2021

Did Voir Dire and Discovery Restrictions Justify the Grant of a New Sentencing Hearing to the Man Convicted of the Boston Marathon Bombing?

Alan Raphael
Loyola University Chicago, School of Law, araphae@luc.edu

Lindsay Hill

CRIMINAL PROCEDURE

Did Voir Dire and Discovery Restrictions Justify the Grant of a New Sentencing Hearing to the Man Convicted of the Boston Marathon Bombing?

CASE AT A GLANCE

Dzhokhar Tsarnaev was sentenced to death after a federal jury trial on numerous counts arising from the Boston Marathon bombing in 2013. He and his brother, Tamerlan, carried out the bombing, which killed 3 people and injured more than 200 others. Because Tamerlan died while resisting arrest, only Dzhokhar was tried for the crimes. On appeal, the First Circuit affirmed 27 of the 30 convictions but vacated the death sentences and remanded for a new sentencing hearing, after finding two errors. One concerned jury questioning, or voir dire; the trial court asked the prospective jurors if the information they heard before trial about the crimes would prevent them from being impartial jurors but refused the defendant's request to ask them to indicate precisely what they had learned from media sources. The other was that the trial court refused to allow discovery regarding an unrelated crime allegedly committed by Tamerlan and another person two years earlier. Dzhokhar did not contest his guilt but sought the information about the earlier crime in support of his theory that Tamerlan was the principal actor in all the crimes and dominated others to obey him to commit crimes, which should be a mitigating factor in his brother's sentencing.

United States v. Tsarnaev
Docket No. 20-443

Argument Date: **October 13, 2021** From: **The First Circuit**

by Alan Raphael and Lindsay Hill
Loyola University Chicago School of Law, Chicago, IL

Introduction

To eliminate possible bias, potential jurors complete a written questionnaire and are questioned in open court, by either the judge, the parties, or both, during a process called voir dire. Trial courts have broad discretion in how voir dire is conducted. Jurors may be excused from participation if their similar life experiences, opinions, or exposure to prejudicial information prevent them from being impartial. A juror may be excused for cause or by a peremptory strike utilized by one of the parties.

In death penalty cases, there is a bifurcated trial—first as to guilt or innocence, and second, if convicted, as to the appropriate sentence. In the latter proceeding, mitigating and aggravating evidence is presented to justify the level of punishment a jury will recommend or impose. If convicted, the defendant in a capital case must be allowed to offer mitigating evidence in a sentencing hearing. Trial courts have discretion in determining whether the evidence offered to reduce defendant's culpability has probative value that outweighs the possibility of unfair prejudice, confusing the issues, or misleading the jury.

Issues

1. Did the court of appeals err 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 they had read, heard, or seen about respondent's case?

2. Did the district court commit 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?

Facts

On April 15, 2013, Dzhokhar Tsarnaev and his brother, Tamerlan, set off two shrapnel bombs near the finish line of the Boston Marathon, causing three deaths and hundreds of injuries. In the days following the attack, the FBI released surveillance-camera images of the bombing suspects. Reports of the attack and its aftermath constantly flashed across TV, computer, and smartphone screens throughout the country. Residents of Boston and surrounding communities were asked to stay home while the suspects remained at large.

Three days after the bombing, the defendant and Tamerlan shot and killed a Massachusetts Institute of Technology campus security officer before carjacking a bystander and fleeing in an SUV. The brothers held the driver hostage until he fled the car at a gas station and phoned the police. The SUV's navigation system was tracked to a neighboring community, and authorities engaged in a firefight. The defendant drove toward the police officers and struck Tamerlan, who died hours later.

Tsarnaev escaped and hid in a neighborhood outside of Boston until the police captured him. While in hiding, he wrote a manifesto, explaining that his actions were a result of the United States "killing our innocent civilians" and that "he could not stand to see this evil go unpunished." The investigation revealed Tsarnaev often visited al-Qaeda and other similar websites.

