PROTECTING PROCEDURAL SAFEGUARDS IN FEDERAL CAPITAL TRIALS: *UNITED STATES V. TSARNAEV*

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INTRODUCTION

On April 15, 2013, two bombs exploded near the finish line of the Boston Marathon, killing three innocent victims and injuring hundreds.[1] Even Bostonians not directly impacted by the bombing were left traumatized.[2] Following the tragedy, sales of t-shirts reading "Boston Strong" soared,[3] and the community came together with a common desire to bring the perpetrators to justice.[4] Bostonians celebrated when then-teenager and alleged bomber Dzhokhar Tsarnaev ("Dzhokhar") was captured.[5] The media reported

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1. *Boston Marathon Terror Attack Fast Facts*, CNN (Mar. 23, 2021, 9:57 AM), https://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/index.html.

2. *See* E. Alison Holman et al., *Media's role in broadcasting acute stress following the Boston Marathon bombings*, 111 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 93, 96–97 (2014) (finding those who were only indirectly exposed to the bombings through repeated media coverage were more strongly associated with reports of acute stress than those who were directly exposed by being present).

3. Steve Annear, *Emerson Students That Coined 'Boston Strong' Phrase Organizing Giant Photo Shoot at Copley*, BOS. MAGAZINE. (Jun. 10, 2013, 12:12 PM), https://www.bostonmagazine.com/news/2013/06/10/emerson-students-boston-strong-tshirts/.

4. *See* U.S. v. Tsarnaev, 968 F.3d 24, 50–51 (1st Cir. 2020) (quoting comments made on the social media pages of one of the jurors, in which one commenter described the juror's opportunity to hear the case as "awesome" and another encouraged the juror to "send him to jail where he will be taken care of").

5. *Id.* at 51 (describing the tweet posted by another juror as celebrating with the city of Boston when Dzhokhar was captured); Zachary T. Sampson & Jaclyn Reiss, *Cheers and jubilation follow apprehension of second suspect*, BOS. GLOBE (Apr. 20, 2013, 1:03 AM), https://www.bostonglobe.com/metro/2013/04/20/boston-watertown-erupt-with-cheers-relief-after-capture-terror-suspect/O3MjKHppLKUH6fqOioha3M/story.html.

extensively on the tragedy.[6] Despite such extensive media coverage and community trauma, Dzhokhar's capital trial was conducted in the heart of Boston. His defense team argued jurors selected were from the same pool of people emotionally affected by the tragedy.[7] Moreover, these jurors did not receive a complete picture of the events leading up to the crime.[8]

The following Commentary considers the constitutionality of (1) the trial court's exclusion of relevant mitigating evidence during the trial's penalty phase and (2) the imposition of a death sentence by the Supreme Court during a moratorium on federal executions. In the United States District Court for the District of Massachusetts, the jury ultimately convicted Dzhokhar of thirty counts and recommended death sentences for six of the capital offenses.[9] On appeal, the First Circuit vacated these death sentences and remanded the case for a new sentencing hearing with a different jury.[10] First, the Court of Appeals held that the voir dire used to seat the jury was insufficient.[11] Second, and particularly relevant here, the Court of Appeals held that the district court erred by excluding reliable mitigating evidence from the sentencing phase of Dzhokhar's trial.[12] The excluded evidence was specifically directed at a set of prior murders allegedly committed for jihadist purposes by Dzhokhar's older, influential brother and co-perpetrator in the bombings.[13] Under the Trump Administration, the federal government appealed the First Circuit's vacatur.[14] The case was granted certiorari in March of 2021, following President Biden's

6. *See* Holman, *supra* note 2, at 95 (finding some study participants from the area watched coverage of the marathon bombings for at least six hours a day during the week after the bombings).

7. Katharine Q. Seelye, *Change of Venue Denied for Boston Marathon Bombing Suspect*, N.Y TIMES (Jan. 3, 2015), https://www.nytimes.com/2015/01/04/us/change-of-venue-denied-for-boston-marathon-bombing-suspect.html.

8. *See* Brief of Respondent at 1–2, No. 20-443 (filed Aug. 20, 2021) (arguing that the court's exclusion from evidence about the defendant's violent older brother left the jury with an incomplete picture of the defendant's culpability).

9. Petition for Writ of Certiorari at 2, U.S. v. Tsarnaev, No. 20-443 (filed Oct. 6, 2020).

10. *Id.* at 11.

11. *See id.* ("[T]he 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.").

12. Brief of Respondent, *supra* note 8, at 11.

13. *Id.*

14. Amy Howe, *Justices will decide whether to reinstate death penalty for Boston Marathon bomber*, SCOTUSBLOG (Mar. 22, 2021, 5:06 PM), https://www.scotusblog.com/2021/03/justices-will-decide-whether-to-reinstate-death-penalty-for-boston-marathon-bomber/.

inauguration.[15]

During the October 2021 term, the Supreme Court heard oral arguments from Dzhokhar's counsel and the federal government on both issues decided by the First Circuit.[16] The Court's ruling will likely determine how much deference is given to the decisions of federal trial courts on issues directly linked to the fairness of procedures used in federal capital trials.[17] More narrowly, the Court's decision will guide future appellate courts in determining how much deference to give trial court decisions related to the introduction of mitigating evidence during the sentencing phase of a capital trial.[18] The Court should ensure procedural safeguards are consistently followed to wholly protect the constitutional rights afforded to capital defendants, regardless of the atrocities committed. When the potential punishment is of the utmost severity and places a defendant's life on the line, such safeguards are indispensable in order to maintain consistency with the Constitution.

I. FACTS

Dzhokhar is of Chechen descent and emigrated to the United States at the age of eight in 2002.[19] During his childhood, Dzhokhar admired his older brother, Tamerlan Tsarnaev ("Tamerlan").[20] He often agreed to go along with Tamerlan's plans, as is custom for a younger brother in Chechen culture.[21] For a time, neither brother held any radicalized political or religious beliefs.[22] In 2011, however, just as Dzhokhar was finishing high school, Tamerlan began delving into the world of Islamic extremism.[23]

In 2011, on the tenth anniversary of the 9/11 attacks, Tamerlan's close friends were found robbed and murdered in a Waltham

15. *Id.*

16. The Supreme Court will likely reach a decision on the case by the summer of 2022. *Date Set for Supreme Court to Hear Boston Marathon Bomber Death Penalty Case*, NBC BOS. (Jul. 14, 2021, 2:18 AM), https://www.nbcboston.com/news/local/date-set-for-supreme-court-to-hear-boston-marathon-bomber-death-penalty-case/2428758/.

