No. 20-443

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

DZHOKHAR A. TSARNAEV,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

Questions presented. i

Table of authorities. v

Interest of *amicus curiae*. 1

Summary of facts and case. 2

Summary of argument. 4

Argument. 6

I. Pretrial publicity must be assessed differently when the elements of the offense are not in genuine dispute. 6

A. The meaning of "prejudicial". 6

B. Application to the case. 9

II. There was no "manifest error" in this case under this Court's precedents to date. 11

A. Standard of review. 11

B. This Court's precedents. 12

1. Extent of voir dire. 13

2. Pretrial publicity. 15

3. *Mu'Min* and *Skilling*. 17

C. Application to the present case. 19

III. Rules under the supervisory power should be made rarely, if ever, and none is called for in this case. 20

A. This Court's supervisory power. 20

B. The Court of Appeals' supervisory power. 23

IV. Exclusion of evidence under the criterion of § 3593(c) is constitutional. 24

Conclusion. 26

TABLE OF AUTHORITIES

Cases

Abdul-Kabir v. *Quarterman*, 550 U. S. 233 (2007). 25

Aldridge v. *United States*, 283 U. S. 308 (1931). . . . 13

Arizona v. *Fulminante*, 499 U. S. 279 (1991). 8, 9

Bobby v. *Van Hook*, 558 U. S. 4 (2009). 18

Chambers v. *Mississippi*, 410 U. S. 284 (1973). . . . 25

Connor v. *United States*, 158 U. S. 408 (1895). 13

Eddings v. *Oklahoma*, 455 U. S. 104 (1982). . . 25, 26

Edwards v. *Vannoy*, 593 U. S. __, (No. 19-5807, May 17, 2021). 21, 22

Escobedo v. *Illinois*, 378 U.S. 478 (1964). 20

Estes v. *Texas*, 381 U. S. 532 (1965). 15

Gerstein v. *Pugh*, 420 U.S. 103 (1975). 20

Griffith v. *Kentucky*, 479 U. S. 314 (1987). 22

Ham v. *South Carolina*, 409 U. S. 524 (1973). . . 13, 14

Irvin v. *Dowd*, 366 U. S. 717 (1961). 7, 8, 12, 15

Kansas v. *Marsh*, 548 U. S. 163 (2006). 8

Lockett v. *Ohio*, 438 U. S. 586 (1978). 24

Marks v. *United States*, 430 U. S. 188 (1977). 15

Marshall v. *United States*, 360 U. S. 310 (1959). 6, 15, 16

McNabb v. *United States*, 318 U.S. 332 (1943). 20, 21

Miranda v. Arizona, 384 U.S. 436 (1966). 2, 20

Murphy v. *Florida*, 421 U. S. 794 (1975). . . . 8, 15, 16

Mu'Min v. *Virginia*, 500 U. S. 415 (1991). 7, 8, 11, 12, 17, 18, 19

New York v. *Quarles*, 467 U. S. 649 (1984).. 10

Patriarca v. *United States*, 402 F. 2d 314 (CA1 1968) 23

Patton v. *Yount*, 467 U. S. 1025 (1984). . . . 7, 8, 12, 16

Payne v. *Tennessee*, 501 U. S. 808 (1991). 10

Peña-Rodriguez v. *Colorado*, 580 U. S. __, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017). 14

