggest that high-profile terrorism cases can be tried in the district where the crime occurred. See United States v. Yousef, No. S12 93 Cr. 180(KTD), 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997); United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993). However, unlike here, there is no evidence that the amount of pretrial press, the personal impact stories, or the day-to-day focus on the events was any different in New York City than it was nationwide. Unlike here, the Second Circuit noted "press coverage had substantially subsided by the time Yousef was brought to trial, and there was minimal publicity in the months immediately preceding his trial." United

of venue was abundantly appropriate. It is likewise appropriate here. The district court's failure to transfer is a clear abuse of discretion.

3. This Case Is Not Comparable to *Skilling*

The government, district court, and majority, however, all disagree and equate this case to United States v. Skilling, 561 U.S. 358 (2010). This comparison is inapposite. Unlike the cases just described, Skilling involved neither terrorism nor murder, and it certainly did not involve the death penalty. Instead, Skilling involved the trial of one of the former CEOs of Enron—one of the world's leading energy companies at the time—which collapsed and fell into bankruptcy in 2001 amid fraud. Id. at 368. "[T]he facts of the case were 'neither heinous nor sensational.'" Id. at 369.

After being indicted on numerous counts of wire fraud, securities fraud, insider trading, making false representations to auditors, and conspiracy to commit fraud—of which he was convicted of some charges and acquitted of others—Skilling appealed, arguing that his trial should have been moved outside of Houston. Id. at 375-76. The Supreme Court rejected this argument due to a number of factors, all of which are readily distinguishable here.

First, it explained that Houston is "the fourth most populous city in the Nation." Id. at 382. Boston is not

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States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003). Also of note, New York City is significantly larger and more diverse than Boston; very few places are comparable to New York City. Comparing New York to Boston is like comparing an apple to a bean, rather than apples to apples.

even in the top twenty. See U.S. Census Bureau, Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2013 Population: April 1, 2010 to July 1, 2013, May 2014, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Moreover, the Skilling Court noted that in a survey of potential jurors commissioned by Skilling, "only 12.3% of Houstonians named [Skilling] when asked to list Enron executives they believed guilty of crimes"; "two-thirds of respondents failed to say a single negative word" about Skilling; and "43% either had never heard of Skilling or stated that nothing came to mind when they heard his name." 561 U.S. at 382 n.15. Here, by contrast, Tsarnaev notes that 94% of potential jurors who filled out a questionnaire had been exposed to "moderate" or "a lot" of publicity. Independent news articles report similar findings.[43] Unlike in Skilling, where it was possible to know about the Enron scandal without knowing that Skilling was personally involved, Tsarnaev and the Boston Marathon bombings are one and the same; it is impossible to be aware of one and not the other.

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[43] See, e.g., In Matters of Justice, It's Personal, Boston Globe, Feb. 6, 2015, https://www.bostonglobe.com/opinion/2015/02/05/matters-justice-personal/1HXYIwyRx22d4Pvtxh2SOJ/story.html (noting that a SocialSphere survey of 1000 Massachusetts residents found that 90% thought Tsarnaev was guilty or probably guilty); Shira Schoenberg, Dzhokhar Tsarnaev Trial: Judge, Lawyers Sift Through Potential Jurors' Ties to Boston Marathon Bombing, MassLive (Jan. 16, 2015), http://www.masslive.com/news/boston/index.ssf/2015/01/dzhokhar_tsarnaev_trial_judges.html ("Given the enormous publicity surrounding the bombings, it would be nearly impossible to find jurors who are unfamiliar with the case.").

Second, the Skilling Court examined the pretrial publicity and emphasized that "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." Id. at 382. It added that the "[p]retrial publicity about Skilling was less memorable and prejudicial" and that there was "[n]o evidence of the smoking-gun variety [which] invited prejudgment of his culpability." Id. at 383. Here, by contrast, in the midst of the manhunt, the media showed surveillance video of Tsarnaev with a backpack moments before the bombing, plastered Tsarnaev's photograph everywhere imaginable, and broadcast live the scene of him being found hidden in a boat, covered in blood, and his subsequent arrest. Further reports over the next few weeks and months revealed his note written inside the boat, which was described by many as a "confession."[44] And less than five weeks ago, on the morning jury selection began, the media reported that Tsarnaev offered to plead guilty in exchange for the government removing the death penalty but that the government rejected the offer.[45] Thus, unlike in Skilling, here there is blatantly

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[44] See, e.g., Boston Bombings Suspect Dzhokhar Tsarnaev Left Note in Boat He Hid in, Sources Say, CBS News (May 16, 2013), http://www.cbsnews.com/news/boston-bombings-suspect-dzhokhar-tsarnaev-left-note-in-boat-he-hid-in-sources-say/ ("Boston bombing suspect Dzhokhar Tsarnaev left a note claiming responsibility for the April 15 attack on the Boston Marathon. . . . ").

[45] See, e.g., Evan Pérez, Boston Bombing Trial Lawyers Fail to Reach Plea Deal, CNN (Jan. 5, 2015), http://edition.cnn.com/2015/01/05/politics/dzhokhar-tsarnaev-trial-plea-deal-fails/index.html ("The discussions in recent months have centered on the possibility

prejudicial pretrial publicity. This fact directly cuts against the government's argument that there "have been no reports of a criminal history, of an offer to plead guilty, of a confession to other crimes, or of damaging last-minute admissions."

Third, the Skilling Court explained that "over four years elapsed between Enron's bankruptcy and Skilling's trial" and that "the decibel level of media attention diminished somewhat in the years following Enron's collapse." Id. at 383. As explained above, it has been less than two years since the Marathon bombing, and while the level of media attention has diminished somewhat, it is still extremely strong and prevalent, especially in Massachusetts.[46] The emotional salience of these ongoing reports cannot be overstated.

Fourth, the Court rejected Skilling's argument that the "sheer number of victims" triggered a presumption of prejudice because the "jurors' links to Enron were either nonexistent or attenuated." Skilling, 561 U.S. at 384. While many people in Houston had links to Enron or the energy sector, many also had no connection. See

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of Tsarnaev pleading guilty and receiving a life sentence without parole . . . . [b]ut the talks have reached an impasse because the Justice Department has resisted removing the death penalty. . . . ").

[46] See, e.g., The Associated Press, Marathon Bombing Aftermath Was Top Massachusetts Story of 2014, MassLive (Dec. 26, 2014), http://www.masslive.com/news/index.ssf/2014/12/marathon_bombing-aftermath_was.html ("The legal aftermath of the Boston Marathon attacks dominated headlines in Massachusetts in 2014, much as the attack itself did last year. . . . "); Timeline: Dzhokhar Tsarnaev in the Globe, Boston Globe, Dec. 24, 2014, http://www.bostonglobe.com/2014/12/24/timeline-dzhokhar-tsarnaev-globe/16QJTbj8q15dkhNGvMuVFJ/story.html (collecting every Boston Globe news story related to Tsarnaev).

United States v. Skilling, 554 F.3d 529, 560 n.47 (5th Cir. 2009), aff'd in part, vacated in part, 561 U.S. 358 (2010) ("Skilling offered opinion polls suggesting that one in three Houston citizens 'personally kn[e]w' someone harmed by what happened at Enron."). This situation is different. It is true that a number of Eastern Division of the District of Massachusetts residents were not at the Marathon, did not know anyone at the Marathon, or were not personally subject to the shelter-in-place order. Still, they were nevertheless affected because the entire city of Boston was the intended victim of the bombings.[47] That is the whole point of terrorism—not just to kill or injure a few innocent people, but to make everyone scared and make everyone believe it could have been them or that they could be next. To further the point, it took just one day to qualify thirty-eight prospective jurors in Skilling. Skilling, 561 U.S. at 374. Here, it took eleven days to qualify forty-one.

Finally, the Supreme Court agreed with Skilling that a co-conspirator's "well-publicized decision to plead guilty shortly before trial created a danger of juror prejudice," but found that any prejudice was lessened due to the district court granting a continuance and addressing

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[47] See, e.g., Jonel Aleccia, Boston Bomb Attack Triggered PTSD in Local Kids, Study Finds, NBC (May 30, 2014), http://www.nbcnews.com/health/health-news/boston-bomb-attack-triggered-ptsd-local-kids-study-finds-n118856 (noting that "in addition to [PTSD], researchers detected a range of other disturbing emotional and behavioral responses in kids who felt the impact of the manhunt close to home," and that "[e]veryone in Boston has a story of what they did during the shelter-in-place request"); Alan GreenBlatt, Boston on Lockdown: "Today Is So Much Scarier", NPR (Apr. 19, 2013, http://www.npr.org/blogs/thetwo-way/2013/04/19/177934915/The-Scene-In-Boston-Today-Is-So-Much-Scarier.

the issue during voir dire. Id. at 384-85 (internal quotations marks omitted). Once again, the situation could not be more different here. In the midst of jury selection, three relevant events have occurred: the Charlie Hebdo shooting and manhunt in Paris,[48] the Finish Line "Snowmaritan,"[49] and the guilty plea of Khairullozhon Matanov—a friend of Tsarnaev who is accused of destroying evidence related to this investigation.[50] Unlike in Skilling, the district court has refused to delay the proceedings by even a day,[51] and a review of the questionnaires and voir dire reveals that whether

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[48] See, e.g., Kevin Johnson, Paris and Boston Attacks Pose Striking Parallels, USA Today, Jan. 9, 2015, http://www.usatoday.com/story/news/nation/2015/01/08/paris-boston-attacks/21445461/ (commenting that "there was no escaping the striking similarities between the assault on the Paris offices of a popular satirical newspaper and the 2013 Boston Marathon bombings" and quoting Massachusetts Representative William Keating as stating that "[a]gainst the backdrop of jury selection . . . , it's like Boston is reliving what happened all over again. . . . I'm watching what's happening in Paris, and I'm thinking of Watertown.").

[49] See, e.g., Meg Wagner & Jason Silverstein, Boston Bartender Chris Laudani Clears Snow from Boston Marathon Finish line as Massachusetts Begins Blizzard Cleanup, N.Y. Daily News, Jan. 28, 2015, http://www.nydailynews.com/news/national/boston-begins-blizzard-cleanup-clears-marathon-finish-line-article-1.2094673.

[50] See, e.g., Milton J. Valencia, Tsarnaev Friend to Plead Guilty, Boston Globe, Jan. 13, 2015, http://www.bostonglobe.com/metro/2015/01/13/judge-sets-jan-plea-hearing-for-friend-boston-marathon-bombers/SPbRARYlkYS5XYJMrZNFcM/story.html.

[51] See, e.g., The Associated Press, Judge Rejects Bid to Delay Tsarnaev Trial over Paris Attacks, Boston Herald, Jan. 14, 2015, http://www.bostonherald.com/news_opinion/local_coverage/2015/01/judge_rejects_bid_to_delay_tsarnaev_trial_over_paris_attacks.

these topics have had any prejudicial affect on the jury has not been deeply probed.[52]

4. If Not Here, When?

If a change of venue is not required in a case like this, I cannot imagine a case where it would be. The entire city of Boston has been terrorized and victimized, and deep-seated prejudice against those responsible permeates daily life. If residents of the Eastern Division of the District of Massachusetts did not already resent Tsarnaev and predetermine his guilt, the constant reporting on the Marathon bombing and its aftermath could only further convince the prospective jurors of his guilt. Adding the death penalty element to these circumstances, and the makings for a presumption of prejudice abound. If a presumption does not exist here, when would it? How big must a terrorist attack be? How numerous and widespread must the body count and impact be? How pervasive and detailed must the coverage be before a federal court must presume the existence of prejudice?

By refusing to grant a change of venue in this case—one of the most well-known, well-publicized, and emotionally—resonant terrorist attacks ever to go to trial—both the district court and the majority are suggesting that there could never be a case which mandates a change of venue. If their decisions are allowed to

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[52] At the hearing, Tsarnaev explained that all of these events occurred after the questionnaires were filled out, and while the district court has generally asked prospective jurors whether they were aware of these events, it has cut off questioning into how in-depth this knowledge is or how it has affected the prospective juror.

stand, we might as well erase Rule 21(a) from the Federal Rules of Criminal Procedure, some of the due process principles from the Fifth Amendment, and the "impartial jury" phrase from the Sixth Amendment.[53]

B. A Failure to Act Will Cause Irreparable Harm

The second requirement for a writ of mandamus to issue is that a defendant must show "relief is necessary to prevent irreparable harm." In re Justices of the Supreme Court of P.R., 695 F.2d 17, 20 (1st Cir. 1982). This requirement has been satisfied here as well. Should the jury selection process fail to select a fair and impartial jury, the "widespread public comment" in a case of this magnitude would "creat[e] additional difficulty in beginning again at another place for trial." McVeigh, 918 F. Supp. 1467. Any subsequent jury would be exposed to even more prejudicial publicity about the case. For example: it would be exposed to the daily events of the first trial; it would be exposed to the testimony given by the victims, the witnesses, and the experts; and it would be exposed to all the evidence presented by the government. Not only would it be exposed to this evidence, it would be exposed to outside commentary on the evidence as well. But, perhaps most harmfully, a subsequent jury could be expected to know that the new trial was the result of a post-conviction

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[53] Another option, which none of the parties have suggested, would be to select jurors from another jurisdiction and then bring them to the District of Massachusetts for the trial. Though this practice is very rare, it is not unheard of. See Commonwealth v. Moore, Docket No. 169, Crim. No. 2011-10023, at *3, 5 (Mass. Sup. Ct. Oct. 5, 2012) (ordering a "partial change in venue" whereby the trial would be held in Suffolk County but the jury would be "draw[n] from a Worcester County jury venire").