17. *U.S. Supreme Court to Review Federal Appeals Court Decision that Overturned Death Sentence in Boston Marathon Bombing*, DEATH PENALTY INFO CTR. (Mar. 23, 2021), https://deathpenaltyinfo.org/news/u-s-supreme-court-to-review-federal-appeals-court-decision-that-overturned-death-sentence-in-boston-marathon-bombing.

18. *Id.*

19. Brief of Respondent, *supra* note 8, at 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

apartment.[24] Dzhokhar later told his friend that Tamerlan had committed jihad through his involvement in the killings.[25] Tamerlan's computer contained files stating that nonbelievers could be robbed to support jihad.[26] Tamerlan's friend, Ibragim Todashev ("Todashev"), later admitted to investigators that Tamerlan had slit the throats of the Waltham victims. During his confession, however, Todashev attempted to attack the investigators and was killed.[27]

In early 2012, Tamerlan visited Russia for several months to join a violent jihadi group.[28] Before he left and throughout his visit, Tamerlan distributed extremist propaganda to Dzhokhar, attempting to radicalize him.[29] Upon Tamerlan's return to the United States later that year, Dzhokhar visited him during a college break, and the pair viewed bomb-making instructions in an Al Qaeda magazine.[30] It was at this point that Dzhokhar told a friend he wanted to "bring justice for [his] people."[31]

The Boston Marathon bombings occurred on April 15, 2013, when the Tsarnaev brothers detonated two bombs at the finish line.[32] Two adults and a child were violently killed as their loved ones held them.[33] Hundreds of others lost limbs or were embedded with shrapnel, resulting in injuries that would disable them for the rest of their lives.[34] The brothers left the scene, nonchalantly stopping at a grocery store on their way.[35] Dzhokhar returned to college and continued his normal routine the following day.[36]

On April 18, the FBI released images of the brothers and turned to the public to find them.[37] That night, the brothers loaded Tamerlan's car with bombs and a handgun and left his home in Cambridge.[38] Soon after, the brothers shot and killed a campus police officer at the

24. *Id.*
25. *Id.*
26. *Id.* at 5.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 5–6.
31. *Id*.
32. *Id.*
33. U.S. v. Tsarnaev, 968 F.3d 24, 36 (1st Cir. 2020).
34. *Id.* at 36–37.
35. *Id.* at 37.
36. *Id.*
37. *Id.*
38. *Id.*

Massachusetts Institute of Technology and drove to another suburb where they hijacked a car.[39] Authorities were able to track the location of the hijacked car, eventually leading to a shootout between the brothers and police officers.[40] Dzhokar drove over his brother while attempting to flee the scene, resulting in Tamerlan's death hours later.[41] On April 19, a homeowner found Dzhokhar hiding inside his stored boat.[42] Authorities were called and arrested Dzhokhar.[43] Inside the boat, Dzhokhar had carved a manifesto, explaining his actions as revenge for the killing of Muslims by the United States government.[44]

From the time of the bombings and throughout the aftermath of Dzhokhar's capture, the tragedy received widespread publicity from the press and social media platforms.[45] Images of the aftermath and statements from family members of victims and public officials calling for the execution of the perpetrators were prevalent.[46] When Dzhokhar was apprehended, Bostonians united in solidarity.[47] The slogan "Boston Strong" was adopted and used to fundraise for the victims.[48]

II. PROCEDURAL HISTORY

A Boston federal grand jury indicted Dzhokhar on thirty counts, including charges for murder, using a weapon of mass destruction, conspiracy, and possession and use of a firearm.[49] Seventeen of the counts were death-eligible, and the government informed Dzhokhar they would seek the death penalty for each count.[50] Due to the pretrial publicity surrounding the case, especially in the Boston area, Dzhokhar moved for a change in venue for the guilt phase of the trial.[51] The judge denied the motion.[52]

In exchange for denying Dzhokhar's motion for a change in venue,

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39. *Id.*
40. *Id.* at 38.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Brief of Respondent, *supra* note 8, at 7.
46. *Id.*
47. *See Tsarnaev*, 968 F.3d at 110 (Torruella, J., concurring) (discussing the purpose of the slogan "Boston Strong" and quoting the Boston Police Commissioner as telling Congress the terrorist attack caused Boston "to band together as a city . . . in a time of crisis").
48. *Id.* at 111.
49. *Id.* at 39 n.9 (listing all charges from the 30-count indictment).
50. *Id.* at 40.
51. *Id.* at 41.
52. *Id.*

the trial judge attempted to conduct an extensive voir dire to screen jurors for any preexisting biases.[53] Initially, both parties encouraged the district court to ask jurors content-specific questions about the publicity or events they had seen, heard, read, or experienced.[54] The government, however, later opposed such questions.[55] During the first screening of the voir dire, a questionnaire was presented to potential jurors that asked about the amount of coverage of the bombings they had viewed, and whether that coverage had led them to form an opinion about Dzhokhar's guilt or the punishment he should receive.[56] In the second round, the court followed up on the answers jurors had given to the questionnaire.[57] Specifically, Dzhokhar's counsel asked the court to inquire into what each juror had heard, read, or seen about the bombing and the subsequent events.[58] The court declined this request, stating that answers to these content-specific questions that were separate from those asked in the questionnaire would lead to inefficiency and be unreliable.[59] By the end of the voir dire, twelve jurors were seated who had confirmed that they had not paid much attention to the pretrial publicity and would be able to set aside any personal biases or prior views.[60] The court, however, was still unaware of the specific content that nine of the jurors had seen.[61] The jurors eventually convicted Dzhokhar on all counts, despite arguments by his counsel to show that his radicalization stemmed from his brother.[62]

The same jury convened for the penalty phase of the trial.[63] To establish a theory of mitigation, Dzhokhar's counsel argued that he had only committed the crimes because of his older brother's influence.[64] The key to this argument was to show Tamerlan's involvement and lead role in the Waltham murders.[65] To discover potential admissible

53. *Id.*
54. Brief of Respondent, *supra* note 8, at 7.
55. *Id.* at 8.
56. Petitioner's Writ of Cert., *supra* note 9, at 7.
57. *Id.*
58. *Id.*
59. *Id.* at 7–8.
60. *Id.* at 8
61. Brief of Respondent, *supra* note 8, at 8.
62. U.S. v. Tsarnaev, 968 F.3d 24, 41 (1st Cir. 2020).
63. *Id.*
64. *Id.* at 66.
65. *See* Brief of Respondent, *supra* note 8, at 19 ("The Waltham evidence was highly probative of Dzhokhar's lesser culpability."). *See also* discussion *infra* Part IV.A.1 (summarizing Dzhokhar's basis for his argument at the trial court).