People v. *Smithey*, 20 Cal. 4th 936, 978 P. 2d 1171 (1999). 25

Reynolds v. *United States*, 98 U. S. 145 (1879). 11, 12

Rideau v. *Louisiana*, 373 U. S. 723 (1963). 7, 15

Ristaino v. *Ross*, 424 U. S. 589 (1976). 14

Rosales-Lopez v. *United States*, 451 U. S. 182 (1981). 14, 15

Sheppard v. *Maxwell*, 384 U. S. 333 (1966). 15

Skilling v. *United States*, 561 U. S. 358 (2010). 11, 19

Skipper v. *South Carolina*, 476 U. S. 1 (1986). 24, 26

State v. *Davis*, 175 Wash. 2d 287, 290 P. 3d 43 (2012). 25

Teague v. *Lane*, 489 U. S. 288 (1989). 22

United States v. *Bailey*, 444 U. S. 394 (1980). 6

United States v. *Fell*, 360 F. 3d 135 (CA2 2004). . . 24

United States v. *Fell*, 531 F. 3d 197 (CA2 2008). . . 26

United States v. *Purkey*, 428 F. 3d 738 (CA8 2005). 25

United States v. *Smith*, 534 F. 3d 1211 (CA10 2008). 10

United States v. *Tsarnaev*, 968 F. 3d 24 (CA1 2020). 2, 3, 4, 6, 9, 10, 24

Walton v. *Arizona*, 497 U. S. 639 (1990). 25

United States Statutes

18 U. S. C. § 3593(c). 24

Rules Enabling Act, 28 U. S. C. §§ 2071-2077. 21

Rules of Court

Federal Rule of Evidence 401. 25

Federal Rule of Evidence 403. 24

Supreme Court Rule 10(a). 20

Secondary Authorities

Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324 (2006). 13, 20, 21, 23

Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433 (1984). 21

Dzhokhar Tsarnaev Interrogation Notes, online at https://www.scribd.com/document/391368362/Dzhokhar-Tsarnaev-interrogation-notes.. 11

Emshwiller, An Audacious Enron Defense: Company's Moves Were All Legal, Wall Street Journal, Jan. 20, 2006, online at https://www.wsj.com/articles/SB113772974804651717. 19

Green, Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution that Might Have Been, 49 Stetson L. Rev. 241 (2020).. 21

Judicial Conference of the United States, How the Rulemaking Process Works, online at https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works. 21

Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131 (2019).. . . . 25

Story, J., Commentaries on the Constitution of the United States (abridged ed. 1833) (reprint 1987). 23

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

DZHOKHAR A. TSARNAEV,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Court of Appeals for the First Circuit overturned the well-deserved sentence of death for a horrible and infamous crime for one reason that

1. The parties have filed blanket consents to *amicus* briefs. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

has no basis in the Constitution, laws, or rules of court of the United States and a second reason that is a misapplication of the governing statute. Obstruction of justice on such flimsy grounds is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Dzhokhar Tsarnaev, along with his brother, committed one of the most atrocious acts of terrorism that has ever been committed on American soil—the infamous Boston Marathon bombing. See *United States* v. *Tsarnaev*, 968 F. 3d 24, 34 (CA1 2020) (*Tsarnaev III*).[2] "Radical jihadists bent on killing Americans, the duo caused battlefield-like carnage. Three people died. And hundreds more suffered horrific, life-altering injuries. Desperately trying to flee the state, the brothers also gunned down a local campus police officer in cold blood." *Ibid*.

Tsarnaev did not merely kill and injure children incidentally. He is on camera *intentionally* placing his bomb behind a row of children watching the race. J. A. 163.

Tsarnaev confessed twice before trial. One confession was written on wooden slats in a boat where he was hiding from the police. See *Tsarnaev III*, 968 F. 3d, at 38. The second confession occurred when he was questioned by police in the hospital without complying with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), because public safety required determining

2. The Court of Appeals refers to its two prior decisions denying writs of mandamus as *Tsarnaev I* and *Tsarnaev II*. See *Tsarnaev III*, 968 F. 3d, at 40, n. 11.

if there were more conspirators planning additional attacks. See *Tsarnaev III*, *supra*, at 38-39.

This crime was, of course, the subject of extensive news coverage. "[W]hile the media (social, cable, internet, *etc*.) gave largely factual accounts, some of the coverage included inaccurate or inadmissible information — like the details of his un-*Miranda*-ized hospital interview and the opinions of public officials that he should die." *Id*., at 58 (citation omitted).

The trial court's questionnaire asked prospective jurors about the publicity they had seen, but the court refused Tsarnaev's request to ask the prospective jurors about the specific content. The court also declined to ask such questions during *voir dire*. The court did, however, allow follow-up questions by counsel, and defense counsel did ask content questions of some prospective jurors. See Brief for the United States 8-10.