reversal. Thus, the new jury would know that Tsarnaev had already been convicted by a prior jury, with his guilt already proven once beyond a reasonable doubt. The jury might likely conclude that the retrial is due only to a perceived "technicality," and as a result, any pretrial prejudice may be even stronger at a retrial. While this is, of course, a concern in any situation where a conviction is reversed on appeal, very few, if any, cases have the press coverage and widespread dissemination of information that are present here. Thus, contrary to the majority's position, the fact that Tsarnaev, should he be convicted, will be able to raise his arguments in an appeal does not defeat the irreparable harm prong.[54]

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[54] The majority misunderstands the nature of modern media coverage of high-profile criminal trials, and the distinction between prior coverage in Boston versus the rest of the country. Since the Marathon bombing, media coverage of the story has never ceased in Boston, where the story remains present and at the fore of the public's interest. On the national stage, however, in the two-year gap between the bombing and the start of jury selection, media coverage has waned and pales in comparison to local coverage. Nonetheless, given the American experience with high-profile criminal trials over the past few decades, there is every reason to expect that the national news media (including 24-hour cable channels, radio, print newspapers, social media, and internet sources) will ramp up with Tsarnaev's trial and engage in the relentless, highly detailed, omnipresent coverage that characterized criminal trials such as those of O.J. Simpson, Casey Anthony, the Menéndez Brothers, Jeffrey Dahmer, Phil Spector, and Ted Bundy. See, e.g., Casey Anthony Murder Trial Garners Extensive Media Coverage: Cable and Broadcast TV Coverage Draws Comparison to the Trials of O.J. Simpson and the Menéndez Brothers, L.A. Times, July 6, 2011, http://articles. latimes. com/2011/jul/06/entertainment/la-et-casey-anthony-trial-sidebar-20110706 (noting, among other things, that "[m]ore than 600 press passes were doled out for media coverage, and every major broadcast network has had at least one reporter at the trial"); see also Emily

Another consideration the majority fails to adequately consider is the harm that will be done to the judicial system as a whole. In In re Cargill, Inc., 66 F.3d 1256 (1995), a case involving a mandamus petition for a judge's recusal, we held that "[p]ublic confidence in the courts may require that such a question be disposed of at the earliest possible opportunity." Id. at 1262. Though the issue here is change of venue and not recusal, the concern over "public confidence" is just as vital. It is not just Tsarnaev that is on trial as a result of the issues before us, but also the integrity of our federal judicial system. The entire world is watching to see how the American values of "innocent until proven guilty" and "the right to a fair trial"—values we proudly proclaim—are applied in the toughest of cases, where the most allegedly despicable of defendants are on the docket. The actions taken by the district court cast doubt on the tenets by which our entire system is based, and it is thus necessary for us to act.

Shire, From O.J. to 'Serial': We're All Armchair Jurors Now, The Daily Beast (Jan. 23, 2015), http://www.thedailybeast.com/articles/2015/01/23/from-o-jto-serial-we-re-all-armchair-jurors-now.html ("It's the 20th anniversary of the start of O.J. Simpson's trial, a media event which led to an explosion of courtroom TV and loud legal experts. . . . "); id. ("The 24-hour cable news network meant that the murder trial was transformed into a celebrity-making machine. Simpson, his defense team, his prosecutors, the judge, and cable legal analysts all became characters in the most gripping drama on television."); id. ("Transforming television viewers into jurors who were chomping at the bit to declare guilt or innocence drove the media coverage of the most sensationalized trials of the next 20 years: Scott Peterson, Casey Anthony, Jodi Arias.").

There is serious doubt in the public sphere that Tsarnaev can receive a fair trial in the District of Massachusetts. Major papers throughout the world have published articles suggesting that the trial should be moved outside of Boston.[55] For example, a survey of 1,000 Massachusetts residents showed that only 47% of those polled were confident that Tsarnaev would receive a fair trial.[56] While only 8% were not at all confident, the other 43% (2% of the respondents were unaccounted for)

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[55] See, e.g., Joe D'amore, Tsarnaev Trial Should Not Be in Boston, Gloucester Times, Feb. 9, 2015, http://www.gloucestertimes.com/opinion/letter-tsarnaev-trial-should-not-be-in-boston/article_8155d310-7ba2-5046-a9aa-5406973c3df6.html; Thomas Farragher, Tsarnaev Trial Should Be Moved to Another Venue, Boston Globe, Feb. 7, 2015, https://www.bostonglobe.com/metro/2015/02/06/tsarnaev-trial-should-moved-another-venue/5HovPmXy1dTyv1XhV5VzSI/story.html ("Most potential jurors don't think Tsarnaev is guilty. They know he's guilty."); Danny Cevallos, Can Tsarnaev, Hernández, Holmes Get Fair Trials?, CNN (Jan. 29, 2015), http://www.cnn.com/2015/01/28/opinion/cevallos-major-trials-pretrial-publicity/; Thaddeus Hoffmeister, The Judge Should Rethink His Decision to Try Tsarnaev in Boston, N.Y. Times, Jan. 7, 2015, http://www.nytimes.com/roomfordebate/2015/01/07/when-a-local-jury-wont-do/the-judge-should-rethink-his-decision-to-try-tsarnaev-in-boston; Richard Lind, The Judge's Decision in the Tsarnaev Case Sets a Bad Precedent, N.Y. Times, Jan. 7, 2015, http://www.nytimes.com/roomfordebate/2015/01/07/when-a-local-jury-wont-do/the-judges-decision-in-the-tsarnaev-case-sets-a-bad-precedent-19; Harvey Silverglate, Why the Tsarnaev Trial Should Be Moved, Delayed, Boston Globe, Jan. 2, 2015, http://www.bostonglobe.com/opinion/2015/01/02/why-tsarnaev-trial-should-moved-delayed/K2is6uVCo179w6JzDLvZYJ/story.html.

[56] In Matters of Justice, It's Personal, Boston Globe, Feb. 6, 2015, http://www.bostonglobe.com/opinion/2015/02/05/matters-justice-personal/1HXYIwyRx22d4Pvtxh2SOJ/story.html.

had varying levels of doubt as to whether or not Tsarnaev could receive a fair trial.[57] Many legal publications agree.[58] But perhaps most notably, prospective jurors themselves have stated that "it will be very tough to find an impartial jury this close to the crime," that the trial is a "waste of time and money," and that "there is no way [the juror] could be impartial."[59]

Yet, instead of alleviating any doubt as to the fairness of the proceedings, the district court has repeatedly refused to grant Tsarnaev's motions for change of venue. Not only that, it often refuses to act at all. Tsarnaev filed his second motion for change of venue on December 1, but the district court sat on the motion for a month before issuing its denial. In addition to this being just five days before jury selection was to begin, it was also New Year's Eve. Unfortunately, the district court went further and criticized Tsarnaev for filing the motion to begin with. See Op. and Order, Jan. 2, 2015, Case No. 13-10200, ECF No. 887, 1-6 (characterizing the motion as an ill-timed and delayed motion for reconsideration despite Tsarnaev's attempt to supplement the record with additional facts and reports supporting community bias). A similar practice occurred when Tsarnaev filed his third motion for a change of venue.

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[57] Id.

[58] See, e.g., Andrew Cohen, Can Tsarnaev Get a Fair Trial in Boston? Of Course Not., Brennan Center for Justice (Jan. 9, 2015), http://www.brennancenter.org/analysis/can-tsarnaev-get-fair-trial-boston-course-not.

[59] It is worth noting that many other prospective jurors conveyed similar sentiments regarding the unlikely prospect of Tsarnaev receiving a fair trial. While these prospective jurors were hopefully struck for cause, their comments only further highlight the strong views in the community.

Again, the district court failed to act promptly. It sat on the motion for sixteen days and only issued an order once the instant petition for mandamus was filed. The district court did, however, immediately act to chastise Tsarnaev's defense team for publicly including quotes from the jury questionnaires. See Text Order, Jan. 22, 2015, Case No. 13-10200, ECF No. 983. Though there may have been legitimate reasons for these delays and criticisms, to the public, these actions may suggest that Tsarnaev's attorneys are being punished for doing their jobs.[60]

Rather than stepping in to remedy this appearance of injustice and restore faith in the system before its integrity is irreparably damaged, the majority has largely sidestepped the issue. As I noted in my dissent to Tsarnaev's first petition for mandamus, the majority denied his petition within hours of receiving the complete briefing. In re Tsarnaev, 775 F.3d 457, 457-59 (1st Cir. 2015) (Torruella, J., dissenting). In today's opinion, it likewise focuses not on the merits, but the "onerous" burden Tsarnaev must overcome.

Let us recap: Tsarnaev was filmed being arrested after a four-day manhunt; the entire city, which in itself is a victim, came together and adopted "Boston Strong"

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[60] See, e.g., Alysha Palumbo, Tsarnaev Lawyers Defend Use of Juror Quotes to Move Trial, New England Cable News (Jan. 23, 2015), http://www.necn.com/news/new-england/Boston-Marathon-Bombing-Suspect-Dzhokhar-Tsarnaev-Jury-Selection-Continues-289565681.html; Pete Williams, Judge Chides Tsarnaev Lawyers for Releasing Jurors' Comments, NBC (Jan. 22, 2015), http://www.nbcnews.com/news/us-news/judge-chides-tsarnaev-lawyers-releasing-jurors-comments-n291636.

as a sign of camaraderie; national media outlets had essentially stopped covering the bombing and its aftermath prior to trial, but the local news (both television and print) continue to report on it daily; jury selection is being conducted in the Moakley Courthouse, which is just a few miles from the Marathon's finish line, and which has become a heavily guarded fortress surrounded by a media circus; the district court has been slow in acting on Tsarnaev's motions and repeatedly criticizes his attorneys for zealously advocating on his behalf; and when Tsarnaev seeks relief from this court, a majority rebuffs his pleas. This is not the kind of "American Justice" that is expected of the federal courts, particularly in a criminal death-penalty case of this magnitude and import.

As Justice Sotomayor opined in Skilling, "our system of justice demands trials that are fair in both appearance and fact." Skilling, 561 U.S. at 464 (Sotomayor, J., concurring in part and dissenting in part). By failing to act now, the majority is only furthering the perception that this whole trial has a pre-ordained outcome and that our "guarantee of due process" is nothing but an empty promise. See Rideau, 373 U.S. at 726 ("Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality. . . . The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law.").

A mandamus order from this court could have saved the district court's clear error, avoided some of the danger of mistrial on the basis of a prejudiced jury pool, and precluded the irreparable harm that, thanks to the media circus bound to form around this trial, would mar any

subsequent trial for Tsarnaev in the event of such a mistrial or reversed conviction. Such irreparable harm is not limited to Tsarnaev himself, but also extends to the damage done to the credibility and integrity of our legal system. With today's decision, any chance of avoiding such harm is now gone.

C. The Equities Favor Transfer

Finally, for the writ to issue, the equities, on balance, must favor the petition. In re Bulger, 710 F.3d at 45. Such is the case here. Even assuming this is a "close case," which I do not think it is, we should err on the side of caution. Again, let us not forget, this is a death penalty case. As the Supreme Court stated in Irvin, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." 366 U.S. at 728. The government, the district court, and the majority have failed to proffer any strong, persuasive case or reason why the equities should weigh against transfer. Indeed, their supposedly strongest point—that "the trial be held where the crimes were committed" so that, in part, "[m]embers of the community will have access to the trial and to the court room," ante, at 33-34—is factually inaccurate. While the trial may be held where the crime was committed, the public will not have access. Instead, the public and the victims will be relegated to "overflow" rooms where they can watch the proceedings on closed-link video cameras. There is no reason that a trial being held in a different district could not similarly be broadcast. Indeed, that is exactly what happened in McVeigh. Accordingly, any legitimate doubt that Tsarnaev cannot receive a fair trial tips the equities

in favor of issuing the writ and requiring a transfer out of this district.

III. Conclusion

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin, 366 U.S. at 722. As I have explained above, almost the entire pool of potential jurors has been compromised by the Boston Marathon bombings in one respect or another. Even though potential jurors may have the best of intentions, I believe it is impossible to empanel a jury in this jurisdiction that is impartial, let alone indifferent.

I understand what this trial means for the community: an opportunity for closure, a sense of justice. But what makes both America and Boston strong is that we guarantee fundamental constitutional rights to even those who have caused us the greatest harm. Rather than convicting Tsarnaev and possibly sentencing him to death based on trial-by-media and raw emotion, we must put our emotions aside and proceed in a rational manner. This includes guaranteeing that Tsarnaev is given a fair trial and accorded the utmost due process. The actions of the district court and the majority of this court fall short of these ideals.

Tsarnaev is entitled to a writ of mandamus ordering the district court to grant Tsarnaev's motion for a change of venue. Because this court refuses to grant this relief, I strongly dissent.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Filed: Jan. 15, 2016

OPINION AND ORDER

O'TOOLE, D.J.

Dzhokhar Tsarnaev was tried on a thirty-count indictment arising out of the bombings at the Boston Marathon on April 15, 2013. Jury selection for his trial began January 5, 2015. On April 8, 2015, the jury returned a verdict in the first phase of his capital trial finding him guilty under all counts. The maximum penalty for seventeen of the crimes was death. On May 15, 2015, the jury returned its verdict in the second phase of the trial, deciding that the death penalty should be imposed on six of the seventeen capital counts, but not on the other eleven. On June 24, 2015, the Court sentenced the defendant to death on those six counts in accordance with the jury's verdict and to various terms of imprisonment on the remaining counts.

On July 6, 2015, the defendant moved for a new trial in the interests of justice pursuant to Federal Rule of Criminal Procedure 33 and, in the alternative, for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. In his motion, he reiterates some grounds for such relief that he had previously raised before or during trial. As to those grounds that are repeated from prior written or oral motions, both aspects of the present motion are denied for the same reasons the prior motions were denied. As to most of them, no further discussion is necessary; the issues are preserved for the defendant on appeal.

He repeats his objection to trial in this District, and the reasons for denying his renewed attack on venue are discussed below.