evidence of Tamerlan's unescapable influence, Dzhokhar's counsel requested that the court make available all reports that contained statements from Todashev on the Waltham murders.[66] The government opposed this request, citing *Brady v. Maryland*[67] and arguing that the requested materials were non-discoverable.[68]

Ultimately, the court agreed with the government, finding it sufficient that the government generally disclosed the content of Todashev's statement.[69] This decision, however, prevented Dzhokhar's counsel from learning details about the Waltham crimes which, as disclosed by Todashev, revealed that Tamerlan took the lead in the murders.[70] Additionally, the court granted the government's motion in-limine to bar Dzhokhar's counsel from presenting any evidence of the Waltham murders in general.[71] From its own review of the evidence disclosed by investigators, the court concluded that it did not show for certain that Tamerlan was the key actor in the crimes, and that its introduction may "be confusing to the jury . . . without [having] any probative value."[72]

Despite efforts by the defense to show that Tamerlan's influence was key to Dzhokhar's criminal conduct, the mitigation theory was greatly weakened by the trial court's decision to exclude the Waltham evidence.[73] Contrarily, the government succeeded in arguing Tamerlan and Dzhokhar were equally culpable.[74] Using the weakened mitigation evidence presented, the government successfully argued that the defense only showed that Tamerlan was "bossy" and did not prove that Tamerlan "coerced or controlled" Dzhokhar.[75] The jury recommended the death penalty for six of the death-eligible counts, which the judge

66. *Tsarnaev*, 968 F.3d at 64.

67. 373 U.S. 83, 89 (1963) (holding that the government is only required to disclose evidence from a criminal investigation if such information is material to a defendant's punishment).

68. *Tsarnaev*, 968 F.3d at 64–65.

69. *Id.* at 65.

70. *See id.* (describing aspects of Todashev's disclosure that showed Tamerlan had a coercive influence over those that interacted with him and lead role in the Waltham murders, including that Tamerlan bought the tools for the crime, Tamerlan instructed Todashev to duct tape one of the victims, Tamerlan made the decision to kill the men despite Todashev only agreeing to robbing them, and Talerman slashed the victim's throats).

71. *Id.* at 66.

72. *Id.*

73. *See id.* at 66–67 (reducing the argument made by Dzhokhar's counsel to mere examples of Tamerlan occasionally breaking minor rules, being slightly and occasionally argumentative, and, at worst, possibly being physically abusive to his girlfriend who later married him).

74. *Id.* at 67.

75. *Id.*

formally imposed alongside several life terms for the remaining counts.[76] Consequently, Dzhokhar appealed to the First Circuit.[77]

The Court of Appeals affirmed several of Dzhokhar's convictions, but vacated the imposed death sentences on two grounds and remanded the case for a rehearing on the sentencing proceedings with a new jury.[78] First, the Court of Appeals relied on *Patriarca v. United States*[79] to hold that district court judges were required to "elicit 'the kind and degree' of each prospective juror's 'exposure to the case or the parties,' if asked by counsel."[80] Using this standard, the court concluded that the district court abused its discretion in the voir dire when it denied defense counsel's requests to ask content-specific questions about the publicity jurors had seen.[81] In reaching this conclusion, the First Circuit recognized that the court failed to consider content-specific questions about pretrial publicity to be constitutionally required during voir dire.[82] Nevertheless, the circuit court found that lack of a constitutional requirement does not prevent a federal appellate court from using its supervisory powers to be more involved in setting the standards for the voir dire used by federal trial courts.[83] Resultingly, in regard to the sentencing phase of Dzhokhar's trial, the circuit court found that the government did not prove beyond a reasonable doubt that the trial court's denial to ask content-specific questions was harmless.[84]

Second, the Court of Appeals held that the district court abused its discretion when it barred Dzhokhar's counsel from presenting mitigating evidence from the Waltham murders during the penalty phase.[85] Unlike the district court, the First Circuit concluded that evidence from the Waltham murders was "highly probative of Tamerlan's ability to influence Dzhokhar."[86] In reaching this

76. *Id.* at 42.
77. *Id.*
78. Petitioner's Writ of Cert., *supra* note 9, at 2. Consequently, the First Circuit found it did not need to decide whether the trial court abused its discretion by deciding that the venue in Boston was proper. *Tsarnaev*, 968 F.3d at 56.
79. 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969).
80. *Tsarnaev*, 968 F.3d at 35 (quoting Patriarca, 402 F.2d at 318).
81. *Id.* at 58.
82. *Id.* at 60 (citing Mu'Min v. Virginia, 500 U.S. 415 (1991)).
83. *Id.*
84. *Id.* at 62.
85. *Id.* at 73.
86. *Id.* at 69.

conclusion, the circuit court determined that the Waltham murders showed Tamerlan's ability to commit brutal acts, that he was able and willing to commit jihad without Dzhokhar's help, and that at least one juror could have found Dzhokhar did not merely find Tamerlan "bossy" but feared what he would do to him if he did not help with the bombings.[87] Thus, the Court of Appeals rejected the government's contentions that the evidence was not relevant.[88]

The government filed its petition for writ of certiorari in October 2020. On March 22, 2021, the Petition was granted.[89]

III. LEGAL BACKGROUND

A. *Constitutional Requirements Embedded in the Federal Death Penalty Act*

During the sentencing phase of a capital trial, the Court has long affirmed that the Eighth Amendment allows defendants to present a wide range of mitigating factors that would be relevant in support of a sentence less than death, including "any aspect of a defendant's character or record and any of the circumstances of the offense."[90] This rule encompasses a defendant's constitutional right to argue that they were less culpable than other actors who joined in committing the crime.[91] The Court has also held that a statute, or a court's interpretation of a statute, cannot prevent a jury "from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence."[92] Consequently, the sentencing jury is required, and therefore must be allowed by a trial court, to consider, "*as a matter of law*, any relevant mitigating evidence,"[93] if such evidence would logically and reasonably allow a juror to determine that a sentence less than death is warranted.[94] Once evidence has been deemed relevant, it need only be shown to have a

87. *Id.*

88. *Id.* at 70.

89. *U.S. Supreme Court to Review Federal Appeals Court Decision that Overturned Death Sentence in Boston Marathon Bombing*, *supra* note 14.

90. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).

91. *See id.* at 608 (holding a state statute was unconstitutional under the Eighth Amendment, because it did not allow a defendant to argue as a mitigating factor her relatively minor role in the crime).

92. Brewer v. Quarterman, 550 U.S. 286, 289 (2007).

93. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original).