In opening argument, defense counsel admitted that Tsarnaev committed the crimes of which he was accused.

> "There's little that occurred the week of April the 15th—the bombings, the murder of Officer Collier, the carjacking, the shootout in Watertown—that we dispute. If the only question was whether or not that was Jahar Tsarnaev in the video that you will see walking down Boylston Street, or if that was Jahar Tsarnaev who dropped the backpack on the ground, or if that was Jahar Tsarnaev in the boat—captured in the boat, it would be very easy for you: It was him." J. A. 190.

Counsel claimed that Tsarnaev was "influenced" by his older brother and co-conspirator Tamerlan Tsarnaev, but did not claim that he was coerced. "The evidence will not establish, and we will not argue, that Tamerlan put a gun to Jahar's head or that he forced him to join

in the plan, but you will hear evidence of the kind of influence that this older brother had." J. A. 193-194.

In the penalty phase, to bolster its argument of "influence" but not duress, the defense sought to introduce evidence that the brother had earlier committed unrelated crimes of robbery and murder. The evidence consisted of an oral, self-serving, hearsay statement of the accomplice to those crimes as he was seeking "a deal for cooperating." *Tsarnaev III*, 968 F. 3d, at 64. The accomplice admitted that he participated in the robbery but did not want any part of killing the victims to eliminate them as witnesses. *Ibid.* The trial judge excluded the evidence on the ground that it " 'would be confusing to the jury and a waste of time, ... without any probative value.' " *Id.*, at 66.

The Court of Appeals vacated the death sentences on the *voir dire* issue. See *id.*, at 62. The court also ruled that the exclusion of the unrelated crime evidence was prejudicial error. See *id.*, at 68. This Court granted the Government's petition for writ of certiorari.

SUMMARY OF ARGUMENT

The prejudicial nature of evidence must be judged in light of what issues are genuinely in dispute and what evidence is admissible at trial on those issues. This case is unique among this Court's pretrial publicity cases in that guilt of the crime was not genuinely at issue. Publicity of the horror of the crime and devastation to the victims can be prejudicial in a case of disputed guilt because those facts have no logical relevance to the question of who committed the crime but may trigger an emotional reaction from the jury to the detriment of the person accused. In the penalty phase of a capital case, however, those factors are quite properly before the jury and may be presented in evidence at trial. The

fact that prospective jurors have seen news reports of horrors that they are going to see in evidence is not prejudicial. Similarly, news reports of a confession not admitted in evidence are not prejudicial if they do not contain facts material to penalty that are not established at trial by other evidence or admissions of the defense.

The standard of review on the *voir dire* issue is "manifest error." There is no error under this Court's precedents to date, especially *Mu'Min* v. *Virginia*. The vacatur of the death sentence could be upheld only if (1) this Court used this case to establish a different rule for federal courts under its supervisory power, or (2) it decided the case under the First Circuit's rule.

Making bright-line rules of procedure not required by the Constitution, statutes, common law, or duly promulgated rules of court via the supervisory power is an exercise of dubious legitimacy. While this Court once did so fairly often, the practice has largely fallen into disuse for many years now. It should not be revived.

When new rules of procedure are needed, the Rules Enabling Act provides a better method. The rulemaking power there is clearly authorized by law. It provides a more deliberate and open process. Most importantly, improvements to procedure can be made prospectively without overturning just convictions and sentences that were properly entered under the rules in effect at the time of the trial.

The trial judge's exclusion of evidence was well within his discretion under 18 U. S. C. § 3593(c). The constitutionality of applying rules of evidence to exclude dubious evidence of marginal probative value is well established. Loose language in some of this Court's Eighth Amendment cases should not be construed to cast any doubt on this statute.

