UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 16-6001

UNITED STATES,
Appellee,

v.

DZHOKHAR A. TSARNAEV,
Defendant-Appellant.

On Appeal from the United States District
Court for the District of Massachusetts

BRIEF OF EIGHT DISTINGUISHED LOCAL CITIZENS *AMICI CURIAE* IN SUPPORT OF APPELLANT DZHOKHAR TSARNAEV

Submitted by:

George H. Kendall
Court of Appeals (admission pending)
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 872.9800

Timothy P. O'Toole
Court of Appeals (#1187070)
Miller & Chevalier
900 16th Street, NW
Washington, DC 20006
(202) 626.5800

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici in this matter are eight individuals who reside in the Boston area. They are not a corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF *AMICI CURIAE*

Amici[1] – Robert M. Bloom, Mark S. Brodin, James Doyle, Fernande R.V. Duffly, Daniel S. Medwed, Michael Meltsner, Alan Morse and Christopher Winship – are eight prominent citizens of the greater Boston community. We are Republicans, Democrats and Independents. Each of us has lived here for decades and invested ourselves in public life and public matters. We believe in the even-handed administration of our judicial system. Some of us support use of capital punishment in instances of sufficient justification. Others oppose capital punishment, either on moral grounds or because it cannot be administered fairly. On a wide variety of matters of public policy, we often do not see eye to eye.

We have come together here because we believe the court below made a grievous error in insisting this case be tried in Boston. The multiple violent terrorist acts and their aftermath profoundly affected our friends and neighbors. Holding the trial here asked too much, both of our neighbors, who were called to jury service, and of the *voir dire* process. Sometimes, overwhelmingly violent and traumatic circumstances preclude the reliable assessment of partiality and prejudice. This is particularly so here, at least regarding the sentencing decision the jury would be required to make. Unlike his older brother, the surviving Tsarnaev brother was a young, recent high school graduate with no prior criminal

[1] *See* Addendum for a full description of *Amici*.

history, and he was not the moving force behind these monstrous crimes. Even accounting for the horrific crimes committed, disinterested jurors often will reject sentences of death when considering such offenders.

We submit this brief to make two important points. First, while Boston has seen its fair share of sensational court cases, it has never before experienced the amalgamation of extraordinary, traumatizing events that began on April 15, 2013, and then played out very much in the public eye though continuous media coverage in the succeeding hours, days and months. When all of the events are properly accounted for, it was inevitable that every member of the greater Boston community would be deeply affected by the spectacle of this bloody terrorist attack and its aftermath. Although the Supreme Court has never considered a change of venue issue arising from a criminal prosecution rooted in terroristic acts, proper application of guiding principles that it has announced in other cases strongly support this trial taking place elsewhere.

Second, when a community is subjected to frightening acts of terror that have impacted the community as a whole, the *voir dire* process is ill-suited to reliably identify partiality, in part because we cannot reasonably expect potential jurors – even those trying sincerely and in good faith – to fully and honestly self-report in that public setting all the effects visited upon them by these extraordinary, traumatic events.

This is the situation the trial court confronted. While we might admire the court's determination to attempt to identify and seat an impartial jury, the circumstances on the ground precluded that seating.

ARGUMENT

The greater Boston community was deeply traumatized by the deadly terrorist acts committed on April 15, 2013, and by the extraordinary and frightening events that took place during the next four days that changed each of us. There is also little question that as a community, we came together, first to shelter in place and participate in the manhunt for Dzhokhar Tsarnaev, then to celebrate his capture, and last to mourn and mend our injured and traumatized friends, our neighbors, our community, and ourselves. Given these unique and overwhelming experiences, it asked too much of our community to hold the trial in Boston.

I. The Events That Precluded the Seating of an Impartial Local Jury

Though we lack the pages to do so comprehensively, Amici will fully address all of the extraordinary circumstances. As even our more summary review makes abundantly plain, when it was time for jury selection, the local pool had been exposed to events too powerful and traumatic to allow anyone to reasonably conclude that Boston area jurors could put all of this aside in order to function as the Constitution requires – as disinterested fact-finders.

1. *The April 15 Bombings*: The exploding bombs captured on camera and televised in dramatic detail on April 15, 2013 were not the work of street gang members who, in the course of seeking to avenge a prior killing by another gang, kill innocent bystanders. That would have been bad enough. Ordinarily, in those circumstances, we would grieve the loss of life, hope the police quickly apprehended those responsible, and believe justice will be meted out fairly in the courts. And we would move on.

The April 15 bombing and its aftermath was different. Very different. It was purposefully intended as an attack on the greater Boston community as a whole. With that purpose, a better day could not have been selected. Patriots Day is the "star-spangled holiday" [2] for the greater Boston area as we celebrate our unique contributions to the formation of our country with the staging of "the world's most prestigious road race."[3] The immediate results were staggeringly horrific: three lives extinguished and more than 260 runners, spectators, race enthusiasts, family members and friends wounded, some permanently disabled. As one local journalist put it, "[i]n a cruel, unimaginable moment, the finish line of the

---

[2] John Powers, *Joyous Event Turns Shocking as Tragedy Halts Marathon*, THE BOSTON GLOBE (Apr. 16, 2013), https://www.bostonglobe.com/sports/2013/04/15/finish-boston-marathon-place-triumph-becomes-place-horror/aPXaZ1RlVvu13VVaE37lgL/story.html.