The media coverage, both traditional and social, of the bombing stands unrivaled in American legal history. The events of the bombing and subsequent capture flashed on every TV screen in the country, including information that was later ruled inadmissible at trial, such as the defendant's involuntary confession and statements from Boston's mayor and the families of victims. Boston's mayor publicly stated that Tsarnaev should get the death penalty. He was called "evil," a "monster," "depraved," "vile," a "scumbag," and even the "devil" on various forms of media.

A federal grand jury charged Tsarnaev with 30 offenses, including 17 capital counts. During pretrial proceedings, he filed two motions for a change of venue based on the extraordinary publicity. In denying the motion, the district court stated that "juror impartiality does not require ignorance." The appellate court affirmed that ruling in a pretrial appeal, and jury selection began in January of 2015.

The pool of potential jurors included 1,300 people, who then completed a questionnaire on their backgrounds, exposure to publicity, views on the death penalty, and opinions of the defendant. Question 77 of the juror questionnaire asked potential jurors whether, because of what they had seen or read in the news media, they had formed an opinion that Tsarnaev was guilty, or whether he should receive the death penalty. It went on to ask if the potential juror could set aside any opinion and decide about guilt and punishment solely on the evidence presented in court. The district court declined the defendant's request to add a question asking potential jurors to list what they knew about the case, explaining that this would create unmanageable amounts of data.

After reviewing the questionnaires, the district court called back 256 prospective jurors. The voir dire took 21 days. Both parties were allowed to question the prospective jurors; however, the district court denied Tsarnaev's multiple requests to ask each prospective juror about what stood out in his or her mind from everything he or she might have "heard, read, or seen about the Boston Marathon bombing and the events that followed it."

Numerous prospective jurors were dismissed by the court for cause, but none of the dismissals were related to the questions that Tsarnaev sought to ask. Two jurors were seated despite the defense discovering that their social media postings were arguably inconsistent with their answers during voir dire. One juror denied making any posts about the case, but in fact posted 22 times, including calling Tsarnaev a "piece of garbage." Another juror described the jury selection process on Facebook and was told by a friend to "play the part" to get on the jury to send Tsarnaev to prison, where he "will be taken care of." A third motion for a change of venue was denied, and the appellate court affirmed the ruling.

Further, in pretrial proceedings, the defendant sought to compel discovery about the investigation of an unsolved triple homicide that occurred in Waltham, Massachusetts, in 2011. Investigators suspected Tamerlan's friend of involvement. The friend later admitted to the crime,

but explained that Tamerlan was the one who killed the witnesses of their robbery. This friend began writing a confession, but then attacked the investigators, who shot and killed him before the confession was complete.

Tsarnaev was informed of the fact and general substance of the statements but was not provided with the reports or recordings from the investigation. The district court denied his motions to compel discovery and granted the government's motion to exclude the Waltham murder evidence from the penalty phase of the trial. The defendant sought to offer the Waltham crimes as mitigating evidence in the punishment phase of the trial to support his theory that he was following Tamerlan's strong lead and that, because he was not the mastermind behind the bombings, he should get the lesser sentence of life imprisonment.

After the jury found the defendant guilty on all 30 counts, it recommended capital punishment for 6 of the capital offenses, life imprisonment on the remaining capital offenses, and several concurrent and consecutive terms on the remaining 13 offenses. The district court imposed the punishments as recommended. The court denied a posttrial motion for acquittal or a new trial, again rejecting concerns over the venue of the trial.

On appeal, the First Circuit affirmed judgments for 27 of the 30 counts but vacated the capital sentences and remanded for a new sentencing proceeding on the grounds that the district court abused its discretion when it denied Tsarnaev the chance to ask questions about the pretrial publicity. *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020). Also, the court found that denial of discovery and introduction of the Waltham evidence was reversible error, as the government did not show that it would not have convinced even one juror that Tsarnaev did not bear the same moral culpability as his brother. Finally, the court held that the refusal to order disclosure of the reports and recordings of the confession violated *Brady v. Maryland*, 373 U.S. 83 (1963), in that the evidence was favorable to the defendant and there was a reasonable probability that the Waltham evidence's disclosure would have produced a different penalty-phase result. It did not rule on the issues surrounding claimed violations of Tsarnaev's Fifth, Sixth, and Eighth Amendment rights, which possibly occurred when the two jurors who did not disclose about their social media use were seated.