Lastly, he argues that all of his convictions under 18 U.S.C. § 924(c) for carrying a firearm during and in relation to a crime of violence must be vacated. His argument is based first on issues he claims arise from the Supreme Court's decision, issued days after he was formally sentenced, declaring a portion of the Armed Career Criminal Act unconstitutionally vague. See Johnson v. United States, 135 S. Ct. 2551 (2015). He also argues that his § 924(c) convictions must be set aside because it cannot properly be determined whether the various underlying crimes were "crime[s] of violence" in the necessary sense.

The Court permitted an extended briefing schedule and, after oral argument on a portion of the defendant's motion, allowed the parties to file supplemental memoranda. This Opinion and Order resolves the issues raised by the post-trial motion.

I. Venue

The issue of venue has been previously litigated in this case and extensively addressed in opinions of this Court and of the Court of Appeals. The defendant now again renews his venue argument, contending generally that local media coverage, local events, and information or postings on social networks during the course of the trial should raise a presumption of prejudice[1] and require a conclusion that the District of Massachusetts was an improper venue for his trial. The defendant's opening brief contains only limited references to legal authority, but he appears to be raising the claim under both the Sixth Amendment to the Constitution and Federal Rule of Criminal Procedure 21(a), although he does not distinguish between them.

In Skilling v. United States, the Supreme Court identified four factors generally relevant to a determination whether a presumption of prejudice should be indulged: (1) the size and characteristics of the community in which the crime occurred; (2) the nature of the publicity surrounding the case; (3) the time between the crime and the trial; and (4) whether the jury's decision indicated bias. 561 U.S. 358, 382-84 (2010); see also United States v. Casellas-Toro, 807 F.3d 380, 386 (1st Cir. 2015); In re Tsarnaev, 780 F.3d 14, 20-21 (1st Cir. 2015) (per curiam).[2] The defendant does not expressly articulate

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[1] Notably, he does not argue that there was actual prejudice. (See Reply to Gov't's Opp'n to Mot. for J. Notwithstanding Verdict and for New Trial at 1-2 (dkt. no. 1589).)

[2] Some case law suggests that the number or percentage of jurors excused could be relevant to the inquiry. See, e.g., Casellas-Toro, 807 F.3d at 389 (citing cases regarding percentages of potential ju-

a legal framework for analyzing his claim, but it appears he seeks to advance an argument related primarily to the second and third factors. For the sake of completeness, in this post-trial analysis I will address all four Skilling factors.

A. Size and Characteristics of the Community

As has been previously described, see In re Tsarnaev, 780 F.3d at 21; United States v. Tsarnaev, Cr. No. 13-10200-GAO, 2014 WL 4823882, at *2 (D. Mass. Sept. 24, 2014), Boston is located in a large, diverse metropolitan area. The geographic region from which the jury was drawn, the Eastern Division of the District of Massachusetts, includes about five million people living not just in Boston, but also in smaller cities and towns, encompassing urban, suburban, rural, and coastal communities.[3] Residents in the area obtain their daily news from a variety of sources. In re Tsarnaev, 780 F.3d at 21. In light of these facts, this factor weighs against a

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rors excused for cause). The defendant does not make that argument here. Such a metric would not reliably assess the extent of any potential juror prejudice in this case. A very large number of jurors were excused because of the personal hardship they would endure if required to serve on the protracted trial. Another significant cohort of excused prospective jurors included those whose firmly held beliefs about the death penalty in general, and not about this case in particular, disqualified them under applicable law. Additionally, the Court was deferential to the parties' joint agreements about for-cause excusals of particular jurors, which appeared at least sometimes to be based on negotiations about those prospective jurors' general death penalty views. In light of these facts, the percentage of jurors excused would be an unreliable—indeed plainly inaccurate—proxy for the extent of any potential juror bias against the defendant.

[3] The residences of the empaneled jury reflect this geographic diversity.

finding of presumed prejudice. Compare Skilling, 561 U.S. at 382 (stating that "large, diverse pool" of approximately 4.5 million eligible jurors in Houston area made the "suggestion that 12 impartial jurors could not be empaneled . . . hard to sustain"), and United States v. Yousef, No. S12 93 CR. 180 (KTD), 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997) (noting in pre-Skilling case that the district was one of the "largest and most diverse in the country" (quoting United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993))), with Rideau v. Louisiana, 373 U.S. 723 (1963) (remarking that community where the crime occurred was a small parish of only 150,000 people), and Casellas-Toro, 807 F.3d at 386-87 (explaining district court acknowledgement that, although Puerto Rico has a population of 3 million people, a fact tending to mitigate the potential for prejudice, Puerto Rico is "a compact, insular community . . . highly susceptible to the impact of local media" (citation omitted)).

B. Nature of the Publicity

The main basis for the defendant's motion appears to be the extent and nature of the publicity concerning the case itself and the events at issue in it. In his post-trial motion, he focuses largely on media coverage concerning observances of the anniversary of the bombings, the 2015 Boston Marathon itself, and publicity about victims; coverage of foreign family witnesses; physical surroundings of the courthouse; and social media.[4]

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[4] The defendant submitted two compact discs containing voluminous materials purportedly in support of his post-trial motion. In the Scheduling Order regarding post-trial motions, the parties were

i. Marathon-related media coverage

The defendant relies heavily on local marathon-related media coverage. It is certainly true that the local media gave substantial coverage to the anniversary of the bombings, its victims, and the 2015 marathon. What the defendant disregards, however, is the national —and international—interest in those same events and people. This was not a crime that was unknown outside of Boston. To the contrary, media coverage of the bombings when they occurred was broadcast live around the world over the Internet and on television. Contrast Casellas-Toro, 807 F.3d at 388 (noting that defendant "would be relatively unknown outside of Puerto Rico"). The defendant's own pretrial poll, for instance, show that even in his preferred venue, Washington, D.C., those polled overwhelmingly were familiar with the bombings.[5] (Reply to Gov't's Opp'n to Def.'s Mot.

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directed to include in their post-trial briefs "specific and detailed citations to the record and appropriate legal authority." (May 28, 2015 Scheduling Order at 2 (dkt. no. 1449).) To the extent there is material on the compact discs that is not expressly referred to by the defendant in his briefing, I decline to comb through uncited materials in order to locate what I might conclude the defendant would regard as relevant portions and then try to connect them to his legal arguments; that is a party's responsibility. (See, e.g., Mem. in Supp. of Mot. for J. Notwithstanding Verdict and for New Trial at 3 (dkt. no. 1506) ("A sample of . . . additional information is summarized. . . . "); id. ("Supporting materials—including those expressly mentioned in this [m]emorandum as well as many others—have been compiled. . . . ").) Therefore, I generally limit discussion and consideration of the exhibits that were actually referenced by the defendant in his post-trial motion, as required by the Scheduling Order.

[5] Similarly, 86.1% of Washington D.C. survey respondents in the defendant's pretrial poll indicated that "[b]ased on what [they had]

for Change of Venue and Submission of Supp. Material in Supp. Ex. 4F at 4 (dkt. no. 461-23)); see also In re Tsarnaev, 780 F.3d at 16 (96.5% of survey respondents).

Nor did the crime affect an event about which only Bostonians are concerned. Although the Boston Marathon is an important event in the city and region, it is also an iconic event known worldwide. According to testimony by the executive director of the Boston Athletic Association, the organization which hosts the Boston Marathon, the race was originally known as "America's Marathon." (Mar. 4, 2015 Tr. of Jury Trial—Day Twenty-Seven at 69 (dkt. no. 1528).) Because "it is the only marathon outside of the Olympic Games and the world championships for which one needs to qualify in order to run, . . . it's an aspiration for a great many people." (Id. at 68.) It "attracts some of the finest competitors in the world." (Id. at 70.) The approximately 27,000 registered runners come from all 50 states and many countries. (Id. at 68, 75.) At least 40% of them are from "outside Massachusetts and New England." (Id. at 75.) Similarly, spectators include not only people from the Boston area but also many visitors from elsewhere, coming to watch friends and family members participating in the race. (Id. at 73.) Like the Olympic Games, the event receives worldwide media coverage. In recent years, approximately 1,000 media credentials have been issued to representatives of about 80 registered news organizations. (Id. at 80.) The mar-

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read, seen or heard about the case," they "believe[d] Dzhokhar Tsarnaev was" either "definitely" or "probably" guilty. (Reply to Gov't's Opp'n to Def.'s Mot. for Change of Venue and Submission of Supplemental Material in Supp. Ex. 4F at 5) (dkt. no. 461-23).)

athon is broadcast live locally, nationally, and internationally to about 20 countries, and it is also live-streamed over the Internet. (Id. at 80-81.)

Not surprisingly, then, the pretrial and trial proceedings were covered not only locally but also nationally and internationally. National and international news outlets comprised approximately two-thirds of the media organizations that requested one of the thirty seats reserved for media in the trial courtroom and more than one-half of the media organizations that were ultimately assigned a seat or rotating seat there. Many others followed the proceedings from overflow rooms in the courthouse. Newspapers around the world closely followed the trial as it unfolded, both in their print editions and on the Internet, focusing not just on the more significant trial events like opening statements and closing arguments, but even on the more particular aspects of the legal process.[6] There is no reason to think—and certainly no specific evidence—that this extensive coverage would have been any different in kind or degree if the trial had been conducted elsewhere.

Moreover, there is no reason to think that if the trial had been moved to another district, the local media in that district would not also have given it attentive coverage. What was first a national story would have become a local story in that venue. It surely is not plausible to believe that if the trial had been moved to the

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[6] For example, a graphics editor from the Washington Post, the most widely circulated newspaper published in the defendant's preferred venue, chronicled the end of the guilt phase and the entirety of the penalty phase of the trial in blogs and courtroom sketches. Richard Johnson, The Tsarnaev Trial: Drawing a Line, Washington Post, http://wapo.st/Tsarnaev (last updated May 15, 2015).

District of Columbia, as the defendant sought, the Washington Post, which covered the trial as a national story, would have ignored it as a local one, and residents of the vicinage from which jurors would have been drawn would have been exposed to that local, as well as national, reporting. In this case, that would likely have been inevitable wherever the trial was held.

I also disagree with the defendant's implicit assertion that the local coverage of the trial was prejudicial to him simply because there was coverage. Not only was the coverage generally factual in nature, rather than inflammatory, but with regard to the appropriate punishment for his crimes much of it skewed in the defendant's favor.[7] For example, as trial proceeded, media coverage regarding the appropriate punishment suggested a growing disapproval of the imposition of the death penalty by residents in the Boston area. One poll released by Boston's National Public Radio news station in March showed that the death penalty was not a popular choice in the community. Zeninjor Enwemeka, WBUR Poll: Most in Boston Think Tsarnaev Should Get Life in Prison over Death Penalty, WBUR News, Mar. 23, 2015, http://www.wbur.org/2015/03/23/wbur-poll-tsarnaev-death-penalty-life-in-prison (27% in Boston and 38% in Boston area favored execution as penalty). According

[7] Although it was not evident at the time the pretrial motions to change venue were briefed and decided, in the trial itself the potential for unfair prejudice from media coverage was as a practical matter confined to the question of punishment, not guilt. Any possibility of unfair prejudice with respect to whether the defendant was guilty of the crimes charged was effectively and dramatically overborne by his counsel's opening statement in the guilt phase, acknowledging, "It was him." See infra at 19.

to a later poll, the percentage of poll respondents in favor of a death sentence for the defendant decreased slightly as the case proceeded to the penalty phase. Asma Khalid, Death Penalty for Tsarnaev Increasingly Unpopular, WBUR Poll Finds, WBUR News, Apr. 16, 2015, http://www.wbur.org/2015/04/16/tsarnaev-death-penalty-poll-wbur (26% in Boston and 31% in Boston area favored execution). As the penalty phase continued, a poll conducted by the Boston Globe indicated that support for the imposition of the death penalty had declined further. Evan Allen, Few Favor Death for Tsarnaev, Poll Finds, Bos. Globe, Apr. 27, 2015, at A (15% in Boston and 19% in Massachusetts favored execution).

Both local and national media reported on statements of victims' family members, elected officials, religious leaders, and other organizations opposing the imposition of the death penalty for the defendant's crimes. For example, during the penalty phase of the trial, the parents of Martin Richard, the eight-year old boy killed by the bomb placed by the defendant, urged the prosecution not to pursue imposition of the death penalty in a letter published on the front page of the Boston Globe. Bill and Denise Richard, To End the Anguish, Drop the Death Penalty, Bos. Globe, Apr. 17, 2015, at A. The media also reported statements by two amputee victims and a social media post by the sister of Sean Collier, the police officer killed in the aftermath of the bombings, conveying their opposition to the imposition of the death penalty in this case. Eric Moskowitz, 2 More Oppose Death for Tsarnaev, Bos. Globe, Apr. 20, 2015, at B; John R. Ellement, Victim's Sister Still Against Death Penalty, Bos. Globe, Apr. 14, 2015, at B. There were published reports of similar statements by the Massa-

chusetts Attorney General, both United States Senators, a local bar association, area Catholic leaders, veterans, and others. See, e.g., David Scharfenberg, Most Top Lawmakers Oppose Execution in Bombing Case, Bos. Globe, Apr. 10, 2015, at A; Associated Press, AG Healey: Marathon Bomber Should Spend Rest of Life in Jail, Bos. Herald, Apr. 8, 2015, http://www.bostonherald.com/news_opinion/local_coverage/2015/04/ag_healey_marathon_bomber_should_spend_rest_of_life_in_jail; Bob Oakes, Why the Boston Bar Association Wants the Death Penalty Removed from Tsarnaev Trial, WBUR News, Feb. 25, 2015, http://www.wbur.org/2015/02/25/why-boston-bar-opposes-death-penalty-tsarnaev; Cardinal Seán P. O'Malley, Letter, Bishops Oppose Death Penalty, Taunton Daily Gazette, Apr. 10, 2015, at A4; Danny McDonald, Vets for Peace: Spare Tsarnaev, Metro—Bos., Apr. 21, 2015. Shortly before the jury began deliberations in the penalty phase, an anti-death penalty forum on the topic "Beyond the Death Penalty: A Public Conversation with Family Members of Murdered Victims," sponsored mostly by local organizations opposing capital punishment, was held in Boston. Juan Esteban Cajigas Jimenez, As Tsarnaev Trial Nears End, Death-Penalty Opponents Address Forum, Bos. Globe, May 12, 2015, at A. No doubt, these expressions were directed to the prosecution team in an effort to persuade the government to abandon its pursuit of the death penalty. The point to be made is that, even if the trial jurors saw and absorbed the extensive media coverage during the penalty phase, and I have no evidence whatsoever to believe that they did (and do have their repeated assurances to me that they did not), the coverage was not of a nature that would support a conclusion

—or even a justifiable presumption—that the defendant was unfairly prejudiced by such exposure.