[3] Mark Arsenault, *3 Killed in Marathon Blasts*, THE BOSTON GLOBE (Apr. 16, 2013), https://www.bostonglobe.com/metro/2013/04/15/three-killed-more-than-injured-marathon-blast/QQOiYNU2n1vt1Xul3BXVsL/story.html.

world's most storied road race became a kind of battlefield, a surreal jumble of screams, smoke, and a 'sidewalk loaded with blood.' The city's signature event, a vast celebration that fixes the nation's eye on Boston, had been shattered by an apparent act of terrorism, turning the heart of Back Bay into mayhem. A city that would never be quite the same."[4]

These were deeply shocking events. In their immediate wake, the community came together to help all who were hurt and wounded. Former Mayor Menino expressed our feelings when he reminded the world the day following the bombings, "[t]his is a close-knit place, the city of Boston. Here, we know our neighbors, we grieve for them."[5] Indeed, to an extent never before seen, authorities and the community joined forces to identify and catch those responsible. This crime, "the first major terrorist attack on American soil in the age of smartphones, Twitter and Facebook, provided an opportunity for everyone to get involved."[6] And we did. Social media, particularly Twitter, served as a key

---

[4] Peter Schworm, In Copley Square, *Celebration Turns to Bloody Chaos*, THE BOSTON GLOBE (Apr. 16, 2013), https://www.bostonglobe.com/metro/2013/04/15/copley-square-celebration-turns-bloody-chaos/SLXSjyoxjcWnkA8aJxVtiP/story.html.

[5] 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-old-boy-among-those-killed-in-boston-bombing.

[6] Ken Bensinger & Andrea Chang, *Boston Bombings: Social Media Spirals Out of Control*, L.A. TIMES (Apr. 20, 2013),

component of law enforcement's efforts to communicate the dangers and details of the bombings to the public. "Key Twitter accounts held by local public officials experienced dramatic surges in attention as they provided real time updates from the scene of the bombing and additional messages throughout the week."[7] In the week following the bombing, the Twitter accounts for the Boston Police, Massachusetts State Police, and then-Mayor Menino soared in popularity, gaining 273,000, 26,000 and 17,000 new followers, respectively.[8]

This unusual police/citizen partnership persisted throughout the community as Boston quickly became an occupied city. As one report noted, "19,000 National Guard troops moved into an American city, not to put down a civil uprising, quell riots or dispel an insurrection, but to search for a single man. Armored vehicles motored up and down residential neighborhoods. Innocent people were confronted in their homes at gunpoint or had guns pointed at them for merely peering through the curtains of their own windows."[9] In the wake of the ferocious gun battle that

---

http://articles.latimes.com/2013/apr/20/business/la-fi-boston-bombings-media-20130420.

7 Jeannette Sutton et al., *What it Takes to Get Passed On: Message Content, Style, and Structure as Predictors of Retransmission in the Boston Marathon Bombing Response*, PLoS ONE (Aug. 21, 2015), at 6, https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0134452&type=printable.

8 *Id.* at 6-7.

9 Radley Balko, *Was the Police Response to the Boston Bombing Really Appropriate?*, WASHINGTON POST (Apr. 22, 2014),

killed the senior Tsarnaev brother, the Governor issued the "unprecedented"[10] shelter in place order that brought greater Boston to a near standstill. During this time, many of our neighbors used streaming platforms such as Ustream and broadcastify.com to monitor police scanners. During the morning of April 19, when the manhunt was in full swing, nearly 83,000 people were streaming audio of Boston's police scanner.[11] According to Ustream, one stream broadcasting audio from a Boston police scanner had roughly 4,000 peak concurrent viewers in the early morning of the manhunt; however, at 5:00 am, that number jumped to 37,000 and continued to climb, peaking at roughly 265,000 viewers by 8:30 pm, near the time of Dzhokar's arrest.[12] A CNN commentator observed this intense police-community partnership will be studied "for quite some time because police officers up there did something that's never been quite done before. They essentially

---

https://www.washingtonpost.com/news/the-watch/wp/2014/04/22/the-police-response-to-the-boston-marathon-bombing/?noredirect=on&utm_term=.198e2e7ba5d2.

[10] Philip Bump, *This Is What It Looks Like When the Police Shut Down a City*, THE ATLANTIC (Apr. 19, 2013), https://www.theatlantic.com/national/archive/2013/04/boston-lockdown-residents-are-asked-shelter-place-while-cops-sweep-watertown/316096/.

[11] *Tweeting Police Chatter Creates Confusion Over Boston Suspect*, NBC News (Apr. 19, 2013, 6:34 AM), http://usnews.nbcnews.com/_news/2013/04/19/17823365-tweeting-police-chatter-creates-confusion-over-boston-suspect.