The government sought review by the Supreme Court to reverse the First Circuit ruling and to reinstate the death penalties. The Court granted *certiorari* on March 22, 2021.

Case Analysis

The Fifth and Sixth Amendments to the U.S. Constitution require that criminal trials must be conducted fairly before an impartial jury based on the evidence produced in court. For over a century, the Supreme Court has protected juror impartiality, finding that our trial system rests on conclusions that are drawn from evidence and argument in open court and that are not affected by any outside influence. Although it is not required that venirepersons be ignorant of the facts and issues involved in the case, it is required that the jurors are unbiased and impartial.

When a criminal defendant has been the subject of extensive pretrial publicity, the need for action by the trial court is apparent. The Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), held that there is a duty assigned to trial judges to take steps to reduce the potential prejudice and that failure to do so can result in a violation of the defendant's constitutional rights. Thus, due process requires that the accused receive a trial by an impartial jury free from outside influences. Trial judges should utilize available tools to diminish the effects of the prejudicial publicity, which includes granting a change of venue or sequestering the jury.

Voir dire safeguards the defendant's constitutional rights and allows exploration of potential biases in prospective juries. It has long played a critical function in empaneling impartial jurors. Without an adequate voir dire, the defense cannot develop bases for making challenges and the trial judge cannot fulfill the duty of removing prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence.

In determining whether the district court erred in prohibiting Tsarnaev from asking questions about what the venireperson has seen, read, or heard about the case, the important precedent discussed by the parties are *Mu'Min v. Virginia*, 500 U.S. 415 (1991), *Skilling v. United States*, 561 U.S. 358 (2010), and a First Circuit opinion, *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968).

In *Mu'Min*, the defendant was convicted of murder, and his motion for a change of venue was denied despite submitting dozens of local newspaper articles discussing prejudicial information. During voir dire, 8 of the 12 jurors indicated they had media exposure to the case; however, the Supreme Court rejected the argument that this violated the defendant's due process and Sixth Amendment rights. *Mu'Min* recognized that state and

federal court judges have wide discretion in deciding which questions should be asked during voir dire and that the Sixth Amendment does not require questions on what information the potential juror was exposed to. But the Court made clear that federal courts can set the standards for voir dire and that these types of questions could prove helpful—even desirable from the viewpoint of sound judicial practice.

Skilling held that identifying impartial prospective jurors is "particularly within the province of the trial judge," who "sits in the locale where the publicity is said to have had its effect," observes prospective jurors up close, and can adopt tailored measures to detect and eliminate bias. The defendant in *Skilling* was a longtime chief executive officer of Enron, an energy-trading and utility company, who sought a change of venue after hundreds of news reports detailed the company's downfall, his bankruptcy, and his negative reputation in the community.

The rulings in *Mu'Min* and *Skilling* are important precedent, but they do not squarely answer the question asked here. The First Circuit relied on its precedent, *Patriarca*, in holding that where the trial judge finds "'a significant possibility that jurors have been exposed to potentially prejudicial material,'" the judge, "on request of counsel," should examine each venireperson to elicit the kind and degree of their exposure to the case or the parties. When the district court failed to do so here, especially given the immense media coverage of this case, it had impermissibly delegated to potential jurors the work of judging their own impartiality. Thus, the rule derived from *Patriarca* is that content-specific questioning is required in high-profile cases when the court finds a significant possibility that potential jurors have been exposed to potentially prejudicial material, and the First Circuit utilized its supervisory power to enforce the rule. Because Tsarnaev admitted that he committed the crimes, the error affected only the sentencing but not the determination of guilt.