In sum, the extensive coverage of the trial was not limited to this District. Contrast Casellas-Toro, 807 F.3d at 388. Consequently, moving the trial to another venue would not likely have eliminated or even substantially reduced the coverage. Furthermore, the media coverage of the trial as it unfolded was not demonstrably prejudicial to the defendant. And finally, the jurors gave repeated assurances that they were avoiding media reports about the case.[8]

ii. "Media Circus" over Foreign Witnesses

The defendant complains about media coverage of the arrival and lodging of several witnesses who traveled from overseas to the United States with the government's assistance and pursuant in part to a court order. It is unclear how the circumstances of the travel and lodging of the foreign witnesses contribute to the defendant's venue arguments. The defendant describes a "media circus" surrounding the witnesses, but he does not suggest either that the jurors were at all aware of the so-called "circus"—there is no information suggesting that they were—or that it disrupted the court proceedings in any way.

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[8] The defendant's present motion focuses on the media attention during trial. Of course, in denying the previous motions for a change of venue, I made the same conclusions about pretrial publicity that came after the flurry of initial news reports—that is, while extensive, it subsided somewhat in the time period between the crimes and trial, was largely sober and factual, and was not in any substantial degree inflammatory.

As to court proceedings more broadly, it is an obvious fact but it bears emphasizing that throughout the trial, the atmosphere within the trial courtroom itself was quite solemn and essentially undisturbed by interruption throughout the trial proceedings. Prior to trial, I issued a Decorum Order governing trial conduct and prohibiting observers from any contact with jurors or depictions of them or reports of their names. (Decorum Order at 1-5 (dkt. no. 879).) The defendant does not contend that the Order was violated either by the media or general public.

For those who were not present, a brief description of the courtroom may be helpful. About thirty seats in the gallery were reserved for media representatives, who were able to take notes but not photograph or record the proceedings. The remaining seats, numbering about eighty, were reserved for the defense and government teams, the defendant's family and supporters, victims and their advocates, law enforcement personnel, and members of the general public. There were no substantial disruptions of any kind; proper decorum was observed by all in attendance. There is no reason at all to believe the sitting jurors could have been affected in any way by the presence or deportment of the people in the gallery, except, perhaps, to be impressed by their good behavior.[9] Contrast Sheppard v. Maxwell, 384 U.S. 333, 353, 355, 358 (1966) (noting that "bedlam

[9] The Decorum Order also prohibited observers in the trial courtroom and overflow locations from "wear[ing] or carry[ing] any clothing, buttons, or other items that carry any message or symbol addressing the issues related to this case that may be or become visible to the jury," including law enforcement uniforms and badges. (Decorum Order at 2-3.)

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 v. Texas, 381 U.S. 532, 536 (1965) (describing how reporters and television crews overran the courtroom with "considerable disruption" so as to deny the defendant the "judicial serenity and calm to which [he] was entitled").

Outside the courthouse, reporters and cameras were organized in an orderly way so that they could report on the comings and goings of various trial participants, including the foreign witnesses. On most days, a small number of people demonstrated against the death penalty and, on occasion, individuals demonstrated in general support of the defendant. Except that a relatively large number of people were positioned outside the entrance to the courthouse, there was to my knowledge nothing approaching a "circus" atmosphere.[10]

In any event, the jurors did not enter the courthouse through the main entrance. Rather, they assembled at a remote location and travelled together by van directly into the garage of the building, bypassing the front and side doors to the courthouse. So even if there were some legitimate concern about the number of people at

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[10] The United States Marshals Service and other officers kept me informed about any issues possibly touching on security or public order. I am aware that over the whole length of the trial from January through mid-May, there were only a few occasions when a member of the general public present in the public spaces of the courthouse (not the courtroom itself) had to be reprimanded and warned by security personnel to observe proper decorum. To the best of my information, that is the full extent of anything that could remotely be called "disruption" in the courthouse. The jury was not exposed to any of those minor incidents.

the front entrance, which I do not share, the jurors were not exposed to it in any significant way. Similarly, when they were not in the trial courtroom, jurors were in limited access space behind the courtroom where the media and other members of the general public are not permitted. (See Jury Management and Transportation Order at 1-3 (dkt. no. 1113) (under seal).) After they were seated and sworn, the jurors were never in the public spaces of the courthouse where they might have observed either media representatives or members of the public.

I am fully satisfied that the Decorum Order was effectively implemented and observed. Within and around the courthouse, the defendant was not deprived of the solemnity and sobriety to which he was entitled.

iii. Physical Surroundings of Courthouse

The defendant next argues that jurors could not have avoided exposure to various events and publicity about the marathon and related issues, including such things as "Boston Strong" signs and paraphernalia both in the vicinity of the courthouse and in other public places.[11]

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[11] The Boston Strong theme is (or was) "about civic resilience and recovery. It is not about whether [the defendant] is guilty or not of the crimes charged" or about what kind of sentence he should receive if he were found guilty. In re Tsarnaev, 780 F.3d at 25 n.13. While the term, drawing from a history of similar slogans, appears to have arisen in the aftermath of the marathon bombings, that association weakened somewhat over time through overuse, particularly as people and companies coopted the term, often for profit. The defendant's materials showing Boston Strong merchandise sold at the airport alongside Red Sox hats, magazines, candy, and stuffed animals underscore this point. (See Mem. in Supp. of Mot. for J. Nothwithstanding Verdict and for New Trial Ex. A "Photos Collected By Defense Team" (dkt. no. 1509-1) (under seal).)

The defendant offers various photographs of things he claims the jurors might have been exposed to, but there really is no way to tell whether that happened during the trial or not, or if it happened, how much and to what extent.[12] We know, of course, that before they were jurors, they were people in the area who were aware of the events of the bombings and the aftermath. We know they had heard the term "Boston Strong" because we asked them about it in their written questionnaire and in their face-to-face *voir dire*. They were ultimately seated because I was satisfied that any prior exposure to such images or materials would not prevent their faithful performance of their duty to be impartial and fair-minded.

Between the verdict in the guilt phase and the commencement of the penalty phase, there was significant publicity about the 2015 running of the marathon, as well as various events commemorating the second anniversary of the bombings. By that time, the jurors had been advised recurrently to avoid all media accounts of the subject matter of the case, as well as publicity about events concerning the 2015 marathon. (See, e.g., Jan. 5, 2015 Tr. of Jury Trial—Day One—A.M. Session at 11-12 (dkt. no. 1512); Mar. 4, 2015 Tr. of Jury Trial—Day Twenty-Seven at 12-13, 189 (dkt. no. 1528); Apr. 6, 2015

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[12] For example, a banner hanging at a hotel across from the courthouse would not have been visible at the entrance used by the jurors or from their jury room, which faced only a large commercial building on the opposite side of the courthouse. Similarly, the cement truck referenced by the defendant in his brief was within a construction site bordered by a tall enclosure (See Fourth Mot. for Change of Venue Ex. A at 2 (dkt. no. 1108-1) (photograph taken from above on February 12, 2015, a day on which no empaneled juror attended court).)

Tr. of Lobby Conference at 3-21 (dkt. no. 1541) (under seal); Apr. 14, 2015 Tr. of Jury Trial—Day Forty-Six at 3-7 (dkt. no. 1287); Apr. 21, 2015 Tr. of Jury Trial—Day Forty-Seven at 5, 137 (dkt. no. 1603); May 13, 2015 Tr. of Jury Trial—Day Fifty-Nine at 4, 183-84 (dkt. no. 1418).) Not only are jurors presumed to follow a court's instructions, but the jurors in this case continually affirmed their adherence to my repeated instructions. Specifically, before the guilt phase case was submitted to them, I interviewed each juror individually *in camera* to inquire whether he or she had faithfully abided by my instructions to avoid media coverage and private conversations concerning the case. They all assured me that they had. (Apr. 6, 2015 Tr. of Lobby Conference at 3-21.) Between their verdict in the guilt phase and the commencement of the penalty phase, on April 14, 2015, we had a short session in open court the main purpose of which was to strongly instruct the jurors to avoid media coverage of the upcoming marathon and any related events. (Apr. 14, 2015 Tr. of Jury Trial —Day Forty-Six at 3-7.) When they returned the following week to begin the penalty phase, I asked them collectively, as I had generally done throughout the trial, whether they had continued to abide by my instructions to avoid extraneous influences. They affirmed their adherence. At the times of these inquiries, the defendant made no objection nor request for any further follow-up inquiry.[13]

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[13] It is also significant that by the time of the anniversary of the bombings, the jurors had been immersed in the trial evidence for weeks, and had heard testimony from almost 100 witnesses and seen over 1,000 exhibits. The jurors themselves were so "saturated" with the actual evidence at trial by that point that passing glimpses

Moreover, in addition to sights and images which may have been sympathetic to victims or associated with the marathon, there were also sights and images with messages friendly to the defendant's interests, including the presence and signs of death penalty opponents who peacefully protested every day of trial near the front entrance to the courthouse and occasionally distributed leaflets. Their signs included messages such as, "Death penalty is murder," "Capital punishment dehumanizes us all," "Blessed are the merciful," "Mercy, not sacrifice," and "Why do we kill people to show that killing people is wrong?" See, e.g., Shira Schoenberg, Anti-Death Penalty Advocates Maintain Presence Outside Dzhokhar Tsarnaev Trial, Masslive.com, Apr. 30, 2015, http://www.masslive.com/news/boston/index.ssf/2015/04/anti-death_penalty_advocates_maintain_presence_dzhokhar_tsarnaev_trial.html; Philip Marcelo, Death Penalty Protest Resumes, N.H. Gazette, Apr. 21, 2015, http://www.gazettenet.com/home/16604387-95/death-penalty-protest-resumes. Again, of course, because the jurors did not pass through the front entrance, any exposure to the signs would have been minimal at most, if it occurred at all.

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of media reports or other physical images would have been inconsequential. As one alternate juror observed when asked about his compliance with the Court's instructions to avoid media: "[I]f there's anything on, I just walk away. There's nothing—I didn't see any point. There's nothing that I could absolutely hear about this. I mean, what's the point? . . . I'm an eyewitness." (Apr. 6, 2015 Tr. of Lobby Conference at 19.)

iv. Social Media

The defendant also argues that the jurors should be presumed to have been prejudiced because of social media activity, primarily by uninvolved third-parties.[14] As an initial matter, I consider the argument largely waived. Most of the evidence cited by the defendant was available to him during the course of the trial and he had ample opportunity to raise any such issue while the proceedings were ongoing. (See, e.g., Apr. 6, 2015 Tr. of Lobby Conference at 3-22 (questioning each juror individually prior to the close of the guilt phase regarding their adherence to the Court's instructions without any objections or requests for follow-up from counsel); May 13, 2015 Tr. of Lobby Conference at 11-12 (dkt. no. 1510) (under seal) (raising explicitly with counsel, prior to close of penalty phase, whether there was any issue regarding jurors' use of social media).) In light of the evident effort the defendant expended on social network research during jury selection and the nature of his venue objection, it strains credulity to suggest that no one on the defense team could follow—or actually was

[14] In support of his claim of presumptive prejudice, the defendant also cites some limited social media activity by the jurors, but he does not contend that the jurors were actually prejudiced, nor that they engaged in any misconduct. (See Reply to Gov't's Opp'n to Mot. for J. Notwithstanding Verdict and for New Trial at 2).) The defendant utilizes the jury's social networks as his sample, but he appears to dismiss as irrelevant whether any jurors actually saw any of the cited material. (See id. at 5-7.)

following—the jury's social media activity during the course of the proceedings.[15]

In any event, the defendant's claims regarding social media "saturation" are overblown. The defendant describes social media activity during the trial to argue that the jurors' accounts were "saturated" by social media activity he labels "inflammatory." But much of the activity is not "inflammatory" in any sense of the word, and the defendant provides no context by which to measure the "saturation." The government's analysis, which assumes that the jury's "friends"[16] each generated one "story"[17] per day, suggests that the cited activity was merely a small fraction of all stories that may have appeared in any particular "news feed" on any particular day. Although the government's calculation may both overvalue and undervalue the total number of "stories"

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[15] Indeed, the data in the file "Name" and "Date Modified" fields for many of the submitted files suggest that files were created during the trial. The same is true for Facebook's timestamps of some of the posts included as exhibits.

[16] The parties uses the term "friend" to describe a connection on Facebook. Of course, the term does not actually suggest a real-world relationship. Over a billion people use Facebook and connect with other users as "friends." Some may be friends in the traditional sense, but others are no more than acquaintances or contacts or in some cases may even be complete strangers.