[12] Tim Peterson, *More Than 2.4 Million People Followed Boston Manhunt on Ustream*, ADWEEK (Apr. 22, 2013), https://www.adweek.com/digital/more-24-million-people-followed-boston-manhunt-ustream-148813/.

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."[13]

With the announcement of Tsarnaev's arrest, celebrations erupted in many neighborhoods through the greater Boston area. Mayor Menino noted "[t]he night we made the arrest, [there were] parties in the streets all over the city."[14] This was because "[t]hese two individuals held the whole city hostage for five days," and the citizenry was engaged; "[t]hey really were vigilant. They all came out and supported us."[15] Time Magazine published a long photo gallery documenting greatly relieved and joyful citizens celebrating in numerous communities throughout the community.[16]

2. *Coming Together to Heal*

With the arrest, our now arm-locked community breathed a great sigh of relief and turned attention to collectively mourning the dead and assisting the healing of the many wounded. Boston Globe writer Maria Konnikova captured

---

[13] *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.

[14] *'This Week' Transcript: Mayor Thomas Menino*, ABC News (Apr. 21, 2013), https://abcnews.go.com/Politics/week-transcript-mayor-thomas-menino/story?id=19008022.

[15] *Id.*

[16] *Joy and Relief in Boston After Bombing Suspect's Arrest*, TIME MAGAZINE (Apr. 19, 2013), http://nation.time.com/2013/04/19/police-manhunt-in-watertown/.

well this movement as it was just beginning. "What we are doing, in these times of crisis, is reorganizing our sense of who we are: not Jews or Christians or Muslims, or men or women, or writers or accountants but simply, say Bostonians. This process, the spontaneous birth of social bonds among strangers arising from shared experiences – and, clearly, shared geography – is known in psychology as mass emergent sociality. In the face of extreme circumstances, we recategorize ourselves. Our personal sense of self recedes, and instead, a new, collective sense of who were are arises to the fore."[17]

Emerson College students Christopher Dobens and Nicholas Reynolds greatly contributed to our efforts when they coined and created a Twitter hashtag for the phrase "Boston Strong."[18] Boston Red Sox team leader David Ortiz' impromptu, stirring speech a week later at Fenway Park, urging our community to "[s]tay strong," gave Boston Strong even more momentum.[19] It became our glue

---

[17] Maria Konnikova, *We Are All Bostonians Now*, THE BOSTON GLOBE (Apr. 21, 2013), https://www.bostonglobe.com/ideas/2013/04/20/are-all-bostonians-now/8ya569K5AYsvyvBQhIiVgI/story.html.

[18] Jessica Prois, *Meet The 'Boston Strong' Team That Started a Movement With a T-Shirt and Turned Hate Into Love*, HUFFINGTON POST (May 31, 2013, 5:21 PM), https://www.huffingtonpost.com/2013/05/31/boston-strong-shirt-movement_n_3368388.html.

[19] Scott Lauber, *David Ortiz's Finest Moment with the Red Sox Wasn't at the Plate*, ESPN (Apr. 10, 2016), http://www.espn.com/mlb/story/_/id/15175959/david-ortiz-finest-moment-red-sox-plate.

and rallying cry. We would not let these horrific events beat us down or keep our injured, surviving neighbors broken. Soon, almost every corner of the greater Boston area contained some reference to Boston Strong, and vendors were selling "stickers, magnets, hats, bracelets, necklaces, cookies – anything you can imagine."[20] Dobens and Reynolds created "Boston Strong" tee-shirts, and sold 70,000 within three years.[21] Not to be left out, companies like McDonalds as well as sports teams, chiefly the Red Sox, used the phrase in advertising campaigns.[22] MBTA buses flashed "Boston Strong" on their LED signs.[23] Live Nation organized a "Boston Strong Benefit Concert."[24] Even today, "Boston Strong

---

[20] Steve Silva, *The Real Meaning of 'Boston Strong'*, BOSTON.COM (Mar. 17, 2014, 8:51 AM), http://archive.boston.com/sports/marathon/blog/2014/03/the_real_meaning_of_boston_str.html.

[21] Chris Dobens, *The Origin of Boston Strong: Co-founder Chris Dobens shares what went into creating the national phenomenon*, MEDIUM.COM (Mar. 8, 2017), https://medium.com/inktothepeople/the-origin-of-boston-strong-5f1cf7a8a52d.

[22] Ben Zimmer, *"Boston Strong," the phrase that rallied a city*, THE BOSTON GLOBE (May 12, 2013), https://www.bostonglobe.com/ideas/2013/05/11/boston-strong-phrase-that-rallied-city/uNPFaI8Mv4QxsWqpjXBOQO/story.html. *See also* Jessica Wohl, *New McDonald's Commercial Generates Strong Reactions,* Chi. Trib. (Jan. 12, 2015), https://www.chicagotribune.com/business/ct-mcdonalds-signs-commercial-1113-biz-20150112-story.html.