ARGUMENT

I. Pretrial publicity must be assessed differently when the elements of the offense are not in genuine dispute.

Out of the gate, this case is different from the Court's previous pretrial publicity cases in a way that requires a different analysis of what publicity is prejudicial. "During the guilt phase of his trial, [defendant's] lawyers *did not dispute that he committed the charged acts*. Rather, their guilt-phase defense rested on the idea that he participated in these horrible crimes only under [his brother] Tamerlan [Tsarnaev]'s influence." *Tsarnaev III*, 968 F. 3d, at 41 (emphasis added). The "influence" claim would not come remotely close to qualifying for a duress defense in the guilt phase, compare J. A. 193-194, with *United States* v. *Bailey*, 444 U. S. 394, 410-411 (1980), so guilt was not substantially disputed. The elements of the prosecution's prima facie case—i.e., the facts that would have the jury believing the defendant was guilty at the close of the prosecution's case in chief—were not disputed at all.

This unusual posture of the case requires that we take a step back and consider how the pretrial publicity precedents apply in this different context.

A. The Meaning of "Prejudicial."

"Prejudice" in the pretrial publicity cases generally refers to publicity that would lead the jury to convict the defendant for an improper reason. The most common type is factual information that is not admissible and will not be admitted at trial. See *Marshall* v. *United States*, 360 U. S. 310 (1959) (*per curiam*) (prior conviction and admission of prior, very similar, criminal act). As the Court noted in *Marshall*, at 312-313, the introduction of inadmissible evidence to the jury via the

press may be worse than the erroneous admission of it at trial, "for it is then not tempered by protective procedures." In *Rideau* v. *Louisiana*, 373 U. S. 723, 724 (1963), an interrogation of the defendant by the county sheriff was video recorded and broadcast on television, but not introduced in evidence. See *id*., at 728 (Clark, J., dissenting).

The second type of prejudicial publicity is coverage that is inflammatory in tone, creating a "wave of public passion," *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961), and "exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court." *Id*., at 730 (Frankfurter, J., concurring). These cases typically involve lurid crimes in rural areas. Compare *id*., at 725 (noting rural area), with *Mu'Min* v. *Virginia*, 500 U. S. 415, 429 (1991) (noting that the county was part of the metropolitan Washington area, distinguishing *Irvin*).

The second type may well be largely a thing of the past. People are no longer so isolated, and their news sources are no longer so localized. Crimes of major violence are, regrettably, common in the news no matter where one lives because our news sources are broader. "True crime" shows abound on television. People are more jaded. Further, major criminal cases rarely go to trial as quickly as they did at the time of *Irvin*. *Patton* v. *Yount*, 467 U. S. 1025, 1033 (1984), noted the greater lapse of time as a factor distinguishing *Irvin*. Justice Frankfurter lamented how common such cases were at the time of *Irvin*, 366 U. S., at 730 (concurring opinion), but "wave of public passion" cases are relatively rare today.

For the first type, prejudice for guilt is not the same as prejudice for penalty. The defendant's prior criminal

record is a very common type of factual publicity claimed to be prejudicial. See *Irvin*, 366 U. S., at 725; *Murphy* v. *Florida*, 421 U. S. 794, 795 (1975); *Mu'Min*, 500 U. S., at 418. The defendant's record is usually irrelevant and inadmissible in the guilt phase. The jury is supposed to be deciding whether the defendant committed the crime in fact, not making a moral judgment about how bad a person he is. A confession that is inadmissible because it was coerced or at least un-Mirandized is powerful evidence that jurors may not be able to get out of their minds. See *Patton* v. *Yount*, 467 U. S., at 1047 (Stevens, J., dissenting); see also *Arizona* v. *Fulminante*, 499 U. S. 279, 290 (1991) (discussing prejudice in harmless error context).

However, for these kinds of pretrial publicity, the prejudicial nature is attenuated, and perhaps eliminated, when neither the criminal act nor its intentional nature nor the identity of the perpetrator is disputed. A confession admitting identity is hardly prejudicial when the defendant's own attorney tells the jury "[i]t was him." J. A. 190. Evidence excluded in the guilt phase because it merely shows that the defendant is a bad person, especially prior convictions, is highly relevant and proper in the penalty phase.[3] Making a moral judgment about the defendant and whether he deserves to die is exactly what the jury is supposed to do in the penalty phase. See *Kansas* v. *Marsh*, 548 U. S. 163, 179 (2006).