94. Tennard v. Dretke, 542 U.S. 274, 284–85 (2004).

"minimal indicia of reliability" to be admitted during sentencing.[95]

The Federal Death Penalty Act of 1994 ("FDPA") attempts to implement a defendant's Eighth Amendment rights through two critical provisions that apply to the scope of evidence admissible during the sentencing phase of a capital trial. First, the FDPA requires the jury to "consider any mitigating factor," and provides an inclusive list of several factors that may be introduced by a defendant.[96] Importantly, this provision explicitly allows a defendant to introduce evidence showing "[m]inor participation" relative to the conduct of another who committed the crime.[97]

Second, the FDPA implements a balancing test that trial courts can use to exclude evidence to the jury during the sentencing phase.[98] In the case of introducing mitigating evidence, the FDPA contemplates that "any information relevant to a mitigating factor" can be presented, regardless of whether that piece of information would be admissible under the standard rules of evidence.[99] Nonetheless, the balancing test allows the trial court to exclude this relevant information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[100] In the case of using the FDPA to exclude aggravating evidence from the sentencing hearing, the balancing test differs from that used by the Federal Rules of Evidence. Unlike the Federal Rules of Evidence, which only excludes evidence with probative value if the scales tip substantially in favor of danger of unfair prejudice, the FDPA will exclude evidence if the balance is only slightly in favor of danger of unfair prejudice.[101]

B. *Supreme Court Limitations on Supervisory Powers and* Patriarca

Since 1957, the Court has recognized the need for appellate courts

95. *See* United States v. Petty, 982 F.2d 1365, 1370 (9th Cir. 1993) (finding relevant hearsay evidence to be admissible during a sentencing proceeding and meeting constitutional due process requirements if it is shown to have a "minimal indicia of reliability," even if such evidence would be inadmissible under rules of evidence or the Confrontation Clause).

96. 18 U.S.C. § 3592(a).

97. 18 U.S.C. § 3592(a)(3).

98. 18 U.S.C. § 3593(c).

99. 18 U.S.C. § 3593(c).

100. *Id.*

101. *See* United States v. Sampson, 486 F.3d 13, 42 (1st Cir. 2007) (interpreting § 3593(c) of the FDPA to determine whether *aggravating* evidence with probative value was impermissibly introduced in the penalty phase).

to have supervisory authority over district court procedures.[102] Such supervisory rules that apply to federal district courts need not have been mandated by the Constitution or a statute.[103] Instead, the Court has held that supervisory rules need only stem from a "reasoned exercise of the courts' authority"[104] and be consistent with existing statutes and the Constitution.[105]

The Court has found supervisory rules directed to jury selection particularly important in cases where there is a high risk of racial bias among potential jurors.[106] The Court has also recognized that a potential for juror bias exists in cases where there has been a high likelihood that jurors were exposed to "vivid, unforgettable information" through pretrial media reports and publicity.[107] In such high-profile cases, the Court has noted that asking potential jurors questions about the specific content of news reports and publicity they have seen or heard may be beneficial in preventing prejudicial jurors from being seated, even though such questions are not constitutionally required.[108]

When *Patriarca* was decided several decades ago, the First Circuit used its supervisory authority to set procedural rules for trial courts to follow when conducting voir dire in cases with extensive pretrial, prejudicial publicity.[109] In *Patriarca*, the defendants were accused of several serious crimes stemming from their involvement in the New

102. *See* La Buy v. Howes Leather Co., 352 U.S. 249, 259–60 (1957) ("We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration of the federal system.").

103. Cupp v. Naughten, 414 U.S. 141, 146 (1973). *See also* Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (noting that courts of appeals have broader supervisory authority to make rules for federal trial courts to follow during voir dire than they do when determining what voir dire procedures are constitutionally required under the Fourteenth Amendment and thus must be followed by state trial courts).

104. Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993).

105. Thomas v. Arn, 474 U.S. 140, 148 (1985).

106. *See, e.g.,* Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981) (plurality opinion) (noting that, where a reasonable possibility for bias against the defendant's race or ethnicity exists, a supervisory rule can require trial courts to ask potential jurors about racial or ethnic prejudices, if requested by the defendant).

107. Skilling v. United States, 561 U.S. 358, 384 (2010).

108. Mu'Min v. Virginia, 500 U.S. 415, 425 (1991). *But see* , 561 U.S. 358 at 447 (Sotomayor, J,, concurring in part an dissenting in part) (emphasizing that trial courts still have broad discretion in conducting voir dire, especially in the realm of pretrial publicity).

109. *See* Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968) (requiring trial courts to determine the "kind and degree of [jurors'] exposure to the case [and] the effect of such exposure on [their] present state of mind" in cases where there is a high likelihood that jurors have seen or heard prejudicial pretrial information).

England Mafia.[110] Widespread media attention in the New England area resulted, which was primarily directed toward the defendants' involvement in the Mafia and the attempted killing of an attorney who was counsel for the prosecution's chief witness.[111] Consequently, counsel for the defendants filed multiple motions for a change in venue, but all were denied by the trial court.[112] On appeal, the First Circuit upheld the rulings, finding that the court did not abuse its discretion, partly because voir dire would have provided a safeguard to allow counsel to mitigate possible effects of pretrial publicity.[113] In reaching this conclusion, however, the court took issue with the generic question asked of jurors by the trial judge to determine whether they had prejudicial views.[114] Consequently, it decided that, in future cases, where a significant likelihood of exposure to prejudicial information existed and upon counsel's request, the trial court should ask jurors questions to determine "the kind and degree of [their] 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."[115]

IV. ARGUMENTS

A. Respondent's Arguments

Dzhokhar's argument that the Court of Appeals correctly vacated his capital sentences is divided into two independent points.[116] First, the defense argues that the trial court's erroneous decision to exclude evidence of the Waltham murders violated the Eighth Amendment and several provisions of the Federal Death Penalty Act (FDPA). This exclusion left the jury with an incomplete picture of the relationship between Dzhokhar and Tamerlan, catastrophically damaging the mitigation theory. Second, the defense argues *Patriarca* represents a valid exercise of the First Circuit's supervisory authority and sets forth

110. *Id.* at 315–16.
111. *Id.* at 316.
112. *Id.*
113. *Id.* at 317.
114. *See id.* at 318 (ruling that the trial court did not err by failing to inquire further, but noting the deficiency in a case of high publicity when a trial court judge merely asks whether "'there is any member of the jury . . . who feels that he would not be able to give the defendant[] a fair and impartial trial.'").
115. *Id.*
116. Brief of Respondent, *supra* note 8, at 11.

a mandatory rule requiring trial judges conducting voir dire to ask potential jurors content-specific questions about the pretrial publicity they have seen when there is a high risk of bias.[117] The trial court violated this supervisory rule by refusing to ask potential jurors about what they had seen or heard in the media, which could have resulted in the selection of jurors who were deeply biased given the extensive, inflammatory publicity that followed the bombings.[118]