[17] A "story" might include a post with a status update or other textual remark, photo, video, or hyperlink; app activity; "likes" from other people and groups with whom a user may be connected; and other social networking activity. When a Facebook user takes one of these actions, Facebook generates a "story" which then *may* appear on the constantly-updating "news feeds" of their "friends." (See Opp'n to Def.'s Mot. for J. Notwithstanding the Verdict and for New Trial at 8-11 (dkt. no. 1542); see id. Ex. A at 1-22 (dkt. no. 1542-1).)

generated by the activity of any particular user, it does reflect what we already know from this case's history: the selective citation of data does not always accurately represent the whole. See, e.g., In re Tsarnaev, 780 F.3d at 21 (describing defendant's selective quotations from jury questionnaires as "misleading").

C. Time Between Crime and Trial

Nearly two years passed in between the marathon bombings and the presentation of evidence in the trial. The trial did not swiftly follow the crimes or contemporaneous reports about them, permitting the overall level of any community passions to diminish. See In re Tsarnaev, 780 F.3d at 22. This case is therefore dramatically unlike Rideau, 373 U.S. at 724-26, where the defendant's lengthy confession was videotaped and broadcasted three times throughout a small town only two months before trial, and Irvin v. Dowd, 366 U.S. 717, 719-20, 725-26 (1961), where jury selection began less than twelve months after the crime and eight months after a widely-reported confession in a small community of 30,000 where 95% of the households received local newspapers which detailed the confession, and Casellas-Toro, 807 F.3d at 383, 387-88, where jury selection began only two months after defendant's televised sentencing in an "intertwined" criminal case that had been covered "every minute of every day" by the media. In this case, local and national media attention naturally increased as the trial neared and then began, but that would be expected no matter where the trial occurred and, as noted *supra*, the coverage was composed of largely factual, and not emotional, accounts describing the proceedings. See Tsarnaev, 780 F.3d at 22.

D. Jury Verdict

Prior to trial, the Court noted that recent experience with high profile trials in this District reflected local jurors' capacity to carefully evaluate trial evidence despite widespread media coverage. United States v. Tsarnaev, Cr. No. 13-10200-GAO, 2015 WL 45879, at *5 (D. Mass. Jan. 2, 2015) (citing Jury Verdict, United States v. Phillipos, Cr. No. 13-10238-DPW (Oct. 28, 2014) (ECF No. 510)); Tsarnaev, 2014 WL 4823882, at *3 (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)).

It is now possible to evaluate the jury's verdicts in this case in hindsight for possible signs of improper prejudice, on the one hand, or expected impartiality, on the other. In the guilt phase of the trial, the jury found the defendant guilty on all counts in the indictment. In some cases, such an outcome might possibly be a sign of abdication of duty and simple submission to the government's theory and authority. That concern is absent in this case. Here, the guilty findings were hardly surprising in light of the defendant's strategy and the overwhelming evidence against him. After all, in her opening remarks, defense counsel essentially conceded that the defendant was guilty of the crimes with which he was charged:

> The government and the defense will agree about many things that happened during the week of April 15th, 2013. On Marathon Monday, . . . Jahar

> Tsarnaev walked down Boylston Street with a backpack on his back carrying a pressure cooker bomb and placed it next to a tree in front of the Forum restaurant. . . .
>
> After their pictures were on television and on the Internet, Tamerlan and Jahar went on a path of devastation the night of April the 18th, leaving dead in their path a young MIT police officer and a community in fear and sheltering in place. Tamerlan held an unsuspecting driver, Dun Meng, at gunpoint, demanded his money and compelled him, commanded him, to drive while Jahar followed behind.
>
> The evening ended in a shootout. You've heard about it. Tamerlan walked straight into a barrage of gunfire, shooting at the police, throwing his gun, determined not to be taken alive. Jahar fled, abandoned a car, and was found hiding in a boat.
>
> There's little that occurred the week of April the 15th—the bombings, the murder of Officer Collier, the carjacking, the shootout in Watertown—that we dispute. If the only question was whether or not that was Jahar Tsarnaev in the video that you will see walking down Boylston Street, or if that was Jahar Tsarnaev who dropped the backpack on the ground, or if that was Jahar Tsarnaev . . . captured in the boat, it would be very easy for you: It was him.

(Mar. 4, 2015 Tr. Excerpt: Jury Trial—Day Twenty-Seven at 3-5 (dkt. no. 1117); see id. at 5-6 ("We do not and will not at any point in this case sidestep—attempt to sidestep or sidestep Jahar's responsibilities for his actions. . . . ").) So too in her closing in the guilt phase, counsel said:

Jahar Tsarnaev followed his brother down Boylston Street carrying a backpack with a pressure cooker bomb in it and put it down in front of the Forum restaurant, knowing that within minutes it would explode. Three days later, Tamerlan Tsarnaev murdered Officer Collier, and Jahar was right there with him.

Within a half an hour or so, . . . Tamerlan Tsarnaev held a gun to Dun Meng's head, demanded him to drive, and Jahar followed in the Honda. He took the ATM card, he took the code, and he stole $800 from Dun Meng's ATM account. Jahar was part of a shootout in Watertown. We know that his brother had the Ruger P95 because he was shooting at the police. We know that Jahar had a BB gun.

Still, he hurled explosives at the police, and when he saw his brother walk into a hail of gunfire shooting, clearly determined to go out in a blaze of glory, he ran to the Mercedes and escaped as police riddled the Mercedes with bullets. And he ran over his older brother, the brother that he loved, and the brother that he followed.

When I talked with you almost—just over a month ago, I said to you the evidence would bear out all of the events that I just talked about and that they just talked about. And it has. I said to you that we would not disagree with this evidence or dispute it, challenge it, and we haven't. I said to you that it was inexcusable, and it is. And Jahar Tsarnaev stands ready, by your verdict, to be held responsible for his actions.

. . .

> And now when you go back to the jury room, we are not asking you to go easy on Jahar. We are not asking you to not hold him accountable and responsible for what he did. The horrific acts that we've heard about, the death, destruction and devastation that we've heard about deserve to be condemned, and the time is now. I know, and we know, that by your verdict, you will do what is right and what is just, and your verdict will speak the truth.

(Apr. 6, 2015 Tr. Excerpt: Jury Trial—Day Forty-Three at 4-5, 27 (dkt. no. 1244).) Consistent with these concessions, during the guilt phase the defendant often chose to not cross-examine witnesses or to challenge the prosecution's version of "who, what, where and when."[18] (Id. at 5.)

Yet, despite the defendant's strategy and defense counsel's wholesale concessions, it appears that the jury nevertheless thoughtfully deliberated the defendant's guilt of the crimes charged. At the end of their second day of deliberations, the jury asked two questions. The questions indicated that, notwithstanding counsel's concessions, the jury was measuring the evidence against the applicable legal principles as to the various charges in the indictment. For example, the jury asked, "Can a conspiracy pertain to a sequence of events over multi-

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[18] Indeed, it was the defendant who introduced photographs documenting his capture from the boat in Watertown and who successfully moved for a jury view of the boat and the message the defendant wrote in it prior to his capture. (Ex. Def-3060G ("Boat photos_DT arrest on ground"); Mot. to Bar Spoliation of So-Called "Boat Writings" and to Make Boat Available for View by Jury at Trial (dkt. no. 923) (under seal).)

ple days or a distinct event?" (Apr. 8, 2015 Tr. Excerpt: Jury Trial—Day Forty-Five at 3 (dkt. no. 1250).) The jury later asked, "What is the difference between aiding and abetting? Is there a differentiation between the two? If there is phrasing of aiding and abetting, it doesn't seem like there is evidence of both aiding and abetting, but rather only aiding or abetting. How can it be said that aiding and abetting took place?" (Id. at 6.) These questions suggest that the jury did not take an "all or nothing" view of the case, or mindlessly accede to the government's arguments, but rather carefully considered some of the more complicated—and arguably at times weaker—parts of the government's case, such as what events appropriately should be considered within the scope and duration of the charged conspiracies and to what extent co-conspirator Tamerlan Tsarnaev's conduct should be imputed to the defendant. The questions suggest patient and careful deliberation. They do not suggest a jury inflamed by prejudice, eager to return a verdict adverse to the defendant, *even when the defendant had effectively conceded the point*.

Similarly, in the penalty phase of the trial, the jury did not simply blindly accept the government's case. Again, during their deliberations, the jury asked several questions. (See, e.g., May 14, 2015 10:20 a.m. Note from the Jury (requesting additional copies of the verdict form and jury charge because it "would be helpful" for some jurors to have a "visual to use") (dkt. no. 1433); May 14, 2015 11:08 a.m. Note from the Jury (posing multiple questions related to the consideration of aiding and abetting and conspiracy in determining whether the government had proved the gateway intent factors);

May 14, 2015 12:43 p.m. Note from the Jury (asking additional question on whether to consider aiding and abetting when determining gateway intent factor).) The questions reflect serious thought and consideration of the issues they were required to resolve.

Second, their ultimate verdict in the penalty phase appears to be the product of careful, nuanced decision-making. For example, despite the government's focus on the defendant's boat writings and social media posts, the jury entirely rejected the government's alleged aggravating factor regarding whether the defendant made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States. They also declined to find some of the government's proposed statutory aggravating factors, such as whether the defendant knowingly creating a grave risk of death to the victim in the commission of a crime or his subsequent flight and whether the defendant committed the offense in an especially heinous, cruel, and depraved manner. The jury also appeared to carefully consider, as individuals, mitigating factors about the defendant, answering the mitigation questions with varying degrees of approval. And perhaps most notably, the jury ultimately distinguished the defendant from his brother, and overt conduct from conspiracy, determining that death was the appropriate sentence only for the harms caused directly by the defendant and his bomb: the deaths of Lingzi Lu and Martin Richard. The discriminating nature of the verdict itself is convincing evidence that this was not a jury impelled by gross prejudice or even reductive simplicity, but rather a group of intelligent, conscientious citizens doing their solemn duty, however reluctantly.

"The jury's ability to discern a failure of proof" in the government's case and to carefully evaluate as individuals mitigating factors about the defendant "indicates a fair minded consideration of the issues and reinforces [the Court's] belief and conclusion that the media coverage did not lead to the deprivation of [the] right to an impartial trial." See Skilling, 561 U.S. at 384 (quoting United States v. Arzola-Amaya, 867 F.2d 1504, 1514 (5th Cir. 1989)) (second alteration in original). As I have previously noted, the jury's penalty verdict was not the only possible outcome, but it was a reasoned moral judgment on the evidence before them.

For all the foregoing reasons, I find and conclude that the defendant has failed to demonstrate that this is one of the rare and extreme cases where prejudice must be presumed so as to override the constitutional norms requiring criminal trials to be held in the State where the crimes were committed. See U.S. Const. art. III, § 2, cl. 3 ("Trial shall be held in the State where the said Crimes shall have been committed. . . . "); id. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . "); see also Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). The defendant's renewed attack on venue is again rejected.

II. Convictions under 18 U.S.C. § 924(c)

A. The "Residual" Clause—Section 924(c)(3)(B)

In Johnson v. United States (Samuel Johnson), 135 S. Ct. at 2557,[19] the Supreme Court held that a portion of a statutory definition of the term "violent felony" set forth in 18 U.S.C. § 924(e)(2)(B) was unconstitutionally vague. The defendant argues that the decision requires a conclusion here that the statutory definition of a different term applicable in a different context is also unconstitutionally vague.

Section 924(c) of Title 18 of the United States Code punishes a person who carries a "firearm," a defined term, "during and in relation to" a "crime of violence." The defendant was charged with and convicted of fifteen separate § 924(c) offenses, each related to an underlying "crime of violence" that was specifically identified in the indictment, including use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a, bombing a place of public use in violation of 18 U.S.C. § 2332f, malicious destruction of property by fire or explosive in violation of 18 U.S.C. § 844(i), carjacking in violation of 18 U.S.C. § 2119, robbery affecting interstate commerce ("Hobbs Act robbery") in violation of 18 U.S.C. § 1951, as well as conspiracies to commit some of those crimes. The punishment imposed on § 924(c) "carrying" charges,

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[19] In this Opinion and Order, the short-form citation includes the petitioner's first name because there is a second case relied on by the defendant in which the petitioner was a Curtis Johnson. That case, Johnson v. United States, 559 U.S. 133 (2010), will be referred to in short form as Curtis Johnson. Referring to the cases as "Johnson I" and "Johnson II", as the parties and other writers have done, can be misunderstood as suggesting a lineal or historical relationship between the cases that does not exist.

which have statutory mandatory minimum terms of imprisonment, is additional to any punishment imposed on the underlying crime of violence; any sentence for a "carrying" conviction must run consecutively to any sentence imposed on the underlying offense. 18 U.S.C. § 924(c)(1)(A).

As used in § 924(c), a "crime of violence" that can serve as a predicate offense for the enhanced "carrying" conviction and punishment is defined as a felony that

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3).

Samuel Johnson examined a different term in another part of the statute, § 924(e), which provides for enhanced punishment for certain recidivist criminals who unlawfully possess a firearm. 135 S. Ct. at 2555-56. A prior felon convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g) is subject to enhanced punishment if he has had at least three prior convictions for a "violent felony" or a "serious drug offense." What constitutes a "violent felony" for these purposes is defined in § 924(e). While the provisions are similar, the definition of "violent felony" in § 924(e) differs somewhat in its formulation from the definition of "crime of violence" in § 924(c). As relevant here, § 924(e) defines "violent felony" as any felony that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

Id. § 924(e)(2)(B).

As can be seen from a comparison of the two definitions, the first clauses in both provisions are quite similar, but the second clauses are organized differently and use different terms. In shorthand, the first clause in each definition has come to be known as the "force" clause, and the second in each as the "residual" clause.[20]

In Samuel Johnson, the Supreme Court held that the residual "or otherwise involves conduct" clause of § 924(e) is too vague to give fair notice of what conduct can be punished by enhanced criminal sentences and thus violates the Due Process Clause of the Fifth Amendment to the Constitution. 135 S. Ct. at 2556-57, 2563. Because the § 924(e) residual clause played no role in the defendant's sentence in this case, the Court's invalidation of that residual clause has no direct applicability here.