[23] *Id.*

[24] James Reed, *Many Details to Orchestrate for Marathon Concert*, THE BOSTON GLOBE (May 27, 2013), https://www.bostonglobe.com/arts/2013/05/26/how-boston-strong-benefit-concert-came-together/ef6nyUYUgXrH3n2AHnANwO/story.html.

remains an integral part of the city's fabric – a unifying theme that continues to buoy the region in moving forward. . . ."[25]

In addition to providing a rallying cry and purpose to work together to heal our community, "Boston Strong" raised significant resources to help pay for the enormous bombing related damages. Dobens and Reynolds alone donated all of their Boston Strong tee-shirt sale profits – more than one million dollars. And all of those dollars went to the Boston One Fund, the one charity that was set up to collect and pay out awards to victims.[26] One Fund, which had many, many local donors, distributed $2,295,000 to each family who lost a member, between $1,345,000 and $2,290,000 to amputees, between $555,000 to $1,023,000 to victims with severe injuries, between $150,000 and $505,000 for victims with minor injuries, and between $8,000 to $20,500 for attendees who received out-patient treatment.[27]

---

[25] Lisa Kashinsky, *Five Years After the Marathon Bombing, 'Boston Strong' Lives On*, THE EAGLE TRIBUNE (Apr. 15, 2018), https://www.eagletribune.com/news/haverhill/five-years-after-the-marathon-bombing-boston-strong-lives-on/article_83e7d8c7-2816-5a5c-9e84-b1631e99ef97.html.

[26] Dobens, *supra* note 20.

[27] Jane Hunter, *Blood on the Streets of Boston: Reviewing the response to the April 2013 Marathon bombings, Action on Armed Violence* (Dec. 2014) at 16-19, https://aoav.org.uk/wp-content/uploads/2015/03/blood_on_the_streets_of_boston2-2.pdf.

There is little question these events profoundly affected us all. We now recognize many in our community – due to these extraordinary and extraordinarily painful events – suffered from vicarious trauma.[28] The community's deeply energetic efforts to heal our neighbors is impressive evidence of consciousness of the many wounds there were to be healed.

Former Police Commissioner Ed Davis summed things up well one month after the bombings in Congressional testimony. He told the House Committee on Homeland Security: "[t]hese 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. . . . The impact on Boston will last for years."[29] This view was shared by "[t]hose who live along the Marathon route . . . [who spoke about] a deeply personal grief, [and] a sense of loss forged by years of Patriots Day celebrations and the cherished ritual of cheering the runners

---

[28] *See* Kathleen M. Palm, Ph.D., Melissa A. Polusny, Ph.D., & Victoria M. Follette, Ph.D., *Vicarious Traumatization: Poteitla Hazards and Interventions for Disaster and Trauma Workers,* 19 Prehospital and Disaster Medicine 72, 73-74 (2004).

[29] *The Boston Bombings: A First Look: Hearing Before the H. Comm. on Homeland Sec.*, 113th Cong. (2013) (Testimony of Edward F. Davis, III, Commissioner, Boston Police), https://docs.house.gov/meetings/HM/HM00/20130509/111785/HHRG-113-HM00-Wstate-DavisE-20130509.pdf.

on."[30] This story reported that Boston residents were saying "it's never going to be the same," and "it will never be the same again."[31] A month after the bombings, Gail Seidman, a local business owner was quoted as saying, "[w]e are all just doing the best we can. But we will never be the same."[32] At the same time, Cambridge City Councilor Craig Kelley remarked, "[t]his is a game changer."[33]

Even five years later, Mayor Walsh confirmed these events had deeply affected our community when he said, "[o]n April 15, 2013, our city changed forever . . . ."[34] It is thus little wonder responsible voices expressed concern, at the commencement of jury selection, whether jurors chosen from the greater Boston community could be sufficiently detached and disinterested. Because "[t]he gruesome sights of that day two Aprils ago are still fresh in the minds of many," Gusina Tremblay, a juror who convicted Whitey Bulger, said, "[y]ou remember

---

30 Lisa Kocian & Peter Schworm, *Along Marathon Route, Grief and Anger Run Deep*, THE 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.

31 *Id.*

32 Meghan E. Irons, *Cambridge Tries to Heal from Marathon Horror*, THE BOSTON GLOBE (May 13, 2013), https://www.bostonglobe.com/metro/2013/05/12/cambridge-tries-heal-make-sense-bombing-horror/uEyVs89m8tOrzICc1POeAJ/story.html.

33 *Id.*

34 Sarah Betancourt & Vaishnavee Sharma, *'Our City Changed Forever': Boston Marks 5 Years Since Marathon Bombing*, NBC San Diego (Apr. 15, 2018, 5:09 AM), https://www.nbcsandiego.com/news/sports/Boston-Marks-5th-Anniversary-of-Marathon-Bombings-479801993.html.

where you were that day. . . . I don't see how anybody can walk in and say they could be impartial."[35]

Given all of this, we were not surprised to learn that of the more than 1300 citizens called for jury service, more than 99% confirmed they had been exposed to coverage of the case, and that nearly 70% viewed Tsarnaev as guilty before hearing a single piece of evidence.[36] It would have been surprising had the numbers been lower.