1. Violation of the Eighth Amendment and the Federal Death Penalty Act (FDPA)

Dzhokhar's counsel makes several arguments alleging that the trial court violated his Eighth Amendment constitutional rights codified in the FDPA. The Supreme Court has long held that the Eighth Amendment allows a defendant facing capital punishment to present to jurors any mitigating factors pertaining to his or her character, record, or role in the crime that would provide support for a sentence less than death.[119] The Court has recognized a corollary of this constitutional right, which requires sentencers to consider "any relevant mitigating evidence."[120] The defense points out that a capital defendant also has a constitutional right to argue that he was the less culpable actor when others were involved in committing the crime.[121] Finally, Dzhokhar's counsel emphasizes that the bar for what can be admitted as mitigating evidence is low.[122] Standard evidentiary rules do not apply and the evidence need only have "hallmarks of reliability"[123] and "tend to logically prove or disprove some fact or circumstance."[124] Dzhokhar's counsel relies on the Federal Death Penalty Act (FDPA), which has implemented these constitutional requirements, as determined by the Court's common-law, into several statutory provisions.[125] Importantly, although the FDPA gives some discretion to trial courts to exclude mitigating evidence if its probative value is outweighed by other considerations,[126] Dzhokhar's counsel emphasizes that this provision does not allow the trial court to minimize a

117. *Id.* at 13.
118. *Id.*
119. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion).
120. *Id.* (citing Skipper v. South Carolina, 476 U.S. 1, 4 (1986)).
121. Brief of Respondent, *supra* note 8, at 15 (citing *Lockett*, 438 U.S. at 604).
122. *Id.* at 16 (quoting Tennard v. Dretke, 542 U.S. 274, 284 (2004)).
123. *Id.* at 16 (citing Green v. Georgia, 442 U.S. 95, 97(1979)).
124. *Id.* at 15 (quoting *Tennard*, 542 U.S. at 284–285)
125. *Id.* at 16 (citing 18 U.S.C. § 3592(a), 18 U.S.C. § 3593(c)).
126. 18 U.S.C. § 3593(c).

defendant's constitutional rights by refusing to admit relevant mitigating evidence that need only be minimally reliable.[127]

The defense first argues that evidence of Tamerlan's involvement in the Waltham murders was highly probative.[128] Dzhokhar's counsel explains that his mitigation theory during the penalty phase was completely premised on jurors understanding the influence placed on him by his older brother and their relative culpabilities in carrying out the bombing.[129] The trial court allowed the defense to present only very minor facts in an effort to show Tamerlan's true personality and the corrosive influence that he had on his younger brother.[130] As the defense points out, however, the Government used these factors and the absence of evidence from the Waltham murders against Dzhokhar, misleading the jury to believe that Tamerlan was "merely bossy" and that the brothers were equals when it came to carrying out the bombing.[131] Highlighting his inability to introduce evidence of Tamerlan's true violent nature and his powerful ability to radicalize Dzhokhar through his alleged prior commission of jihad, the defense emphasizes that the jury had only a small and minor picture of Tamerlan's behavior.[132] The defense further explains the relevance of Tamerlan's potential involvement in the murders, arguing that commission of that crime, with evidence pointing to its jihadist roots, coupled with the government's own affidavit recounting Tamerlan's leadership role, could have allowed jurors to conclude that Dzhokhar was less culpable in the bombings.[133]

Second, the defense explains why evidence of Tamerlan's involvement in the Waltham murders was at least reliable enough to be presented to the jury.[134] First, the defense reemphasizes that the bar for admissibility of evidence at a sentencing hearing is low.[135] Evidence need only be minimally reliable.[136] Dzhokhar's counsel points out that the government itself used Todashev's confession to obtain a search

127. Brief of Respondent, *supra* note 8, at 16.
128. *Id.* at 17.
129. *Id.*
130. *See id.* at 18 (allowing the defense to present evidence that Tamerlan once poked someone during an argument and occasionally yelled at people).
131. *Id.*
132. *Id.*
133. *Id.* at 24.
134. *Id.* at 26.
135. *Id.* at 27.
136. United States v. Fields, 483 F.3d 313, 337–38 (5th Cir. 2007).

warrant, which required swearing that probable cause existed to believe Tamerlan had committed the Waltham murders.[137] If the Government had sufficient evidence to independently conclude that they had probable cause to obtain a sworn warrant affidavit, the defense reasons the evidence must have been reliable enough to present to a jury as part of a mitigation theory during sentencing.[138] Dzhokhar's counsel emphasizes that the government often presents evidence of untried and uncharged crimes during the sentencing phase in support of their aggravation theory.[139] If such evidence can be admitted by the government as an aggravating factor, regardless of how admissible it would be under standard rules of evidence, it follows that the same evidence should be admissible to support a defendant's mitigation theory.[140]

Third, the defense concludes that exclusion of the evidence was a violation of both the Eighth Amendment and the FDPA.[141] Dzhokhar's counsel admits that the trial court had discretion to determine the manner in which the evidence was presented to prevent jury confusion. But Respondent's counsel argues that the Constitution does not allow the court to altogether exclude relevant and reliable evidence solely because it may have been confusing or, as the Government alleges, a "waste of time."[142] The defense also emphasizes that evidence being contested does not in itself make the evidence confusing or unreliable.[143] Dzhokhar's counsel points to several cases where the government was allowed to present complex, time-consuming evidence to provide support for aggravation theories, and reasons that, if the Eighth Amendment allowed such evidence to support aggravation, it similarly must allow defendants to admit comparable evidence in support of their mitigation theories. For similar reasons, because the trial court incorrectly found that the Waltham evidence had no probative value, Dzhokhar's counsel adduces that exclusion of it violated the FDPA by preventing the presentation of relevant information.[144] In reaching this conclusion, the defense reasons that the trial court did not perform the balancing test required by Section

137. Brief of Respondent, *supra* note 8, at 26.
138. *Id.* at 28.
139. *Id.* at 30.
140. *Id.*
141. *Id.*
142. *Id.* at 31.
143. *Id.* at 32.
144. *Id.* at 33.

3593(c), which weighs the probative value of the evidence against the court's reason for excluding it. If the trial court had performed the test, the defense argues that its reasons for exclusion could not have possibly outweighed its probative value, leading to violation of Dzhokhar's Eigth Amendment guarantees codified in the FDPA.