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[20] Strictly speaking, the residual clause in § 924(e) is the last part of clause (ii), beginning "or otherwise involves conduct." The first part of clause (ii) identifies specific criminal offenses and was not held to be unconstitutionally vague. See Samuel Johnson, 135 S. Ct. at 2563. "Residual" aptly describes the clause in § 924(e) beginning "or otherwise." Section 924(c)(3)(B) lacks that formulation, and it seems less apt to describe that portion of the definition as "residual," though it is apparently the universal practice to do so.

The defendant's argument rather is that the Court's opinion in Samuel Johnson should be understood as condemning not only the residual clause in § 924(e) but also any provision that calls for the categorical assessment of "risk," and that since § 924(c)(3)(B) requires assessing whether a particular offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used," it must, given the Court's reasoning in Samuel Johnson, also be held to be too vague to be valid. (See Def.'s Mem. in Supp. of Mot. for J. Notwithstanding Verdict and for New Trial at 31-32 (dkt. no. 1506).)

That is a very—and I think unduly—expansive reading of the Court's opinion. In fact, the Court itself cautioned against that very expansion of its ruling:

> The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. Not at all. . . . As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree."

Samuel Johnson, 135 S. Ct. at 2561 (second alteration in original) (citations omitted).

There will not always and necessarily be difficulty or ambiguity in making a categorical assessment whether

a particular offense "by its nature" involves a "substantial risk that physical force against the person or property of another may be used in the course of committing the offense." For example, it is simply common sense to conclude that using the mails to execute a scheme to defraud does not as a categorical matter involve a substantial risk that physical force will be used against the person or property of another, 18 U.S.C. § 1341, but that using the mails in furtherance of the use of a weapon of mass destruction, id. § 2332a(a)(2)(A), does. There may be debatable cases, but that possibility only counsels for making case-specific judgments. Although the Court in Samuel Johnson held that § 924(e)'s residual clause was facially void, rejecting an "as applied" approach, the reasons seem to be the Court's overarching conclusion that the clause's "or otherwise involves conduct" standard had been demonstrated in practice to be hopelessly inconducive to coherent and consistent application on a case-by-case basis. See 135 S. Ct. at 2560; see also Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring) ("After almost two decades with [the] 'categorical approach,' only one thing is clear: [the Armed Career Criminal Act's] residual clause is nearly impossible to apply consistently."). That is not true of § 924(c).[21]

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[21] There is a structural reason why this is so. Whereas § 924(e) mandates a sentencing enhancement in the event of a particular prior criminal history, § 924(c) defines a separate crime from the underlying "crime of violence." See United States v. Felton, 417 F.3d 97, 104 & n.3 (1st Cir. 2005); see also United States v. Hansen, 434 F.3d 92, 104 (1st Cir. 2006). Section 924(c) operates necessarily in an "as-applied" context. A defendant is charged under § 924(c) with having carried a firearm during and in relation to a crime of violence that is, typically, as here, specifically alleged in the same

The Court in Samuel Johnson also thought that an attempt to understand the risk involved in the "ordinary case" of a crime that might fall within the residual clause of § 924(e), as required under its prior precedents, compounded the problem. 135 S. Ct. at 2257-58; see also James v. United States, 550 U.S. 192, 208 (2007) ("The proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another."), overruled by Samuel Johnson, 135 S. Ct. 2551; Taylor v. United States, 495 U.S. 575, 602 (1990) (stating that in determining whether crime falls within § 924(e)(2)(B)(ii) courts should look to the elements of "generic" offense). The § 924(e) residual clause followed the enumeration of four specified offenses that Congress had apparently concluded involved conduct presenting a serious potential risk of physical injury: burglary, arson, extortion,

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indictment. Accordingly, consulting the specific allegations of the indictment is unavoidable. Even if the underlying crime is not specifically alleged as a separate offense, to convict under § 924(c) the jury would necessarily have to conclude that the elements of that crime were proven in order to convict on the "carrying" charge. In other words, what is referred to as the "modified categorical approach"—consultation of so-called Shepard-approved documents—is necessarily imposed by the circumstances. See Shepard v. United States, 544 U.S. 13, 26 (2005). Consequently, adjudicating the § 924(c) count "require[s] gauging the riskiness of conduct in which an individual defendant [is alleged to have engaged] *on a particular occasion*." Samuel Johnson, 135 S. Ct. at 2561 (emphasis in original). As the Court further noted, "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." Id. Rather than imagining an "idealized ordinary case," which the Court found necessary under the residual clause in § 924(e)(2)(B)(ii), id., the focus under § 924(c)(3)(B) must necessarily be on the specific "case" alleged in the indictment.

and the use of explosives. The Court thought that it was unclear how those examples constructively guided the categorical inquiry under the residual clause. See Samuel Johnson, 135 S. Ct. at 2558 ("These offenses are 'far from clear in respect to the degree of risk each poses.'" (quoting Begay v. United States, 553 U.S. 137, 143 (2008))). That is a problem occasioned by the unique text of § 924(e); there is no similar confusing enumeration of offenses followed by an invitation to extrapolate contained in § 924(c). See id. at 2561 ("Almost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples. 'The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red" assuredly does so.'" (quoting James, 550 U.S. at 230 n.7 (Scalia, J., dissenting) (emphasis in original))).

It should also be noted that the reasons that the Court identified in Taylor as warranting a categorical approach are absent in the § 924(c) context. The statutory language indicates that it is the fact of a prior conviction, not the historical facts concerning what the offender had done, that serves the basis for sentence enhancement under § 924(e)(1). For identified crimes such as burglary, what matters are the elements of the crime in the generic case, which the categorical approach is suited to identify. Taylor, 495 U.S. at 600. That reading of the statute is also supported by the legislative history. Id. at 601. Further, the categorical approach to identifying qualifying prior convictions avoids the practical problems attendant upon seeking to understand what had transpired in the historical prose-

cution that led to any particular conviction. Id. Because in the § 924(c) context there is no "prior conviction," but rather an actually or effectively simultaneous one, those considerations are all inapposite.

The Court in Taylor also concluded that use of a categorical approach to classifying an offender's prior history of criminal convictions avoided anomalies that might arise from variations in state law definitions of similarly named crimes, raising the prospect that persons could face enhancement of the federal sentence, or not, depending on which State's law controlled the prior conviction. Id. at 590-91. The solution was to look only to the fact of conviction of the generic crime, an approach supported directly by the statutory language. Id. at 600. The effect of variations in state law is not a potential problem in the case of a "carrying" charge under § 924(c); the underlying predicates will always be federal crimes. See 18 U.S.C. § 924(c)(1) ("[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States. . . . ").

For these reasons, I conclude that the Supreme Court's opinion in Samuel Johnson neither requires nor counsels the conclusion that § 924(c)'s residual clause is unconstitutionally vague. I understand that some courts have taken a different view. It is sufficient here to say that, for the foregoing reasons, I respectfully disagree with their reasoning.

B. The "Force" Clause—Section 924(c)(3)(A)

Under § 924(c)(3)(A), the "force" clause, an offense is a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against

the person or property of another." Citing Johnson v. United States (Curtis Johnson), 559 U.S. 133 (2010), the defendant argues that the "physical force" required to meet the statutory definition must be "violent force" as discussed in that case, id. at 140, and that because the predicate offenses charged against him were capable of being committed without the necessary violence, as a categorical matter (borrowing from Taylor, 495 U.S. at 600, and successor cases addressing § 924(e)) it cannot be reliably concluded that they involve the use of violent force.[22]

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[22] As the defendant notes, (see Mem. in Supp. of Mot. for J. Notwithstanding Verdict and for New Trial at 28 n.2), whether a crime qualifies as a "crime of violence" under § 924(c) is a matter of law for the court to decide. United States v. Weston, 960 F.2d 212, 217 (1st Cir. 1992), abrogated on other grounds by Stinson v. United States, 508 U.S. 36 (1993); see also United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014); United States v. Credit, 95 F.3d 362, 364 (5th Cir. 1996) (collecting cases); cf. United States v. Bishop, 453 F.3d 30, 32 (1st Cir. 2006) (citing cases). In this case, the government requested a jury instruction that each of the underlying offenses charged was a crime of violence within the definition of § 924(c). The defendant made no objection either to the government's request or to my draft instructions that were given to the parties, and after I instructed the jury to that effect, made no objection to the actual instruction. The defendant did object to other parts of the government's requests and of my actual instructions. Under these circumstances, the omission to object could reasonably be considered a waiver by tacit acquiescence of any claim that it was error to instruct the jury that the underlying offenses were crimes of violence under § 924(c). Certainly, if there had been an affirmative expression of "no objection" by defense counsel, one would be warranted in finding a waiver. Especially in light of the diligence and vigor with which defense counsel did object to various matters, including proposed and actual jury instructions, it would not be unfair to infer from the absence of a voiced objection that there was in fact no objection.

To begin with, the defendant overreads what was decided in Curtis Johnson. The question presented in that case was "whether the Florida felony offense of battery by '[a]ctually and intentionally touch[ing]' another person 'has as an element the use . . . of physical force against the person of another,' and thus constitutes a 'violent felony' under the Armed Career Criminal Act."[23] 559 U.S. at 135 (alterations in original) (citations omitted). Under the Florida statute at issue, a person commits the offense of battery if he "[a]ctually and intentionally touches or strikes another person against the will of the other," or if he "[i]ntentionally causes bodily harm to another person." Id. at 136 (alteration in original) (quoting Fla. Stat. § 784.03(1)(a)). In sum, the Court held that for a battery under Florida

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Because the principal cases upon which the present argument about the "force" clause is now pressed had been decided before the indictment in this case, there can be no contention that the legal basis of the present arguments regarding the "force" clause was unavailable to him, in contrast to the arguments based on Samuel Johnson directed at the "residual" clause. If the arguments directed to the "force" clause were waived, the waiver is a sufficient basis in itself for denying the relief requested.

Alternately, the omission to object to the instruction that the predicate offenses each qualified as a "crime of violence" could be considered to have been a forfeiture, rather than a waiver. In the latter circumstance, the Court of Appeals could review the point for plain error. See United States v. Olano, 507 U.S. 725, 732-33 (1993); see also Fed. R. Crim. P. 52(b). In order for an error to be "plain," it first must be determined to be an "error." Olano, 507 U.S. at 732; United States v. Antonakopoulos, 399 F.3d 68, 77 (1st Cir. 2005). I explain in this Opinion and Order why I think there was no error.

[23] The Court was interpreting § 924(e), but the relevant language of § 924(c)—"has as an element the use . . . of physical force against the person . . . of another"—is the same.

law to qualify as a "violent felony" under the Armed Career Criminal Act (the "ACCA"), the "force" involved could not be merely an intentional and unconsented to touching under the first statutory alternative but rather had to be "violent force" sufficient to "cause[] bodily harm" under the second. See id. at 140 (emphasis omitted). In other words, because under the state statute a person could be convicted of battery if he "[a]ctually and intentionally touche[d] . . . another person against the will" of that person, without necessarily causing any bodily harm, it was possible to be guilty of a non-violent battery. The Court sensibly concluded that for a prior conviction to count as a "violent felony" under the ACCA it could not be a conviction for a non-violent battery.

The defendant argues that while the § 924(c) underlying offenses in this case certainly can be committed in a violent way and thus under Curtis Johnson could be considered "crime[s] of violence," it is also possible to imagine non-violent methods of commission of the offenses, so using only a categorical analysis, it cannot be determined that they qualify as "crime[s] of violence." The argument is a mix of ingenuity and sophistry. For example, the defendant argues that the definition of a "weapon of mass destruction" in 18 U.S.C. § 2332a(c)(2) includes not only "destructive device[s]" such as explosive bombs (which concededly involve violence), but also poisons, toxins, and radiation. (Def.'s Mem. in Supp. of Mot. for J. Notwithstanding Verdict and for New Trial at 33-34.) These latter agents, he says, can be deployed passively—as by nonexplosive release—so they do not necessarily involve the use of "violent force," as he says Curtis Johnson requires. This argument rests heavily on an understanding of "violent force" that is

strictly limited to the specific factual context of that case, which involved an ambiguous battery conviction under the Florida law described above, and it also requires swallowing the proposition that killing a person by poison or radiation does not necessarily have as an element the use of violent physical force against that person. Under the defendant's proposed theory, the destruction of internal organs by poison (or toxins or radiation) should not be considered "violent physical force" but may be deemed non-violent. There is no support in Curtis Johnson for such an artificial and cramped construction.[24]

The defendant's argument that the crimes of use of a weapon of mass destruction, bombing of a place of public use, and malicious destruction of property by fire or explosive are not by their nature "violent" enough to be considered "crime[s] of violence" is refuted by its mere statement.[25] The defendant's argument has a bit more traction with respect to the carjacking and Hobbs Act

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[24] Cf. United States v. Castleman, 134 S. Ct. 1405, 1415 (2014) (The petitioner "errs in arguing that although '[p]oison may have "forceful physical properties" as a matter of organic chemistry, . . . no one would say that a poisoner "employs" force or "carries out a purpose by means of force" when he or she sprinkles poison in a victim's drink.' The 'use of force' in Castleman's example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim.") (alterations in original) (citation omitted).

[25] Under existing First Circuit precedent, conspiracy to commit a crime of violence is also a crime of violence for purposes of § 924(c). United States v. Turner, 501 F.3d 59, 67 (1st Cir. 2007).

robbery counts, because, he argues, those crimes can be committed by "intimidation" in the case of carjacking, 18 U.S.C. § 2119, or by "extortion" in the case of Hobbs Act robbery, id. § 1951, as well as by the use or threat of physical force, and intimidation and extortion might conceivably be accomplished without the use or a threat of physical harm. The argument is not persuasive.