The potential for prejudice of various instances of pretrial publicity must be judged in light of what the jurors are expected to decide and how the news reports relate to the admissible evidence. Even in the guilt

3. There are no prior convictions in this case, but we include this point for completeness because many, probably most, cases of this type do involve prior convictions.

phase, admitting an inadmissible confession may be harmless error if a properly admitted confession covers substantially the same ground. See *Fulminante*, 499 U. S., at 310. The trial judge's determination of whether jurors are biased and what depth of *voir dire* is needed to determine whether they are biased have been given considerable deference in this Court's decisions. In this case, those determinations need to be reviewed with due regard to the unusual posture of the case.

B. Application to the Case.

Applying these considerations to the present case makes it even more straightforward than the Government's argument makes out. The extent to which the pretrial publicity was prejudicial is greatly reduced by the fact that only the penalty was genuinely contested.

In accepting Tsarnaev's argument on this point, the Court of Appeals described the allegedly prejudicial pretrial publicity that it believed triggered a duty to ask content-specific questions:

> "And there was 'a significant possibility' that the prospective jurors had been 'exposed to potentially prejudicial material.' Again, the pervasive coverage of the bombings and the aftermath featured bone-chilling still shots and videos of the Tsarnaev brothers carrying backpacks at the Marathon, of the maimed and the dead near the Marathon's finish line, and of a bloodied Dzhokhar arrested in Watertown (to name just a few). Also, while the media (social, cable, internet, *etc*.) gave largely factual accounts, some of the coverage included inaccurate or inadmissible information — like the details of his un-*Miranda*-ized hospital interview and the opinions of public officials that he should die." *Tsarnaev III*, 968 F. 3d, at 58 (citations omitted).

Graphic details of a horrible crime may be deeply prejudicial in the guilt phase because the horror of the crime has no logical connection with the question of who committed it or other issues regarding guilt, but it may produce an emotional reaction that makes the jury more prone to convict. See, e.g., *United States* v. *Smith*, 534 F. 3d 1211, 1219 (CA10 2008). In the penalty phase of a capital case, though, the horror of crime and the "specific harm caused by the defendant" are quite properly front and center "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness." *Payne* v. *Tennessee*, 501 U. S. 808, 825 (1991).

The Court of Appeals' statement that the hospital confession was inadmissible is doubtful. *New York* v. *Quarles*, 467 U. S. 649 (1984), held that a confession taken without *Miranda* compliance to meet an urgent public safety need is admissible. In this case, the police did not yet know whether there were other conspirators out planting more bombs. See *Tsarnaev III*, 968 F. 3d, at 38-39. A more urgent public safety need can scarcely be imagined. However, the Government stipulated that they would not introduce the confession because they simply did not need it. The other evidence made it unnecessary. See Brief for United States in No. 16-6001 (CA1), p. 297.

The same reasons that led the prosecution to decide that the confession was unnecessary also undermine the claim of prejudice. Whether the jurors' possible knowledge of a confession is prejudicial depends on what facts are in issue and what aspects of the confession are redundant with admissible evidence. See *supra*, at 9. The Court of Appeals did not specify what statements within this confession reveal damaging information not already revealed by the admissible "note in the boat," the videos, or other admissible evidence. The full

notes are now available to the public. See Dzhokhar Tsarnaev Interrogation Notes, online at https://www.scribd.com/document/391368362/Dzhokhar-Tsarnaev-interrogation-notes.[4] There does not appear to be anything material in them that was not apparent from admissible evidence or his lawyers' admissions. He committed the crime with his brother, and he did it as an act of jihad and out of hatred for the United States. The jury knew all that from admissible evidence.

The Court of Appeals is correct that opinions of any person about whether Tsarnaev should be executed are inadmissible. However, the idea that jurors are going to be indelibly stained by the opinions of politicians printed in the newspaper is far-fetched.