Finally, the defense argues that the trial court's error was not harmless. The Government cannot be nearly certain, as the Court requires,[145] that the jury would have reached a unanimous verdict to recommend the death penalty if the Waltham evidence had been permitted, preventing the trial court's error from being harmless.[146] In reaching this conclusion, the defense points to the lack of presentation of the Waltham evidence as a missing puzzle piece which would allow jurors to conclude that he had been radicalized because of Tamerlan's influence.[147] The defense also references the fact that Dzhokhar's knowledge of Tamerlan's involvement in the murders, along with his young age and culture that encouraged respecting older siblings, would have additionally pressured him to follow in Tamerlan's footsteps.[148] Thus, because of the misleading picture portrayed to jurors, along with the fact that the jurors only recommended death for the charges they were led to believe the Respondent had performed without Tamerlan's pressure,[149] the Respondent reasons that at least one juror could have voted for life in prison without the possibility of parole.[150]

2. Violation of the First Circuit's Valid Supervisory Rule in *Patriarca*

The Court has long allowed appellate courts to create "desirable" rules of procedure for district courts to follow.[151] These rules need only

145. Victor v. Nebraska, 511 U.S. 1, 15 (1994).

146. Brief of Respondent, *supra* note 8, at 33.

147. *See id.* at 34 (referencing other factors that supported the Respondent's theory that Tamerlan had influenced his radicalized beliefs and behavior but finding that, without more concrete evidence that could have been provided by the Waltham murders, the jurors were led to believe that the Respondent had radicalized without Tamerlan's pressure).

148. *Id.*

149. *See id.* at 35–36 (finding that the jurors only recommended death for actions Dzhokhar performed when Tamerlan was not physically present). Such recommendation would support the inference that the government cannot be virtually certain that the jury would have unanimously voted to recommend death if the defense counsel had been allowed to show evidence that Tamerlan's influence extended beyond his mere physical presence to create coercive mental pressure on Dzhokhar to commit the acts.

150. *Id.* at 36.

151. *Id.* at 39.

be created within the authority of the court[152] and not "conflict with constitutional or statutory provisions."[153] Thus, the defense argues that, because the supervisory rule promulgated by the First Circuit in *Patriarca* is reasonable and ensures that an unbiased jury is selected through voir dire, it should be followed.[154]

Dzhokhar's counsel begins by pointing to instances where the Court was concerned about biased jurors and used supervisory authority instead of constitutional rules to afford greater protections in securing an impartial jury.[155] The defense compares the First Circuit's exercise of supervisory authority in *Patriarca* to this line of precedent, emphasizing that a biased jury can result from their exposure to pretrial publicity.[156] The defense then reconciles the supervisory rule in *Patriarca* with the holding in *Mu'Min v. Virginia*.[157] *Mu'Min* held that a trial court was not constitutionally required to ask jurors about the specific content they had viewed about the case before the trial.[158] Nevertheless, nothing in *Mu'Min* directly prohibited courts of appeals from setting supervisory rules for voir dire that required content questioning of potential jurors.[159] In fact, Dzhokhar's counsel points out that the Court in *Mu'Min* unanimously agreed that content questioning could be helpful, and that several trial courts have implemented similar lines of questioning in high-profile cases to assess potential juror bias.[160]

The defense next evaluates the wide range of media that was disseminated before the trial.[161] Such publicity included racial slurs and community leaders calling for the death penalty as well as claims about Dzhokhar's immigration status.[162] The defense argues that such statements were of such an inflammatory character that the Eighth Amendment would have made them impermissible.[163] Many of these statements were made on the Internet and social media, preventing the trial court judge from understanding fully the type of publicity jurors

152. Ortega-Rodriguez v. United States, 507 U.S. 234, 244 (1993).

153. Thomas v. Arn, 474 U.S. 140, 148 (1985).

154. Brief of Respondent, *supra* note 8, at 40.

155. *See id.* at 41 (pointing to the Court's desire to prevent a racially-biased jury and using its supervisory authority to require racial-bias questioning of potential jurors under certain circumstances, even though such a line of questioning was not constitutionally required).

156. *Id.* at 41–42.

157. 500 U.S. 415 (1991)

158. *Id.* at 416.

159. Brief of Respondent, *supra* note 8, at 43.

160. *Id.*

161. *Id.* at 44.

162. *Id.*

163. *Id.* at 44–45.

had seen.[164] Further, Bostonians were united by the publicity, leading to feelings of a shared obligation to obtain justice for the victims.[165] Thus, the defense argues the effects of the inflammatory statements were worsened, resulting in a heightened need for a rule that would allow the trial court to determine exactly what jurors saw.[166]

Finally, Dzhokhar's counsel addresses the Government's counterarguments. First, they dismiss the Government's contention that a supervisory rule can only be promulgated if it is constitutionally required. In support of their argument, Dzhokhar's counsel points to the Court's decision in *Rosales-Lopez v. United States,*[167] which found that supervisory rules directed to voir dire do not need to be constitutionally required to be promulgated.[168] Second, Dzhokhar's counsel emphasizes that, although the Court has granted trial courts wide discretion in conducting voir dire, such discretion has also been limited to ensure trial judges have sufficient information on the potential jurors before making any final decisions.[169] Such limitations are necessary to ensure jurors seated are truly impartial.[170] Last, the Respondent asserts the Petitioner has mischaracterized the *Patriarca* rule as inflexible, since it only requires content-based questioning if the trial court believes there is a high risk of pretrial publicity.[171]

Accordingly, the Respondent concludes that *Patriarca* is an entirely valid supervisory rule that was directed violated. Such violation resulted when, in a case with such a wide range of inflammatory pretrial publicity, the Respondent requested content questioning, but the court refused to ask jurors exactly what they had seen or remembered about the case.[172] The Respondent stresses that merely asking how much of the publicity jurors had seen was not sufficient, because a juror could have deep emotional feelings about a particular piece from the media while still having only seen a small amount of publicity in total.[173]

164. *Id.* at 45.
165. *Id.*
166. *Id.* at 47.
167. 451 U.S. 182, 192 (1981).
168. *Id.* at 48.
169. *Id.* at 49.
170. *Id.*
171. *Id.* at 50.
172. *Id.* at 51.
173. *Id.*

B. Petitioner's Arguments

As the Petitioner, the Government argues that the First Circuit erred in overturning Dzhokhar's capital sentences. The argument is divided into two main points, both of which are largely critical of the lack of deference given by the First Circuit to the trial court's discretionary judgment.[174] First, on the issue of pretrial publicity, the Government points to the extensiveness of the voir dire undertaken by the trial court. The Government maintains that the First Circuit's strict application of the rule from *Patriarca* is constitutionally unnecessary and contrary to Supreme Court precedent requiring deferential review of voir dire.[175] Second, the Government uses the FDPA to argue that the district court did not abuse its discretion by refusing to allow Dzhokhar's counsel to admit the Waltham evidence.[176] Instead, the Government contends that the First Circuit owed more deference to the district court's decision to exclude such evidence from the penalty phase.[177]