In the first place, Hobbs Act robbery is regarded as a crime of violence under § 924(c)(2)(A) under First Circuit precedent. United States v. Morales-Machuca, 546 F.3d 13, 21 (1st Cir. 2008). It is not up to me to decide otherwise. The instruction to the jury that the Hobbs Act robbery was a crime of violence was thus consistent with governing law.

The First Circuit has not explicitly held carjacking to be a crime of violence, although several other circuits have done so.[26] See United States v. Brown, 200 F.3d 700, 706 (10th Cir. 1999); United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994); United States v. Jones, 34 F.3d 596, 601-02 (8th Cir. 1994); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994); United States v. Singleton, 16 F.3d 1419, 1423 (5th Cir. 1994). The language of the statute strongly supports the conclusion that the act of taking the car from a person by "intimidation" connotes intimidation by threat of physical harm,

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[26] In United States v. Quinones, 26 F.3d 213, 217 (1st Cir. 1994), the court assumed, without deciding because it was not in issue, that "carjacking by its nature is a violent felony." See also United States v. Gonzalez-Melendez, 594 F.3d 28, 31 (1st Cir. 2010) (noting that grand jury indicted appellant "on one count of aiding and abetting a carjacking" and "one count of using a firearm during and in relation to a carjacking (*which is a crime of violence*). . . . " (emphasis added)).

rather than, say, economic deprivation. One of the elements of the offense is a present "intent to cause death or serious bodily harm" on the part of the defendant. 18 U.S.C. § 2119; see also Holloway v. United States, 526 U.S. 1, 12 (1999). The statute also requires that the vehicle be taken "from the person or presence of another." 18 U.S.C. § 2119. Thus, the statute describes a face-to-face encounter in which the carjacker is possessed of an "intent to cause death or serious bodily harm." Further, the taking must be accomplished "by force and violence or by intimidation." Id. In context, then, the use of the word "intimidation" strongly connotes that "intimidation" means intimidation by threat of the use of physical force.

Even if either question were an open one, the defendant's argument, relying on Descamps v. United States, 133 S. Ct. 2276 (2013), and prior cases addressing what is or is not a "violent felony" under the ACCA, that neither carjacking or Hobbs Act robbery can be said to be categorically a "crime of violence" because either could conceivably be performed without the use or threat of physical force (by non-violent intimidation or non-violent extortion), is based on a misreading of the relevant precedents.

In Descamps, the issue was whether the so-called "modified categorical approach" could be used to determine whether the defendant's prior conviction for burglary under California law was for "generic" burglary, and thus a "violent felony" under § 924(e). Id. at 2281-82. The state statute at issue punished "a person who enters" certain locations "with intent to commit grand or petit larceny or any felony" as "burglary." Id. at 2282 (quoting Cal. Penal Code § 459 (West)). To prove

the crime, it was not necessary to prove that the "entry" was unlawful, id., as would be required under the "generic" crime of burglary as established in Taylor, see 495 U.S. at 599. Consequently, a person could be convicted under the statute of either generic burglary, if the entry was proved to have been unlawful, or non-generic burglary, if not. The Court held that when a statute contained a "single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense," the modified categorical approach—consulting certain limited case documents—could not be employed to identify whether the conviction was on the basis of facts that fit the generic definition of burglary or not. Descamps, 133 S. Ct. at 2283.

The Court, however, continued to sanction the use of the modified categorical approach in the case of a so-called "divisible" statute, one that "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." Id. at 2281 (emphasis in original). "[W]hen a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the modified categorical approach permits comparing the elements of the generic crime to the elements, not the facts, of the crime of the defendant's prior conviction. Id. at 2285 (quoting Nijhawan v. Holder, 557 U.S. 29, 41 (2009)).

The defendant's argument regarding the carjacking and Hobbs Act robbery counts is a case of trying to have one's cake and eat it too. On the one hand, he maintains that the statutes should be regarded as "indivisible" under the Descamps taxonomy, so that as a categorical matter it cannot be determined whether those

crimes were committed by the use or threat of force or by some kind of non-forceful "intimidation," in the case of carjacking, or "extortion," in the case of Hobbs Act robbery. On the other hand, in positing that those crimes can be committed by non-violent intimidation or extortion rather than by violent threats or actions, he necessarily emphasizes that the statutes by their texts authorize alternate proofs, else there is no conundrum, which seems to put them squarely in the "divisible" category under Descamps. Id. at 2284 (noting that a statute is "divisible" if it "comprises multiple, alternative versions of the crime"). His way out of the dilemma is to argue that "intimidation" and "extortion" do not establish alternate *elements* of the offenses but only refer to different *means* of committing them. Fortunately, we are saved from the search for a reliable method of distinguishing the elements of a crime from the means of committing it, see Richardson v. United States, 526 U.S. 813, 817-18 (1999), because the Court said in Descamps that for present purposes the distinction does not matter:

> Whatever a statute lists (whether elements or means), the documents we approved in Taylor and Shepard—i.e., indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. . . . When a . . . law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

133 S. Ct. at 2285 n.2.

It should be observed that it is far from clear that Congress' inclusion of "intimidation" in the carjacking statute or "extortion" in the robbery statute actually

was intended to create an alternative of any kind, or was simply the kind of synonymous repetition not uncommon in legislative drafting. I have explained above why it is quite plausible that in context "intimidation" as used in § 2119 means intimidation by use or threat of physical force. The same is true for "extortion" as used in § 1951. The term is defined there as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[27] 18 U.S.C. § 1951(b)(2). There are alternatives in this formulation, but they are the obtaining of property (a) "by wrongful use of actual or threatened force, violence, or fear," and (b) "under color of official right." Id. There is no contention that the vehicle that was carjacked in this case was obtained "under color of official right," and if there were, the modified categorical approach applied to this divisible provision would plainly establish that the former and not the latter alternative was the basis for the defendant's conviction. There is no suggestion in the statute that the alternative of extortion "by wrongful use of actual or threatened force, violence, or fear" is further divisible and includes an alternative that does not have "as an element the use, attempted use, or threatened use of physical force against the person or property or another." Id. § 924(c)(3)(A).

In sum, either the carjacking and Hobbs Act robbery statutes each define an indivisible offense that has as an element the actual, threatened, or attempted use of physical force against the person or property of another,

---

[27] Congress expressly classified extortion as a "violent felony" in § 924(e)(2)(B)(ii).

or each defines divisible alternatives, whether of elements or means, and the Shepard-approved documents, notably the indictment and jury instructions, establish that in each case the defendant was necessarily convicted of the alternative that had such an element. The defendant's argument addressed to the "force" clause is without merit.

III. Death Penalty

The defendant also renews his previously rejected challenge to the constitutionality of the federal death penalty. He relies on a dissenting opinion in Glossip v. Gross, 135 S. Ct. 2726, 2755-80 (2015), where Justice Breyer, joined by Justice Ginsberg, considered perceived problems with the death penalty, including "lack of reliability, the arbitrary application of serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose," and concluded that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishmen[t].'" Id. at 2756, 2776 (Breyer, J., dissenting) (alteration in original) (quoting U.S. Const. amend. VIII). Whatever the merit of the concerns articulated in the dissent, binding precedent—as reflected in the majority opinion of the same case—compels this Court to reach the contrary conclusion.

IV. Conclusion

For the foregoing reasons, the defendant's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 and for Judgment Notwithstanding Verdict Pursuant to Fed. R. Crim. P. 29 (dkt. no. 1490) is DENIED.

It is SO ORDERED.

/s/ GEORGE A. O'TOOLE, JR.
GEORGE A. O'TOOLE, JR.
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV, DEFENDANT

Filed: Mar. 17, 2015

Juror Questionnaire

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury in this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. Both parties are entitled to a jury that is fully fair and impartial. This questionnaire and the jury selection process that we are about to begin is not meant to be intrusive; rather, it serves the important function of ensuring that a fair and impartial jury is selected to hear and decide this case.

It is very important that you answer these questions as completely and accurately as you can. Please write legibly and answer the questions as candidly as possible. There are no right or wrong answers to these questions. But honesty and candor are of the utmost importance.

You have taken an oath promising to give truthful answers. The integrity of the process depends upon your truthfulness.

Please bear the following instructions in mind:

- Do not consult, confer, or talk with any other person in completing this questionnaire.
- If you are unable to answer a question because you do not understand the question, please write "Do not understand" in the space after the question. Do not ask anyone, including court personnel, for clarification or assistance.
- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to the question.
- If you believe that your response to a particular question is of a sensitive or private nature and would like to request that your response not be made public, please write the number of that question in your response to Question #100. Alternatively, if you would prefer not to write an answer to a particular question because of the sensitive or private nature of your response, please write "Private" after the question. The Court may still need to speak with you about the topic, but will endeavor to do so bearing your concerns in mind.
- Please do not write on the back of any page. Use the blank space at the end of the questionnaire (front side only) where there is insufficient room on the form for your answer to any question. When using this space, please include the number of the question(s) you are answering.

- Please write legibly.

You will be permitted to leave for the day when you have completed the questionnaire. Do not discuss any of the questions or your answers on this questionnaire with anyone, including members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you may not answer their questions or engage in any discussion.

Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner.

When you have completed the questionnaire, please sign it, affirming the truth of your answers and confirming that you had no assistance in completing it. As explained by the Court, you will receive further instructions about whether you need to return for the next phase of jury selection by calling the juror information line and entering your nine-digit participant number.

The Court thanks you for your attention and willingness to serve as a juror, an important duty of citizenship in our democracy.

1. Date of birth: _____

2. Gender: ☐ Male ☐ Female

3. Race: (This information will not affect your selection for jury service.) ☐ Black/African American ☐ Asian ☐ American Indian/Native Alaskan ☐ White ☐ Native Hawaiian/Pacific Islander ☐ Other: ____

4. In what city or town do you live? _____

5. How long have you lived there? _____

   If you have lived at that location fewer than 5 years, please list the cities or towns in which you have lived since 2010:

   _____

   _____

6. In what city, state, and country were you born and raised?

   Born: _____ Raised: _____

   If you were born in another country, when did you move to the United States, and when did you obtain U.S. citizenship?

   Moved: _____ Citizenship: _____

7. Have you ever lived in another country?

   ☐ Yes ☐ No

What Country?	For How Long?
_____	_____
_____	_____

8. Do you have any problem understanding English that would make it difficult or impossible for you to serve as a juror in this case? ☐ Yes ☐ No

   If "yes," please explain:

   _____

9. If you believe you have a medical, physical, psychological, or emotional problem, issue, or condition that would affect your ability to serve as a juror, including difficulty hearing, seeing, reading, or concentrating, please explain:

   _____

   _____

   _____

   If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation:

   _____

10. If you are selected to serve on this jury, the trial is scheduled to start immediately after jury selection is completed and to continue for three or four months. The jury will sit on Monday through Thursday from 9:00 a.m. to 4:00 p.m. with a mid-morning break and a lunch break. The jury will also sit on Friday during a week in which the Monday is a legal holiday, such as President's Day. Once the jury begins its deliberations, the jury will sit at least every weekday from 9:00 a.m. until the end of the day (usually 4:30 p.m.).

    The Court is well aware that this is a demanding schedule. However, in fairness to all involved in

this important process, the Court will only excuse someone from jury duty for the most compelling reasons. That is, answering "yes" to this question will not necessarily result in the Court allowing you to be excused from service. With this in mind, does the schedule described above impose a special hardship on you such that it would be difficult or impossible for you to serve in this case?

If "yes," please explain:

_____

_____

_____

11. If you take any medications that you think might affect your ability to serve as a juror, please describe them and their effects:

Medication	Side Effects
Example: Xanax	*Makes me sleepy*
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

12. What is your current relationship status?

☐ Married ☐ Single ☐ Separated ☐ Divorced ☐ Widowed ☐ Civil Union/Domestic Partner

13. Please identify your current spouse or domestic partner (if any) and all former spouses and domestic partners (if any) and provide their highest levels of education and occupations while you were together:

Relationship to You	Highest Education Level	Occupation
Example: Ex-wife	*BA in Physics*	*Engineer*

14. Please describe your parents' and/or step-parents' current or, if retired, former occupations. Write "none" or "deceased" if that applies.

Father: _____

Step-father: _____

Mother: _____

Step-mother: _____

15. Please identify all your children and step-children (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____

16. Please identify all your siblings and step-siblings (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	____	____	_____	_____
#2	____	____	_____	_____
#3	____	____	_____	_____
#4	____	____	_____	_____
#5	____	____	_____	_____

17. Have any of your siblings tried to influence your direction in life or your major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

18. Have you tried to influence any of your siblings' direction in life or major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

19. Do you feel that any of your siblings has had a major positive or negative influence on you? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

20. Do you believe most teenagers are easily influenced by older siblings? ☐ Yes ☐ No

21. If you or any close family member has (or ever had) a mental health or addiction problem that you know about, please describe it:

_____

_____

_____

22. Please list all schools you attended after high school, what you studied, and any certificates or degrees that you received:

School	Location	Area of Study	Degree/ Certificate
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

23. If you have studied law, medicine, psychiatry, psychology, counseling, sociology, social work, or religion, please describe your training:

_____

_____

24. If you have studied ballistics, explosives, arson, criminology, terrorism, computer science, crime scene investigation, or law enforcement, please describe your training:

_____

_____

25. Do you plan to attend school in the future? ☐ Yes ☐ No
If "yes," what do you intend to study?

_____

_____

26. List any jobs you have held for the past 10 years, in reverse chronological order, noting periods of unemployment, retirement, disability, homemaking, study, or stay-at-home parenting. Check "Sup." if you supervised others. If you can't remember exact names, titles, or time periods, please give your best estimate.