Relative to this Court's earlier pretrial publicity cases, discussed in the next part, the pretrial publicity in this case has much less prejudicial impact. This aspect of the case brings the trial judge's decision even more clearly under the umbrella of discretion that should be respected by reviewing courts.

II. There was no "manifest error" in this case under this Court's precedents to date.

A. Standard of Review.

In cases on direct review from both federal and state courts, this Court has long held that a trial judge's decision on the question of jury bias "ought not to be set aside by a reviewing court, unless the error is manifest." *Reynolds* v. *United States*, 98 U. S. 145, 156 (1879); *Mu'Min* v. *Virginia*, 500 U. S. 415, 428 (1991); *Skilling* v. *United States*, 561 U. S. 358, 396 (2010). The same standard was applied on federal habeas corpus in

4. This is part of document 1744-1 from the District Court docket.

Irvin v. *Dowd*, 366 U. S. 717, 723-724 (1961) (discussing *Reynolds* and later cases), and *Patton* v. *Yount*, 467 U. S. 1025, 1031 (1984) (citing *Irvin*).[5]

Reynolds involved a challenge to a specific juror, but *Irvin* applied the standard to a broader claim, that the massive publicity has tainted the community as a whole. See 366 U. S., at 725-728. *Patton* applied the same standard to a "finding that the jury as a whole was impartial." 467 U. S., at 1032. *Mu'Min* erases any doubt. The challenge in that case was the same as this one, that "the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed." *Mu'Min*, 500 U. S., at 417. The Court applied the manifest error standard to this claim, see *id*., at 428, over the dissent's protest that it should not apply. See *id*., at 439.

The opinion of the Court in *Mu'Min*, not the dissent, controls. "Manifest error" is the standard of review in this case.

B. This Court's Precedents.

This Court's precedents on pretrial publicity and mandatory *voir dire* questions include both constitutional decisions that apply to state and federal courts alike and "supervisory power" cases that apply only to federal courts. Sometimes the distinction matters, but usually it does not.

---

5. *Patton* put off to another day whether the then-existing statutory standard for deference to state court findings of fact, enacted after *Irvin*, raised a higher bar. See 467 U. S., at 1031, n. 7. Similar issues would be raised today under the current subdivisions (d) and (e)(1) of 28 U. S. C. §§ 2254. There is, of course, no need to address them in this federal direct appeal case.

1. Extent of voir dire.

Cases on extent of *voir dire* in federal courts in the late nineteenth and early twentieth centuries appear to approach the question as one of the limits of discretion in particular circumstances without laying down any bright-line rules. In *Connor* v. *United States*, 158 U. S. 408, 409-412 (1895), a defendant accused of election interference was denied a *voir dire* question on whether political affiliation would bias the juror's judgment. No special circumstances were shown to take the question outside the bounds of the trial court's discretion. See *id*., at 415.

Aldridge v. *United States*, 283 U. S. 308 (1931), in which a black defendant was tried for murder of a white D.C. policeman, held that some kind of inquiry is required on *voir dire* where the possibility of prejudice is not too remote, distinguishing *Connor* as a "too remote" case. See *id*., at 314, and n. 4. *Aldridge* decided the case as a straight criminal procedure case, citing state cases for most of its precedents and making no mention of the Constitution. *Aldridge* also made no mention of the supervisory power, which is not surprising given that power was not invented until three years later. See Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 328-329 (2006).

Ham v. *South Carolina*, 409 U. S. 524 (1973), was factually similar to *Aldridge* but was tried in a state court. *Ham* confirmed that *Aldridge* was not based in the Constitution but held that the Due Process Clause of the Fourteenth Amendment required questioning the jurors on racial prejudice. See *id*., at 526-527. *Ham* noted that racial prejudice is special in this regard, given the purpose of the Fourteenth Amendment, and rejected an argument that the judge must question jurors about prejudice against men who wear beards.

See *id*., 527-528; see also *Peña-Rodriguez* v. *Colorado*, 580 U. S. __, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107, 125 (2017) (constitutionally required exception to no-impeachment rule for race only).