1. Limiting the Application of *Patriarca*

First, the Government's argument emphasizes the need to respect and trust the judgment of the trial court in narrowing the pool of potential jurors during voir dire.[178] The Government stresses that the Court has never required jurors to be completely devoid of any knowledge of the case, but rather that the key is to select jurors who can remain impartial, even if they have seen publicity.[179] The Government points to *Skilling v. United States*,[180] a case where the Court held that narrowing the jury pool to eliminate impartial jurors is specifically a responsibility given to the trial court judge.[181] The Government implies that this rule is not without good reason, since trial judges have an opportunity to assess jurors in the moment to determine their impartiality and often sit in the region impacted by the publicity, allowing them a firsthand insight into how jurors may have been affected.[182] Additionally, if "extraordinary local prejudice" were such

174. Petitioner's Writ of Cert., *supra* note 9, at 14–15.
175. *Id.* at 16.
176. *Id.* at 27.
177. *Id.* at 15.
178. *Id.*
179. *Id.* at 17.
180. 561 U.S. 358, 384 (2010).
181. *Id.* at 386.
182. Petitioner's Writ of Cert., *supra* note 9, at 18–19.

an issue, the Government contends that the Court of Appeals would not have found that the trial court did not abuse its discretion by finding the venue in Boston to be proper.[183]

The Government next emphasizes the extensive process undertaken by the trial court to determine the impartiality of potential jurors.[184] The Government points to the detailed questionnaire initially given to all prospective jurors.[185] It insists that jurors were asked whether they had formed an opinion from their exposure to the publicity as to Dzhokhar's guilt and the application of the death penalty.[186] Any jurors who were called back for the individual voir dire, which lasted several weeks, were asked to elaborate on their answer to this question.[187] The Government contends that many potential jurors were excused if they indicated they could not set aside any personal biases or prior views after this process.[188] The broad deference advocated for in *Skilling* would not find this situation to call for a searching inquiry by the appellate court to second-guess the deference afforded to the trial court in determining the impartiality of jurors.[189]

Third, the Government argues that the only reason the Court of Appeals invalidated the capital sentences due to the voir dire was because of a decades-old decision, *Patriarca*.[190] The Government alleges that the First Circuit read *Patriarca* as setting forth a strict, inflexible rule, requiring all district courts to ask every prospective juror about the content of the publicity they had seen or heard, any time any party requested such an inquiry.[191] The Government, however, argues that making the application of this rule mandatory was unexpected, because nothing would have led the trial court to believe that its extensive voir dire did not meet the standard.[192] The Government points out that the generic question asked of already-seated jurors in *Patriarca* did not compare to the detailed questions asked of the prospective jurors in this case, and that the First Circuit had only used *Patriarca* to reaffirm the broad discretion given to trial

183. *Id.* at 17.
184. *Id.* at 19.
185. *Id.*
186. *Id.*
187. *Id.* at 19-20.
188. *Id.* at 19.
189. *Id.* at 21.
190. *Id.*
191. *Id.*
192. *Id.* at 23.

courts during voir dire.

Finally, the Government emphasizes that *Skilling* rejected formulaic, categorical rules to determine the sufficiency of voir dire, and that the Court determined in *Mu'Min* that content-specific inquiries about the specific publicity seen or heard by jurors were not constitutionally required.[193] The Government hypothesizes that such an inflexible rule would not be practical or useful in every case.[194] It points to the holding in *United States v. Hasting,*[195] which requires supervisory powers used to reverse a conviction to be balanced against both the interests of any victims and any practical issues stemming from retrying the issues long after the events occurred.[196]

2. The Federal Death Penalty Act Permits Trial Court Discretion

In arguing that the trial court did not abuse its discretion by excluding evidence of Tamerlan's role in the Waltham murders, the Government relies on the FDPA. First, the Government points out that 18 U.S.C. §3593(c) grants some discretion to trial courts to exclude evidence if they decide its "probative value" would be outweighed by other considerations, such as its potential to confuse the jury.[197] The Government maintains that this section supports the theory that the trial court did not abuse its discretion, because the jury was not required to take part in a side trial to determine Tamerlan's role in the Waltham murders.[198] The Government argues that asking the jury to sidetrack to untangle the respective roles of Tamerlan and Todashev in the Waltham murders would take a significant amount of time and resources because both were deceased.[199] The Government points out that, even if Tamerlan were the lead perpetrator, the Waltham murders were a separate crime, allegedly committed in the spur of the moment. Thus, the Government concludes that the murders were only very loosely tied to an organized terrorist attack and could not show his ability to influence Dzhokhar to commit the marathon bombings and the crimes that followed.[200]

193. *Id.* at 24–25.
194. *Id.* at 25.
195. 461 U.S. 499 (1983).
196. *Id.* at 506-07.
197. *Id.* at 27.
198. *Id.*
199. *Id.* at 28.
200. *Id.*

Second, the Government points to 18 U.S.C. §3595(c)(2)[201] and argues that excluding evidence of the Waltham murders was harmless, regardless of the discretion exercised by the trial court.[202] The Government contends that the evidence unambiguously demonstrates Dzhokhar's independent commitment to jihad through his actions taken without Tamerlan's presence, and that one can reasonably assume that the jury would have recommended the death penalty even if evidence of the Waltham murders were presented.[203]

V. ANALYSIS

A. Constitutionality of the Federal Death Penalty Act

First and foremost, the Court should determine whether the "highly probative" balancing test found in the FDPA under Section 3593(c) applies to the trial court's discretion to exclude information that would support mitigating factors. If the test does apply to the trial court's discretion to exclude information that would support both mitigating and aggravating factors, the Court should determine whether such an application is in accordance with the Eighth Amendment.

In Respondent's brief, counsel briefly argues that the Eighth Amendment prevents the court from excluding any "relevant, reliable evidence," implying that the balancing test is only able to exclude "inflammatory aggravating evidence."[204] During oral arguments, Justice Barrett asked counsel to expand on this point, and counsel reemphasized that the Eighth Amendment requires that any relevant and reliable evidence supporting a mitigation factor must be admitted, unless extraordinary circumstances apply.[205] Justice Sotomayor then added that the balancing test cannot be merely a "fifty-fifty" balancing test if and when it applies to information directed to mitigation.[206]

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201. "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."

202. Petitioner's Writ of Cert., *supra* note 9, at 29.

203. *Id.* at 30.

204. Brief of Respondent, *supra* note 8, at 17 n.2.

205. Oral Argument at 1:02:53, U.S. v. Tsarnaev, No. 20-443 (argued Oct. 13, 2021), https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-death-sentence.

206. Oral Argument at 1:15:40, U.S. v. Tsarnaev, No. 20-443 (argued Oct. 13, 2021), https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-death-sentence.