Since 1968, the First Circuit has used *Patriarca* to evaluate a district court's use of voir dire in highly publicized trials, including *United States v. Medina*, 761 F.2d 12 (1st Cir. 1985), *United States v. Vest*, 842 F.2d 1319 (1st Cir. 1988), and *United States v. Orlando-Figueroa*, 229 F.3d 33 (1st Cir. 2000). The Third, Fifth, and Ninth Circuits have similarly held that district courts should independently investigate the potential bias of jurors when there is a significant possibility of pretrial prejudice through publicity in *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978), and *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968). The Third Circuit expressly invoked its supervisory power and required district courts to ask content-specific questions in cases involving "a significant possibility that [prospective jurors] will be ineligible to serve because of exposure to potentially prejudicial material."

Similarly, in *United States v. Dellinger*, 472 F2d. 340 (7th Cir. 1972), the Seventh Circuit held that inquiry into a juror's past is necessary in some circumstances. On the other side, the Eleventh Circuit rejected this position in *United States v. Montgomery*, 772 F.2d 733 (1985), finding that voir dire can be adequate without questioning into the details of what information the juror has been exposed to.

In seeking to have Tsarnaev's sentences reinstated, the government relies on *Mu'Min*'s core concept that trial courts are not required to ask prospective jurors about the specific contents of the news reports to which they have been exposed. It points out that neither the defense nor the appellate court mentioned *Patriarca* during the pretrial proceedings. The government focuses on *Skilling* to emphasize its point that jurors may serve as long as they can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.

The government details the ways that prospective jurors were asked about their exposure to prejudicial pretrial publicity. Question 77 asked about the types of media consumed, if prospective jurors had "a little," "moderate," or "a lot" of exposure; the questionnaire also asked about the venireperson's assessment of the defendant's guilt. The government argues that the trial court did everything it was supposed to do to identify potential biases and explore whether it would prevent the venireperson from being fair and impartial under applicable Supreme Court precedent.

On the other hand, Tsarnaev argues that *Mu'Min* offers the opportunity for federal courts to enforce rules that do more than what was done in that case and that circuit courts may enforce supervisory rules so long as they do not conflict with constitutional or statutory provisions and represent reasoned exercises of authority. Thus, he argues that in a sound exercise of supervisory power, the First Circuit correctly vacated the death penalties and remanded for a new sentencing proceeding because the district court violated the principle spelled out in *Patriarca*.

Tsarnaev argues that more thorough questioning into the specifics of pretrial exposure only benefits the parties and

the court in providing additional opportunities to reveal biases in prospective jurors. Illustratively, the defendant says that questioning into pretrial media exposure in this case could have revealed the inaccurate statements told by two of the seated jurors to the court. Instead, the defense found out about the jurors' social media postings from their own research, and the trial court allowed the jurors to remain on the venire when they stated they could remain impartial. In this case, because of unprecedented media exposure, Tsarnaev states that questioning into the specifics of pretrial media exposure was necessary to safeguard his right to trial by a fair and impartial jury.

The Eighth Amendment to the Constitution provides that capital defendants must be permitted to introduce evidence relevant to any mitigating factors. For half a century, since *Gregg v. Georgia*, 428 U.S. 153 (1976), the judicious and careful use of the death penalty has been constitutional. This method requires a bifurcated proceeding in which the trial and sentencing are conducted separately.

Under 28 U.S.C. § 3593(c), a capital defendant "may present any information relevant to a mitigating factor." Relevant mitigating evidence "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274 (2004). The proposed mitigating evidence does not need to meet admissibility under the rules of evidence; this broad standard reflects the idea that punishment should be directly related to the personal culpability of the criminal defendant. *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). However, a judge may exclude proposed mitigating evidence if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury under Section 3593(c). The sentencing proceeding is not a mechanism to introduce any and all evidence that a party wishes, and an appellate court reviews the trial court's application of the standard for an abuse of discretion.