Ristaino v. *Ross*, 424 U. S. 589, 596, and n. 8 (1976), confirmed that the constitutional rule of *Ham* was an "all of the circumstances" rule and not a broad *per se* rule for any case where a black defendant is accused of a violent crime against a white victim. However, the Court dropped a curious footnote, saying "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here." *Id*., at 597, n. 9 (citing *Aldridge*). The cite to *Aldridge* for this proposition is curious given that *Aldridge* was neither a "supervisory power" case nor a *per se* rule. The holding of *Ross* is that the Constitution does not require *voir dire* on racial prejudice specifically when "[t]he circumstances [do] not suggest a significant likelihood that racial prejudice might infect [the defendant's] trial." *Id*., at 598.

The question returned to this Court in the federal case of *Rosales-Lopez* v. *United States*, 451 U. S. 182 (1981). The plurality opinion purports to lay down an odd supervisory power rule that questions on racial prejudice should be asked whenever the defendant asks for them, but failure to do so "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id*., at 191. There is not a lot of daylight between the plurality's criterion for reversible error under its supervisory power rule and the constitutional standard established by *Ham* and *Ross*.

It is doubtful whether a plurality opinion can establish a supervisory power rule at all. The concurring opinion's " 'case-by-case' " approach, *id*., at 195 (opinion of Rehnquist, J.), is the narrower ground. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). But even if the plurality's rule is deemed officially created, when the question is whether to reverse a judgment on appeal due to the trial court's denial of race-specific *voir dire*, there is little or no difference between that rule and the constitutional requirement.

2. Pretrial Publicity.

Irvin, *supra*, *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), were cases involving "a trial atmosphere that had been utterly corrupted by press coverage." *Murphy* v. *Florida*, 421 U. S. 794, 798 (1975). We can put these cases to one side, as that is not the claim in this appeal.

The clearest example of a nonconstitutional, federal-only precedent on pretrial publicity is *Marshall* v. *United States*, 360 U. S. 310 (1959). *Marshall* is a brief, cryptic *per curiam*.[6] The opinion recites the facts, including press reports[7] of the defendant's prior conviction and legislative testimony admitting illegal conduct very similar to the charged offense. It notes that the jury received this prejudicial, inadmissable information,

---

6. *Marshall* is a prime example of why making rules of procedure through the supervisory power is often unwise, a point we will return to in Part III, *infra*. A strong argument can be made that *Marshall* was wrongly decided and should be overruled to the extent that it established any kind of bright-line rule, but that issue is for another day.

7. The reports in *Marshall* were during trial rather than pretrial, see *id*., at 311, but that difference is not material.

and without further explanation declares that "[i]n the exercise of our supervisory power to formulate and apply proper standards ... we think a new trial should be granted." *Id*., at 313. Exactly what standard is formulated in this case is unclear. Surely not every trial in which jurors have read inadmissible information needs to be reversed. That would be an impossible standard.

Murphy v. *Florida*, 421 U. S., at 798, read *Marshall* as establishing "the principle ... that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced." But that principle does not have "any application beyond the federal courts." *Ibid*. It also has no application in this case, as none of the coverage involves a prior criminal record. In *Murphy* itself, the Court examined the *voir dire* and determined that it did not indicate the kind of "partiality that could not be laid aside." *Id*., at 800. The fact that the amount of publicity had sharply declined in the seven months before trial was also significant. See *id*., at 802.

Patton, 467 U. S., at 1032, like *Murphy*, looked to all the circumstances to determine "that the trial court did not commit manifest error in finding that the jury as a whole was impartial." A particularly important circumstance was the lapse of time resulting from the fact that this was Yount's second trial. The crime and the first trial both occurred in 1966. *Id*., at 1026-1027. The trial being reviewed was four years later, see *id*., at 1027, a time lapse similar to the present case. See App. to Pet. for Cert. 47a. "That time soothes and erases is a perfectly natural phenomenon, familiar to all." 467 U. S., at 1034. "In the circumstances of this case, we hold that [the passage of time] clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial." *Id*., at 1035.