Instead, she hypothesized that Eighth Amendment guarantees generally prevent the balancing test from being used to exclude relevant and reliable mitigating evidence.[207] Accordingly, the standard for excluding evidence under the balancing test as applied to mitigating evidence must differ from the "fifty-fifty" standard used by the balancing test to exclude aggravating evidence.[208]

"Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems."[209] In the case of the "highly probative" balancing test found in § 3593(c), the Court should construe the provision to only allow application of the test to exclude aggravating factors. Such an interpretation would be consistent with the Eighth Amendment's treatment toward mitigating evidence, which courts have long held guarantees a capital defendant the right to present "any relevant mitigating evidence"[210] if such evidence is shown to have a "minimal indicia of reliability."[211] Applying the "highly probative" test to mitigating evidence would give trial courts a constitutionally unacceptable range of discretion to prohibit mitigating evidence, because the constitutional standards of relevancy and reliability could be met but the evidence would still be excluded.

The constitutional rationale for excluding application of the "highly probative" test to mitigating evidence is demonstrated in this case. The government admitted that evidence from the Waltham murders was at least reliable enough to provide probable cause to obtain a search warrant.[212] Additionally, "any . . . of the circumstances of the offense"[213] can be considered relevant. Thus, a circumstance of the bombings depends on whether a teenager living in a hierarchical culture was influenced to commit a heinous crime because of his older adult brother's prior commission of jihad. This circumstance could logically and reasonably lead a juror to believe a sentence less than death is warranted, which is all that is required for mitigating evidence to be considered relevant.[214]

207. *Id.*
208. *Id.*
209. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (relying upon the statutory canon of construction of constitutional avoidance).
210. Brewer v. Quarterman, 550 U.S. 286, 289 (2007).
211. United States v. Fields, 483 F.3d 313, 337–38 (5th Cir. 2007).
212. Brief of Respondent, *supra* note 8, at 9.
213. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
214. Tennard v. Dretke, 542 U.S. 274, 284–85 (2004).

In sum, and as Dzhokhar's counsel alludes to during oral arguments,[215] application of the balancing test to determine whether the mitigating evidence has a "highly probative value"[216] introduces a new requirement for mitigating evidence that is not contemplated by Eighth Amendment case law. Through application of this test, the evidence must not only logically and reasonably allow a juror to determine that a sentence less than death is warranted.[217] Instead, determining whether the evidence has a "highly probative value" allows the trial court to determine whether mitigating evidence has some additional value that outweighs minor logistical issues that could arise during the presentation of the evidence. Creation of a new requirement without thoroughly evaluating the consequences is problematic. Such a broad degree of deference granted to a trial court judge prevents a defendant facing the most severe punishment available in the United States from being fully protected by Eighth Amendment guarantees.

B. *Public Policy Considerations*

In reaching a decision, the Court should also consider the political upheaval that recently occurred following the change in administrations. In July of 2021, newly appointed United States Attorney General Merrick Garland placed a moratorium on federal executions to allow for review of execution policies and protocols.[218] This moratorium came after the Trump administration ended a seventeen year pause on executions, which resulted in the killing of thirteen people over a period of seven months.[219] The Attorney General

215. *See* Oral Argument at 1:22:36, U.S. v. Tsarnaev, No. 20-443 (argued Oct. 13, 2021), https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-death-sentence (arguing that the Eighth Amendment imposes a constraint on how the balancing test under § 3593(c) can be interpreted). Later, however, Justice Gorsuch questions as to whether Dhokhar's counsel argued the unconstitutionality of the FDPA in the courts below. *See* Oral Argument at 1:23:07, U.S. v. Tsarnaev, No. 20-443 (argued Oct. 13, 2021), https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-death-sentence.

216. 18 U.S.C. § 3593(c).

217. *Tennard*, 542 U.S. at 284–285.

218. Memorandum from Merrick Garland, Att'y Gen., U.S. Dep't of Jus. on the Moratorium on Federal Executions Pending Review of Policies and Procedures to the Dep. Att'y Gen., U.S. Dep't of Jus. 1 (Jul. 1, 2021) (on file with author), https://www.justice.gov/opa/page/file/1408636/download.

219. Keri Blakinger, *How Biden Can Reverse Trump's Death Penalty Expansion*, THE MARSHALL PROJECT (Mar. 12, 2021, 6:00 A.M.), https://www.themarshallproject.org/2021/03/12/how-biden-can-reverse-trump-s-death-penalty-expansion.

was particularly concerned with the constitutionality of using pentobarbital to induce death, given research by medical experts finding that painful reactions could occur. During oral arguments, Justice Barrett questioned the Government's rationale of reinstituting the death penalty for the Respondent, given that he would be placed on death row for an unknown period of time until presumptively the moratorium is lifted.[220] Justice Barrett touches on an important question: how much should the Court adapt its opinion on a case to a change in policy promulgated by the executive branch, particularly when the policy at issue has the possibility of remaining in place for an uncertain length of time?

In considering this question, the Court should turn to the constitutionality of subjecting capital defendants to the possibility of death for an unknown time period, which could range from months to an indefinite number of years. The Court has not yet considered how long a death row inmate can be on death row before being executed.[221] Research shows, however, that prolonged stays on death row without a set execution date can lead to severe psychological harms, known informally as "death row syndrome."[222] Many of these resulting harms are similar to those inflicted on terminally ill patients which lead to suicidal thoughts.[223] Thus, the Court should intervene and consider whether the infliction of such potential psychological harms by the federal government is constitutional under the Eighth Amendment. This consideration is particularly critical here, because reversal of the First Circuit's decision would equate to the Court subjecting a capital defendant to only a potential death sentence, having full knowledge that a federal moratorium on the death penalty would prevent him from receiving an execution date for an unknown period of time.

VI. CONCLUSION

The Supreme Court should ensure procedural safeguards remain intact in capital trials and affirm the decision of the First Circuit. In reaching this decision, the Supreme Court should decide that the trial

220. Oral Argument at 53:19, U.S. v. Tsarnaev, No. 20-443 (argued Oct. 13, 2021), https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-death-sentence.

221. *Time on Death Row*, DEATH PEANLTY INFORMATION CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row.

222. Amy Smith, Note, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B. U. PUB. INT. L.J. 237, 244–45 (2008).

223. *Id.* at 251.

court's exercise of discretion in using the "highly probative" balancing test was unconstitutional as applied to the exclusion of relevant and reliable mitigating evidence. Accordingly, the Court should clarify the interpretation of the Federal Death Penalty Act, construing it to comply with a capital defendant's Eighth Amendment guarantees. Such an interpretation would allow the Court to reach a conclusion in line with current public policy, which is critical given the temporal uncertainty of the federal moratorium.