In *Eddings*, the Court made clear that a death sentence cannot be imposed without the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments in capital cases. There, the criminal defendant, a 16-year-old found guilty of killing a police officer, wanted to offer mitigating evidence that he had serious emotional disturbance. Because the trial court refused to allow any mitigating evidence other than the defendant's age, the sentence was vacated.

Skipper v. South Carolina, 476 U.S. 1 (1986), quotes *Eddings* and offers a corollary rule that the sentencer may not refuse to consider or be precluded from considering any relevant mitigation evidence. There, the trial court erred when it did not accept the criminal defendant's post-arrest good behavior as a mitigating factor. Both state and federal courts have not read this rule to be a limitation on the statutorily given discretion found in Section 3593(c), and instead, continue to exercise discretion in excluding marginally probative or unreliable evidence.

In determining whether the refusal to admit the mitigating evidence surrounding the Waltham murders was error, the parties cite some of the same authority, but ultimately rely on the facts of Tsarnaev's sentencing proceeding for their analysis.

The district court instructed the jury to consider several mitigating factors relating to Tamerlan's conduct and his influence over the defendant: whether, because of Tamerlan's "aggressiveness," the defendant was susceptible to his older brother's influence; whether Tamerlan planned and directed the bombing; and whether the defendant had acted under Tamerlan's influence. The district court did not allow in or compel discovery on the Waltham murders because it deemed the information as lacking any probative value and requiring a confusing minitrial. The appellate court reversed—finding that the Waltham evidence was not only relevant but *highly* probative of the defense's theory that Tsarnaev was under the influence of his brother, and that his brother was the mastermind not only of the bombing but of his previous crimes.

The government argues that the denial was squarely within the trial court's discretion under Section 3593(c) and the Supreme Court should reinstate the district court's sentences. The government acknowledges that the standard for determining probative value is lower for mitigating evidence than it is for other evidence under Federal Rule of Evidence 403; however, the Waltham evidence would have required a "confusing minitrial," and the value of the evidence does not overcome this harm. Further, because the district court allowed in other evidence that supports the defense's theory that Tamerlan was the aggressive mastermind behind the bombing, the

government argues the Waltham evidence has even less probative value under Section 3593(c).

By emphasizing that Tamerlan made a rash decision to kill the witnesses in Waltham—a completely different circumstance than the thoroughly planned bombing in Boston—the government argues that this evidence would confuse and unnecessarily lead the jury to determine Tamerlan's guilt for an unsolved and unrelated crime.

Conversely, the defendant asserts that the appellate court correctly held that the trial court abused its discretion because the confession by Tamerlan's friend was reliable. He points to the fact that the federal government concluded the confession was sufficiently reliable to support a search warrant affidavit. Further, the defendant argues that the district court could have allowed the evidence to be introduced by admitting only the search warrant affidavit, bypassing the "confusing minitrial" the government warned of and limiting possible distractions.

Counter to the government's argument that the inclusion of some evidence on Tamerlan's aggressiveness decreases the probative value of the Waltham evidence, the defendant argues that the denial is irreconcilable with the court's other admissions. Evidence that Tamerlan yelled at a butcher, poked a man in the chest, and possibly abused his girlfriend was admitted. The defendant argues that these small instances are similar to the Waltham murders, except that the Waltham murders show Tamerlan was a violent criminal, not just a rude customer or aggressive person. Thus, Tsarnaev states the evidence is probative to show that Tamerlan bullied him into participating in the bombings like he bullied his friend into participating in the Waltham murders. Without the evidence of Tamerlan's ability to influence others, Tsarnaev argues that the government was able to paint a misleading portrait of a "bossy older brother," and not a violent criminal.

Significance

The decision in this case may be important in determining the level of questioning necessary in the jury selection of high-profile cases and whether the lack of questioning into a juror's pretrial media exposure is a violation of the supervisory rule that the First Circuit set out more than a half century ago in *Patriarca*. It is important to note that even if the Court affirms the First Circuit, the jury at a new sentencing hearing could again recommend a death sentence for Tsarnaev.