II. The Unique Circumstances Resulting from The Bombing and All That Came Afterwards Preclude the Seating of an Impartial Jury in Boston

The Supreme Court's consideration of when a venue change is necessary to sit a panel of impartial jurors has arisen primarily in the context of violent street crime or sensational fraud cases that attracted sustained and often highly prejudicial media coverage. *See e.g.*, *Irvin v. Dowd*, 366 U.S. 717 (1961) (prosecution for one homicide but suspected of involvement in several others); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (bank robbery and abduction of three employees; each assaulted and one stabbed to death); *Estes v. Texas*, 381 U.S. 532 (1965) (highly publicized, partially televised, land swindling charges); *Sheppard v.*

---

[35] Nestor Ramos, *With Tsarnaev Case, Civic Duty May Impose a Heavy Burden*, THE BOSTON GLOBE (Jan. 12, 2015), https://www.bostonglobe.com/metro/2015/01/12/for-tsarnaev-jurors-civic-duty-will-heavy-burden/CzJfBfhsXiUEzHktQvo7XO/story.html.

[36] Opening Brief for Defendant-Appellant, *United States v. Dzhokhar A. Tsarnaev*, No. 16-6001, United States Court of Appeals for the First Circuit, at p. 48.

Maxwell, 384 U.S. 333 (1966) (prominent doctor charged with wife's murder with highly prejudicial media and television coverage); *Murphy v. Florida*, 421 U.S. 794 (1975) (flamboyant defendant faced serious criminal charge amidst much publicity); *Patton v. Yount*, 467 U.S. 1025 (1984) (retrial of sensational murder case of student by teacher four years after first trial); *Mu'Min v. Virginia*, 500 U.S. 415 (1991) (capital murder prosecution in large Northern Virginia community); *Skilling v. United States*, 561 U.S. 358 (2010) (massive fraud victimizing hundreds in Houston). In these cases, the Court has found relevant: (1) the size of the community, compare *Rideau* (relatively small parish) with *Mu'Min* (large metropolitan community); (2) whether highly prejudicial information was published in advance of trial, compare *Rideau* (videotape confession shown on television news shortly before trial) with *Skilling* (highly critical coverage but no confession); (3) how soon did the case come to trial after extensive coverage, compare *Rideau* (two months) with *Yount* (four years); and (4) jury verdicts, compare *Estes* (convicted of all charges) with *Skilling* (acquitted of some charges).

Requiring consideration of all relevant circumstances, the Court has determined that in some circumstances, the risk of prejudice can be established without review of juror *voir dire* content. That was the Court's approach in *Rideau* where the defendant's videotaped confession was repeatedly shown on local TV broadcasts in a relatively small parish in the weeks prior to trial. *See Rideau*, 373

U.S. at 726. (". . . 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 depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. 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.")(emphasis in original)[37]. *See also*, *Estes*, 381 U.S. at 543, and *Sheppard*, 384 U.S. at 352. But in most cases, the Court will examine all the circumstances, including the *voir dire*. Such review led the Court in *Irvin* to conclude the overwhelmingly prejudicial publicity had sufficiently penetrated the jury pool to require reversal. *See Irvin*, 366 U.S. at 727-28 (combination of adverse pretrial publicity with judge having to excuse 268 of 430 juror for cause due to fixed opinions as to guilt plus 90% of remaining jurors held some opinion as to guilt). Yet in *Mu'Min*, even though 8 of the 12 jurors selected had heard of the case and media had published stories highly critical of *Mu'Min*, none of the jurors indicated

[37] Even in cases of sensational person-on-person crime, a community may remain deeply scared for decades. Rideau was tried a fourth time in 2005 in Calcasieu Parish, the site of the crime. Even though four decades had passed, the trial judge *and* prosecution agreed no jury from that parish should sit. A jury from Ouachita Parish was chosen and brought to Calcasieu Parish for trial. *See State v. Rideau*, 943 So. 2d 559, 562-564 (La. Ct. App. 2006).

any fixed view on guilt and thus it was not error to deny the venue motion. *See* 500 U.S. at 428.

Importantly, none of these cases arise from acts of terror, or from circumstances where the entire community became participants in the crime investigations and the healing of their neighbors. A case that carefully considers and weighs these powerful and unique circumstances is Judge Matsch's opinion addressing the Oklahoma City Bombing, *United States v. McVeigh*, 918 F.Supp. 1467 (W.D. Okla. 1996). In the wake of the bombing of the federal building in Oklahoma City, which is in the Eastern District of Oklahoma, a local federal judge ordered venue changed to Lawton, 87 miles away in the Western District. Because the courthouse there could not host a large trial, the government suggested moving the case to Tulsa, 106 miles away in the Northern District of Oklahoma. The defense objected, asserting that many in the entire state had been affected both by the acts of terror and saturating prejudicial publicity. It urged venue be changed outside of Oklahoma entirely.

Judge Matsch understood the law required that he balance the "measureable effects" of the bombing – the death of 168 persons, injuries to hundreds of others, the destruction of the Murrah Building and collateral economic damage could be reliably tallied up and considered with the much more difficult assessment of the "immeasurable effects on the hearts and minds of the people of Oklahoma from the

blast and its consequences . . .” 918 F.Supp. at 1469. In doing so, we believe he identified and properly assessed the uniquely important circumstances that pertain when a community sustains a deadly terrorist attack.