Employer	Title/Position	Years	Sup.
_____	_____	___to 2015	☐
_____	_____	___to___	☐
_____	_____	___to___	☐
_____	_____	___to___	☐
_____	_____	___to___	☐
_____	_____	___to___	☐
_____	_____	___to___	☐

27. If you are currently employed, please describe your job responsibilities:

_____

_____

28. If you have ever been a published or unpublished author, please describe the things you have written and when you wrote them:

_____

_____

29. If you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it:

_____

_____

30. If you use social media (Facebook, Instagram, Twitter, etc.), please list all the social media you use and how frequently you use each one:

_____

_____

31. If you, a family member, or close friend ever served in the military (including Reserves, National Guard, or ROTC), please describe the nature and length of that service:

_____

_____

_____

32. If one or more of the people you listed ever experienced combat (that you know about), please explain:

_____

_____

33. Have you, a family member, or close friend ever worked for, applied for a job at, or volunteered at a prosecutor's office, public defender's office, criminal defense attorney's office, or any other law office? ☐ Yes ☐ No

If"yes," please explain (including employer and dates of work):

Relationship	Office	Dates
Example: Wife	*State Prosecutor*	*2007-present*

34. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at a law enforcement agency (e.g., FBI, DEA, ATF, ICE, IRS, U.S. Marshals Service, police, sheriff, or correctional department)?
☐ Yes ☐ No

If "yes," please explain (including agency and dates of affiliation):

Relationship	Agency	Dates
Example: Son	*FBI Agent*	*2007-present*

_____	_____	_____
_____	_____	_____

35. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at any federal, state, or local department of corrections, prison, jail, board of prisons, pardons or parole board or probation agency, youth authority, or correctional or detention facility?
☐ Yes ☐ No
If "yes," please explain:

Relationship	Agency	Dates
Example: Self	*Parole Officer*	*2007-present*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

36. The jurors in this case will be instructed that the testimony of a law enforcement officer is to be treated the same as the testimony of any other witness. Jurors are to give neither greater nor lesser weight to the testimony based solely upon the witness's status as a law enforcement officer. Do you have any concerns about your ability to follow this instruction? ☐ Yes ☐ No
If "yes," please explain:

_____

37. Have you ever done paid or volunteer work for the benefit of people accused of crimes or people who served time in prison? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

38. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with victims' rights? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

39. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with the reform of any laws? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

40. If you, a family member, or a close friend have ever (to the best of your knowledge) committed a crime and/or been arrested, accused of a crime, charged with a crime, or prosecuted for a crime, other than a minor traffic violation, please explain (include the person's relationship to you, the charge, the approximate date, the location, and the outcome):

Example: Close friend, Drug Possession, 1982, New Mexico, Pleaded guilty

41. If you, a family member, or close friend, have ever (to the best of your knowledge) been the victim of a crime, please explain (including the person's relationship to you, when and where the crime occurred, and the outcome of any prosecution):

Example: Sister, Victim of assault, 1999, Chicago, Defendant convicted

42. If you (to the best of your recollection) have ever had to appear in court or in any court proceeding (e.g., court trial, court or administrative hearing, civil or criminal deposition, etc.) OTHER THAN as a defendant (e.g., as a witness), please explain:

43. If you, a family member, or a close friend (to the best of your knowledge) have ever been treated unfairly by a law enforcement officer or by the criminal justice system, please explain:

_____

_____

_____

44. If you have strongly positive or negative views about prosecutors, please explain:

_____

_____

45. If you have strongly positive or negative views about defense attorneys, please explain:

_____

_____

46. If you have strongly positive or negative views about law enforcement officers, please explain:

_____

_____

47. Have you ever served on a jury before? If "yes," please describe (to the best of your recollection), for each case on which you served, whether it was state or federal, civil or criminal, what the charges or allegations were, when, where, whether the jury reached a verdict, and whether you were a foreperson:

_____

_____

_____

48. If you answered "yes" to #47, is there anything about the experience that would make you want to serve, or not serve, on a jury again? Please explain:

_____

_____

_____

49. Have you ever served on a grand jury? If "yes," when and where?

_____

50. In the past 10 years, what court cases have you followed with interest? What interested you about these cases?

_____

_____

51. If, to the best of your knowledge, you, or anyone close to you has participated in a group that takes positions on political or social issues (e.g., civil rights, prisoners' rights, crime control, the environment, death penalty, digital freedom, tax reform), please describe the group and any relevant leadership position:

Relationship	Organization	Level of Participation
Example: Spouse	*The Sierra Club*	*Board of Directors*
_____	_____	_____

_____ _____ _____

_____ _____ _____

_____ _____ _____

52. Have you ever changed your mind about an important decision you had to make in your life? If "yes," please give a specific example or examples:

_____

_____

If you answered the previous question affirmatively, what do you think led you to change your mind? Answer as many as apply:

__Additional information

__Reconsideration of pros and cons

__Opinions of others

__Other: _____

53. What religion were you born into (if any)?

_____

54. What religion do you currently practice (if any)?

_____

55. How religious do you consider yourself?

_____

56. How often do you attend your place of worship (if any)? _____

57. How familiar are you with the teachings of Islam (i.e., the Muslim religion)? _____

☐ Very familiar ☐ Somewhat familiar ☐ Not at all familiar

58. Do you have any interactions with people who are Muslim or practice Islam? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

59. Do you have strongly held thoughts or opinions about Muslims or about Islam? If "yes," what are they?

_____

_____

_____

60. Do you believe the United States government acts unfairly towards Muslims in this country or in other parts of the world? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

61. Do you believe the "war on terror" unfairly targets Muslims? ☐ Yes ☐ No

62. Do you believe the "war on terror" is overblown or exaggerated? ☐ Yes ☐ No

63. Do you have strong feelings about our laws or government policies concerning legal immigration? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

_____

64. Do you believe that our government allows too many Muslims, or too many people from Muslim countries, to immigrate legally to the United States? ☐ Yes ☐ No
If "yes," please explain:

_____

_____

65. The defendant was born in Kyrgyzstan and is of Russian descent. Do you have any beliefs, attitudes, or opinions regarding Kyrgyzstan, Russia, Chechnya, or Dagestan, or the people who live there that would make it difficult for you to be a completely fair and impartial juror in this case?

_____

_____

66. If you know anyone who, to the best of your knowledge, is Chechen, Avar, Dagestani or of Chechen, Avar, or Dagestani descent, please describe who it is you know and how you know them:

_____

_____

67. Do you understand any of the following foreign languages: ☐ Russian ☐ Chechen ☐ Arabic

68. What is your primary source of news (e.g., newspapers, internet, TV, radio, word-of-mouth, etc.)? Please list all that apply.

69. What newspapers do you read and how often do you read them? Please include online editions of newspapers in your answer:

70. What news or talk radio programs do you listen to on the radio or over the internet and how often do you listen?

71. What national or local news programs do you watch on TV or over the internet and how often do you watch?

72. To the best of your recollection, have you ever called into a talk show, written a letter to the editor, or posted a comment on a website to express your opinion about ANY issue? If "yes," what was the issue?

73. How would you describe the amount of media coverage you have seen about this case:

__A lot (read many articles or watched television accounts)

__A moderate amount just basic coverage in the news)

__A little (basically just heard about it)

__None (have not heard of case before today)

74. What did you think or feel when you received your jury summons for this case?

_____

_____

75. To the best of your recollection, what kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case?

_____

_____

76. If you did any online research about this case, or about anything relating to it, after receiving your jury summons, please describe it:

_____

_____

77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:

(a) that Dzhokhar Tsarnaev is guilty? ☐ Yes ☐ No ☐ Unsure

(b) that Dzhokhar Tsarnaev is not guilty? ☐ Yes ☐ No ☐ Unsure

(c) that Dzhokhar Tsarnaev should receive the death penalty? ☐ Yes ☐ No ☐ Unsure

(d) that Dzhokhar Tsarnaev should not receive the death penalty? ☐ Yes ☐ No ☐ Unsure

If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? ☐ Able ☐ Unable

78. If you answered "yes" to subparts (a), (b), (c), or (d) of #77, have you expressed or stated your opinion to anyone else? ☐ Yes ☐ No
If"yes," please explain:

_____

79. If you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe:

_____

_____

_____

80. If you or, to the best of your knowledge, a family member, or close friend witnessed the Boston Marathon explosions or the response to them IN PERSON, please describe who was there and what he or she saw:

_____

_____

_____

81. If you or, to the best of your knowledge, a family member, or close friend were personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to "shelter in place" on April 19, 2013), please explain:

_____

_____

_____

82. If you or, to the best of your knowledge, anyone in your family or household has personally (1) taken part in any of the activities, events, or fundraisers that have been held in support of the victims of the Boston Marathon bombings; (2) contributed to the One Fund; or (3) bought or worn any merchandise, clothing, or accessories that have logos such as "Boston Strong" that relate to the Boston Marathon bombings, please explain:

_____

_____

_____

The following is a summary of the facts of this case. Please read it carefully and answer the questions that follow.

On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others. Four days later, on Thursday, April 18, 2013, at approximately 10:30 p.m., MIT Police Officer Sean Collier (26) was shot to death in his police car near the corner of Main Street and Vassar Street in Cambridge. Approximately 90 minutes later, a man named Dun Meng called the police from a gas station on Memorial Drive in Cambridge; be said that two men had carjacked him in Boston, kidnapped and robbed him, and still had his car. Approximately 20 minutes after that, two men in Watertown had a confrontation with police near the intersection of Laurel Street and Dexter Avenue in which shots were fired and bombs were thrown. One of the men, Tamerlan Tsarnaev, was injured at the scene and died shortly thereafter. The other, Dzhokhar Tsarnaev, was captured some 15 hours later after he was found hiding in a boat in Watertown.

Dzhokhar Tsarnaev has been charged with various crimes arising out of these events. Mr. Tsamaev was raised in Cambridge and attended Rindge and Latin High School. At the time he is alleged to have committed the crimes, he was a 19-year-old student at UMass-Dartmouth.

83. To the best of your knowledge, do you or anyone close to you have any PERSONAL connection to any of the individuals or places mentioned in the

case summary you just read? If "yes," please explain:

_____

_____

_____

84. Do you believe you know any of the following people, their colleagues, staff members, or family members? ☐ Yes ☐ No

(a) Presiding judge: The Honorable George A. O'Toole, Jr.;

(b) Defense lawyers: Judy Clarke, David I. Bruck, Miriam Conrad, Timothy Watkins, and William Fick;

(c) Prosecutors: William D. Weinreb, Aloke S. Chakravarty, Nadine Pellegrini, and Steven Mellin;

(d) Defendant: Dzhokhar Tsarnaev

If you answered "yes," please identify whom you know and how you know them:

_____

_____

85. Attached to this document as Attachment A is a list of people who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, identify them here by number and describe how you know them.

_____

_____

86. Attached to this document as Attachment B is a list of people who do not live in the United States and who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, please circle them directly on Attachment B. Do not write their names on this part of the questionnaire.

87. The evidence in this case may include graphic photographs and videos showing very severe injuries suffered by victims of the bombings. Do you think that seeing such graphic pictures would affect your ability to serve as a juror? _____

88. Mr. Tsarnaev is charged with 17 crimes that carry the possibility of a sentence of death. If the jury finds Mr. Tsarnaev guilty of one or more of those crimes, the same jury will then decide whether to sentence Mr. Tsarnaev to death or to a sentence of life imprisonment without the possibility of release.

    If you have any views on the death penalty in general, what are they?

    _____

    _____

    _____

89. Please circle one number that indicates your opinion about the death penalty. A "1" reflects a belief that the death penalty should never be imposed; a "10" reflects a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder.

Strongly Oppose									**Strongly Favor**
1	2	3	4	5	6	7	8	9	10

90. Which of the following best describes your feelings about the death penalty in a case involving someone who is proven guilty of murder?

(a) I am opposed to the death penalty and will never vote to impose it in any case no matter what the facts.

(b) I am opposed to the death penalty and would have a difficult time voting to impose it even if the facts supported it.

(c) I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it.

(d) I am not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment without the possibility of release, whichever I believed was called for by the facts and the law in the case.

(e) I am in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case.

(f) I am strongly in favor of the death penalty and I would have a difficult time voting for life imprisonment without the possibility of release regardless of the facts.

(g) I am strongly in favor of the death penalty and would vote for it in every case in which the person charged is eligible for a death sentence.

(h) None of the statements above correctly describes my feelings about the death penalty.

If you selected (h) as your answer, please explain:

_____

_____

91. If your views about the death penalty have changed over the past 10 years (e.g., now more in favor or less in favor), please explain how and why your views have changed:

_____

_____

_____

92. If your views about the death penalty are informed by your religious, philosophical, or spiritual beliefs, please describe how they are so informed:

_____

_____

_____

93. Which of the following best describes your opinion? Please check only one.

Life imprisonment without the possibility of release is:

☐ Less severe than the death penalty

☐ About the same as the death penalty

☐ More severe than the death penalty

☐ No opinion

Please explain your answer:

_____

_____

_____

94. Do you believe that anyone close to you would be critical of you or disappointed in you if you voted for the death penalty in this case? If you voted for life imprisonment without the possibility of release? If your answer is "yes" or "I'm not sure" to either question, please explain:

_____

_____

_____

95. If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?

☐ Yes

☐ I am not sure

☐ No

96. If you found Mr. Tsamaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?

☐ Yes

☐ I am not sure

☐ No

97. Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your background, experience, employment, training, education, knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?

_____

_____

_____

98. Is there anything else that you would like to tell us, or that you feel we should know about you?

_____

_____

99. Did you have any problems reading or understanding this questionnaire?

_____

100. Did you have a response to any specific question above that you deem private or sensitive that you request not be made public at this time? If so, list the number of that question here:

_____

_____

_____

101. Additional Space (Please indicate question number):

_____

_____

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Additional Space (continued):

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are true and complete to the best of my knowledge and belief.

Signature Date

Print Name

APPENDIX J

18 U.S.C. 3593(c) provides:

Special hearing to determine whether a sentence of death is justified

(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present

argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.