The Court may acknowledge the supervisory power that the First Circuit utilized considering the dicta in *Mu'Min*, explaining how content-specific questioning during voir dire can be helpful. It is undeniable that the media landscape has experienced significant changes in the past century. Because access to media is no longer limited to local and national news reports, newspapers, or word-of-mouth, and a local judge can no longer know the media outlets that a potential juror may have encountered, the Court may accept *Mu'Min*'s position that federal courts can create higher standards for voir dire, especially in high-profile cases. As media regarding any trial becomes more widely available to everyday citizens, this ruling would allow flexibility in the review of jury selection procedures.

On the other hand, *Mu'Min*'s core principles and the ruling in *Skilling* may guide the Court to reject the First Circuit's application of *Patriarca*. No Supreme Court precedent requires that jurors be asked about the specific contents of their media exposure. The precautions taken by the district court in the present case may be sufficient under precedent. If so, the trial court did not commit reversible error by not requiring questions into the venirepersons' specific pretrial media exposure.

Turning to the issue of the Waltham evidence, the Court may find that the trial court acted within its discretion under Section 3593(c) in finding that the probative value did not outweigh the concerns that the evidence would lead to more confusion. If so, the trial court ruling will be upheld. However, if the Supreme Court agrees that the evidence was improperly excluded under Section 3593(c), the Court must then determine if the abuse of discretion constituted reversible error. The Court will not reverse if the government meets the burden of showing that the error was harmless beyond a reasonable doubt, in that Tsarnaev would have been sentenced to death regardless of the error.

If the Supreme Court affirms the appellate decision on either or both grounds, Tsarnaev will have a new sentencing hearing to determine if he will be executed or if he will be incarcerated for life. If the Court reverses, the original death sentences will be reinstated.

This appeal involves important issues surrounding jury selection in high-profile cases. To what extent will modern technology and the heightened level of media exposure people face in their daily lives affect the standard for questioning in voir dire? Was relevant mitigation evidence improperly kept from the jury in this case?

Alan Raphael is a member of the faculty of Loyola University Chicago School of Law and teaches criminal procedure and constitutional law. He can be reached at Araphae@luc.edu.

Lindsay Hill is a 3L at Loyola University Chicago School of Law.

PREVIEW of United States Supreme Court Cases 49, no. 1 (October 4, 2021): 38–44.

ATTORNEYS FOR THE PARTIES

For Petitioner United States (Brian H. Fletcher, Acting Solicitor General, 202.514.2217)

For Respondent Dzhokhar A. Tsarnaev (Ginger D. Anders, 202.220.1107)

AMICUS BRIEFS

In Support of Petitioner United States

Criminal Justice Legal Foundation (Kent S. Scheidegger, 916.446.0345)

National Fraternal Order of Police (William McGinley Jay, 202.346.4000)

In Support of Respondent Dzhokhar A. Tsarnaev

American Civil Liberties Union, American Civil Liberties Union of Massachusetts, Inc., National Association of Criminal Defense Lawyers, and the Rutherford Institute (Catherine Emily Stetson, 202.637.5491)

Michael J. Z. Mannheimer (Jennifer Michelle Keighley, 212.506.3584)

James Fetzer, PhD, et al. (John Remington Graham, 418.888.5049)

Retired Federal Judges and Former Federal Prosecutors (Kannon K. Shanmugam, 202.223.7300)

Shirin Bakhshay, Tarika Daftary-Kapur, Yael Danieli, Angela Jones, Margaret Bull Kovera, Steven D. Penrod, and Christine L. Ruva (Stephen Michael Nickelsburg, 202.912.5000)

In Support of Judgment Below on Evidence Excluded at Penalty Phase

Interested Evidence and Sentencing Law Professors (Dean Arthur Strang, 608.535.1550)

In Support of Neither Party

American Bar Association (Barbara J. Howard, 312.988.5000)