First, he identified that while Art. III of the Constitution provides that criminal trials be held in the state where the crimes were committed, and the Sixth Amendment provides the right to an impartial jury in the state and district where the crime occurred, the right to fundamental due process and to receive an impartial jury trumps the requirement that trial take place where the crime was committed. *See*, 918 F.Supp. at 1469. In *McVeigh*, with the motion to change venue, McVeigh gave up his right to be tried locally.

Second, Judge Matsch determined that among circumstances important to weigh were “news coverage of the explosion, the rescue effort, the investigations by law enforcement agencies and media sources, the arrests of the defendants, court proceedings and community activities.” *Id*. at 1470. The record in *McVeigh* shows that while, initially, national and local media coverage “was extremely comprehensive,” as time passed, “differences developed in both the volume and focus of the media coverage in Oklahoma” compared with out of state coverage. *Id*. at 1470-71. “[C]ontinuing coverage of the victims and their families” from local media did not stop. *Id*. at 1471. The record there showed Oklahomans had “greater informational needs” that “resulted from a perception that Oklahomans are

united as a family with a spirit unique to the state." *Id*. Local media aired "numerous reports of how the explosion shook the entire state, and how the state . . . pulled together in response." *Id.*

Given this unique situation, Judge Matsch found that "the possible prejudicial impact" of the publicity "is not something measurable by any objective standards." *Id.* at 1473. He also rejected expert opinion that suggested "*voir dire* of the jury panel is the only technique available to minimize the effects of pre-trial publicity. . . ." *Id.* He determined that trust in jurors' ability to self-report effects of the bombing experience and subsequent media coverage "diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience." *Id.* These concerns were particularly important where the Government asked the jury to impose death sentences in the wake of conviction. *Id.* at 1474.

Weighing all of these circumstances, the judge determined there was a substantial risk that jurors in Oklahoma – anywhere in Oklahoma – would not and could not be sufficiently disinterested and impartial. He ordered the case moved to Denver, Colorado.

In our view, this roadmap correctly considers and weighs the circumstances that should have guided the court below. Greater Boston was every bit as much affected by the bombing and the events that followed as were our brothers and sisters in Oklahoma in the wake of the horrific Murrah Building bombing. And, as we show below, the *voir dire* process is not suited to reliably detect bias under these unique circumstances.

A. The Voir Dire Process Cannot Reliably Identify Impartial Jurors in Highly Unusual Circumstances Such as These, Where Most Jurors Were Deeply Affected by These Extraordinary Traumatic Events.

Our jury trial system depends on unbiased jurors, who can resolve cases fairly and without prejudice toward the parties. *See Irvin*, 366 U.S. at 722. Jurors who cannot perform this function impartially are supposed to be identified and eliminated during the *voir dire* process, which generally suffices to identify jurors who suffer from disqualifying bias.[38] But rare trials, like this one, involve extraordinary events that have produced a widespread community bias, which affects all potential jurors both consciously and unconsciously. As courts and researchers have long recognized, this form of bias is not amenable to detection through the *voir dire* process. In highly unusual cases like this one, therefore, even

[38] *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017) (noting importance of "careful voir dire" for preventing racial bias in jury deliberations); *see also McVeigh*, 918 F. Supp. at 1473.

the most detailed *voir dire* is an ineffective anti-bias remedy; only a change of venue will allow for an impartial jury.

1. *The voir dire process functions well in the normal case, where potential juror contamination bias is rare, easily identifiable and easily self-reportable*

In most criminal trials, the potential jury pool has not been exposed to the events that they will ultimately need to resolve.[39] Potential jurors do not have fixed views on the guilt or innocence of the accused, the nature of the evidence or the credibility of witnesses, or potential punishment that cannot be effectively addressed through proper *voir dire*.[40] To be sure, jurors are not constitutionally required to be wholly ignorant of the facts of a case that has attracted some publicity and indeed, a jury pool that consists entirely of individuals who have ignored the larger world would have problems of its own. The Supreme Court explained many years ago that "[i]n these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of

---

[39] *See Skilling*, 561 U.S. at 382 (reasoning that large, diverse juror pool in city of 4.5 million allowed for effective voir dire for financial crimes case); *see also Mu'Min*, 500 U.S. at 429 (reasoning that large population and number of similar crimes in community allowed for effective voir dire).

[40] *See Skilling*, 561 U.S. at 382.

the case."[41] As a result, there is no rule that jurors be hermetically sealed from the community, or that they know nothing of the events that will ultimately form the subject of the trial. They simply must be free from disqualifying bias.

In most such cases, even where some exposure to the facts has occurred, potential jurors are capable of self-reporting their views, and in the process, of revealing disqualifying bias if it exists.[42] This is the premise of *voir dire*, which "is based on the assumption that prospective jurors will self-report bias and respond truthfully to questions signaling any prejudicial preconceptions from outside influences so that bias can be identified . . . ."[43] Indeed, because many potential jurors wish to avoid the burden of jury duty in routine cases, it is common for jurors to over-report things that they believe will be disqualifying, such as strongly formed views about police, or the criminal justice system, or civil plaintiffs, or

---

41 *Irvin*, 366 U.S. at 722.

42 *See, e.g.*, Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 Chi.-Kent L. Rev. 1061, 1088 (2003) (noting numerous struck prospective jurors' post hoc admissions that "service would have been hard for them" due to personal biases and "outcome was probably for the best"); *see also* Emily F. Moloney, *As Good As It Gets: Why Massachusetts Should Not Adopt an Attorney-Conducted Voir Dire Process for Civil Trials*, 39 Suffolk U. L. Rev. 1047, 1067 (2006) (noting increased effectiveness of *voir dire* system given certain safeguards).

43 Christina A. Studebaker and Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 Psychol. Pub. Pol'y & L. 428, 439 (1997).

corporate defendants, or the laws that will potentially be the subject of the trial.[44] In those cases, the *voir dire* process generally works well to identify those jurors who are incapable of being fair and impartial. Moreover, state and federal justice systems provide the parties with additional peremptory strikes, which allow the parties to eliminate potential jurors they believe will be unfair, even if the *voir dire* has not produced tangible evidence of juror bias. These protections are generally sufficient to ensure that verdicts are not contaminated by juror bias and are instead resolved by jurors capable of examining the case on the merits alone.

2. ***This is the unusual case in which juror contamination is widespread and, because of the nature of the trauma, very difficult to identify and self-report.***

A few, unique cases fall outside the normal paradigm. As the Supreme Court has long recognized, rare, high-profile cases may produce a "pattern of deep and bitter prejudice . . . throughout the community."[45] More recently, the Supreme Court has reaffirmed that in some cases "extraordinary local prejudice will prevent a fair trial." *Skilling*, 561 U.S. at 378 (2010) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

---

[44] William H. Farmer, *Presumed Prejudiced, But Fair?* 63 Vand. L. Rev. En Banc 5, 8 (2010).

[45] *Irvin*, 366 U.S. at 727-28.

> When an entire community has been affected by a crime, voir dire can be a poor means of identifying local prejudice.[46] As the Supreme Court explained, in cases where community prejudice runs high, jurors may be able to "sincere[ly]" state that they can "be fair and impartial," but "the 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."[47]

Individual jurors may thus feel some pressure to minimize their bias, especially in combination with the "hero effect," by which potential jurors in some high profile cases feel the need "to avenge their community and later boast to their friends and neighbors that they played a part in bringing the 'evildoers' to justice."[48] Any bias may also be "unrecognized in those who are affected by it,"[49] and thus impossible to articulate during the *voir dire* process. In such circumstances, the combination of a traumatic, community-wide event and the strong, unconscious emotional responses it can create, can lead to a situation in

---

46 Farmer, *supra* note 42.

47 *Irvin*, 366 U.S. at 728.

48 Farmer, *supra* note 42 at 8-9.

49 *McVeigh*, 918 F. Supp. at 1472.

which potential jurors have "a sense of obligation to reach a result that will find general acceptance in the relevant audience."[50]

All of these unique factors existed here. The attack in this case was uniformly viewed as a community-wide event – a deliberate and purposeful attack upon the greater Boston area itself. In addition to the four homicide victims, hundreds more were maimed or seriously injured, and many citizens were affected deeply by the many horrifying and tragic events over that four-day period. A very large number of the jury pool knew someone who was victimized, generously contributed to victim fund(s), or became involved in "Boston Strong" – a shorthand phrase for "a united front in the face of a threat."[51]

Voir dire is singularly ineffective for identifying bias in the face of this "united front." Where bias is community-wide and unconscious, and there are strong psychological reasons for potential jurors to deny it so that they can avenge their community and "bring the evildoer to justice;" no series of questions can meaningfully separate the small number of jurors who can actually render a fair verdict – assuming this handful of jurors actually exists – from the many who cannot. In such circumstances, the fundamental premise of *voir dire* is lacking, as jurors are incapable and unmotivated to self-report prejudicial preconceptions,

---

50 *Id.* at 1473.

51 Zimmer, *supra* note 21.

making disqualifying bias difficult, if not impossible, to identify. Because the present, highly unique case exemplifies these principles, it was constitutional error to rely on voir dire as an adequate means of jury selection.

CONCLUSION

For these reasons, we conclude this important trial should have been held in a jurisdiction other than Boston.

DATED: January 3, 2019

Respectfully submitted,

/s/ Timothy P. O'Toole

George H. Kendall, Esq.
Court of Appeals (pending)
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza
New York, NY 10112
Tel: (212) 872-9800
george.kendall@squirepb.com

Timothy P. O'Toole
Court of Appeals (#1187070)
Miller & Chevalier
900 16th Street, NW
Washington, DC 20006
Tel: (202) 626-5800
totoole@milchev.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,830 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5)and type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Timothy P. O'Toole
TIMOTHY P. O'TOOLE

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2019, this document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, including counsel for all parties. I further certify that nine bound copies will be mailed to the Clerk of Court if the Court grants the motion for acceptance of this brief.

/s/ Timothy P. O'Toole
TIMOTHY P. O'TOOLE

ADDENDUM

LIST OF *AMICI CURIAE*

Robert M. Bloom has taught law at Boston College Law School for more than forty years. Upon his graduation from the law school in 1971, he served as a Reginald Heber Smith fellow in Savannah, Georgia practicing civil rights law. He returned to the law school in 1973 at the request of Dean Richard Huber to join the BC Legal Assistance Bureau as a staff attorney. Throughout his career, he has taught courses on civil and criminal procedure and lectured around the globe on the American jury trial. He has authored or co-authored 14 books and more than thirty articles, mostly in the areas of civil and criminal procedure.

Mark S. Brodin is Professor and Michael and Helen Lee Distinguished Scholar at Boston College Law School. A graduate of Columbia College and Law School, he clerked for U.S. District Judge Joseph L. Tauro (D. MA.) before joining the Boston Lawyers Committee for Civil Rights as staff attorney. Professor Brodin has published extensively in the areas of civil and criminal procedure, evidence, litigation, and employment discrimination. He served for brief periods as a public defender in Boston and a prosecutor in Norfolk County.

James Doyle, of counsel to Bassil & Budreau in Boston, Massachusetts, is a veteran litigator and writer, and the former head of the statewide Public Defender Division of the Committee for Public Counsel Services in Massachusetts. His experience includes constitutional litigation, numerous homicide trials and appeals, the representation of crime victims, and important civil rights cases. He is the author of *True Witness*, (2005) the history of the collision between the science of memory and the legal system and the co-author (with Elizabeth Loftus) of *Eyewitness Testimony: Civil and Criminal*, the principal treatise for lawyers in eyewitness cases. He has published numerous articles on evidence, race in criminal justice, and capital punishment. He was a faculty member at the Georgetown University Law Center, where he also served as Deputy Director of the Criminal Justice Clinic. He was the founding Director of The Center For Modern Forensic Practice at the John Jay College of Criminal Justice and its Arson Screening Project. He is an Advisor to the American Law Institute's Project on Policing and a consultant to the National Institute of Justice. He received his B.A. from Trinity College, J.D. from Northwestern University School of Law, and LL.M from Georgetown University Law Center, where he was an E. Barrett Prettyman/LEAA Fellow.

Fernande R.V. Duffly is a 1978 graduate of Harvard Law School. She began her career as a litigator at Warner & Stackpole and became its first partner of color in 1986. In 1992, she was appointed associate justice of the Massachusetts Probate

and Family Court Department, where she served until 2000 when she was appointed associate justice of the Massachusetts Appeals Court. In 2011, Justice Duffly was confirmed as an associate justice of the Supreme Judicial Court of the Commonwealth of Massachusetts. Justice Duffly retired from the bench in 2016 and is presently teaching law at Northeastern University School of Law.

Daniel S. Medwed is a University Distinguished Professor of Law and Criminal Justice at Northeastern University School of Law. He teaches Criminal Law, Evidence, and Advanced Criminal Procedure: Wrongful Convictions and Post-Conviction Remedies. He is the author of *Prosecution Complex: American's Race to Convict and Its Impact on the Innocence* (New York University Press, 2012) and an edited collection, *Wrongful Conviction and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge University Press, 2017). He has published numerous articles focusing upon the criminal justice system. He has previously taught at the University of Utah School of Law and Brooklyn Law School, and early in his career, was an associate appellate counsel at the Legal Aid Society, Criminal Appeals Bureau, of New York City. He received his undergraduate degree from Yale College and law degree from Harvard Law School.

Michael Meltsner is a graduate of Oberlin College and the Yale Law School and has been a resident of the Boston area for forty years. After serving as a professor of Law at Columbia Law School he became the George J. and Kathleen Waters Matthews Distinguished University Professor of Law (and former dean) at Northeastern University School of Law. An experienced Supreme Court advocate, he was first assistant counsel to the NAACP Legal Defense Fund in the 1960s. His book *Cruel and Unusual: The Supreme Court and Capital Punishment* is regarded as the authoritative history of the litigation leading to the Supreme Court's 1972 decision in *Furman v Georgia*.

Alan Morse is a lifelong resident of the Commonwealth and a graduate of Harvard College and Harvard Business School. After thirty-two years as a commercial banker, he served four years in state government including two as Commissioner of Banking. After retiring as chairman of New England's largest HMO, he taught high school math in the Boston public schools for four years and thereafter became Chairman of the Town of Brookline School Committee.

Christopher Winship is the Diker-Tishman Professor of Sociology at Harvard University and a member of the senior faculty at the Harvard Kennedy School of Government. He also is a faculty associate of the Institute for Quantitative Social Science, the Program in Criminal Justice, the Ph.D. Program in

Organizational Behavior, the Center for Public Leadership, the Safra Center for Ethics, and the Program for Social Inequality. Since 1995, he has edited *Sociological Methods & Research* and co-authored with Steve Morgan the widely used treatise on causal inference, *Counterfactuals and Causal Inferernce: Methods and Principles for Social Research.* He has resided in the Boston area since 1992.