What we see in all these pre-*Mu'Min* cases is that, aside from *Marshall*, there has been little difference between the constitutional standard and the standard for federal courts in cases on pretrial publicity and adequacy of *voir dire*. What little there is is limited to the prior conviction publicity rule in *Marshall* and, possibly, the racial bias *voir dire* issue in *Rosales-Lopez*. Neither applies to this case.

3. Mu'Min and Skilling.

Mu'Min v. *Virginia*, *supra*, is thus the primary precedent for this case. It involves the same issue, the lack of content-specific questions on *voir dire*. See 500 U. S., at 417. *Mu'Min* reviewed the state and federal cases on *voir dire* separately but ultimately found little difference between them, instead finding that "two parallel themes emerge from both sets of cases." *Id*., at 424. One dealt with real possibility of prejudice when a black defendant was charged with a violent crime against a white victim, a concern not present in this case. The other was that "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Ibid*.

Mu'Min then went to discuss the defendant's claim that pretrial publicity calls for a stricter rule on *voir dire* than racial prejudice. Much of this discussion involves practical considerations that apply just as much to a supervisory power question as they do to a constitutional question. There is the problem of the *voir dire* process itself conveying inadmissible information to jurors who had not previously heard it and the downside of conducting individual *voir dire* to avoid that problem. See *id*., at 425. There is the difficulty of an appellate court reviewing the adequacy of *voir dire* when the trial judge is in a superior position to judge credibility and demeanor and has the local knowledge.

See *id*., at 424, 427. The weight of authority from other courts tilted the other way. There was much greater agreement on the need for inquiry on racial prejudice than for pretrial publicity. See *id*., at 426. These considerations all weigh against the creation of a rigid *voir dire* requirement whether the asserted authority is constitutional or supervisory.

The same is true for the *Mu'Min* Court's treatment of the ABA Standards for Criminal Justice. See *id*., at 430. The ABA's proposed *voir dire* rule is based on a substantive standard for disqualification that the Constitution does not require, see *ibid*., but also that federal law does not require. The ABA Standards, moreover, "have not commended themselves to a majority of the courts that have considered the question." *Ibid*.[8] These considerations also weigh against adopting them, or a variation of them, under the supervisory power as well.

Mu'Min holds that while the subject of pretrial publicity must be covered, content specific questions are not required. See *id*., at 431. This holding is limited to constitutional requirements, the only question before the Court in that case, but the implication is strong that the Court's greater "latitude in setting standards for

---

8. In matters of criminal law, the American Bar Association long ago ceased to be representative of the profession as a whole and regularly takes the side of the defense bar whenever it takes a stand on matters where the defense bar is largely on one side and prosecutors are generally on the other. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wiggins* v. *Smith*, No. 02-311 (Oct. Term. 2002), pp. 25-27, online at http://www.cjlf.org/program/briefs/Wiggins.pdf (all Internet materials as last visited June 16, 2021). There is no reason why its publications "should be given a privileged position." *Bobby* v. *Van Hook*, 558 U. S. 4, 14 (2009) (Alito, J., concurring). They are position papers of an interest group like any other and should be treated as such.

voir dire in federal courts," *id*., at 424, would not have been exercised even if available. There are certainly no precedents from this Court indicating that a different rule for federal courts applies to *voir dire* regarding pretrial publicity.

Indeed, the defendant in *Skilling*, *supra*, a tycoon who could afford pricey legal talent,[9] did not bother to make a supervisory power argument at all. See 561 U. S., at 446, n. 9 (Sotomayor, J., concurring in part and dissenting in part). *Skilling* is different from *Mu'Min* and the present case in that the trial court did ask about the content of news stories the venire members had seen. See *id*., at 374. Even so, *Skilling* did challenge the adequacy of *voir dire*, and the Court's response was similar to *Mu'Min*. Relying on both constitutional and supervisory power cases, the *Skilling* Court noted that jury selection "is 'particularly within the province of the trial judge.' " *Id*., at 386 (quoting *Ristaino* v. *Ross*, 424 U. S. 589, 594-595 (1976)).

C. Application to the Present Case.

Applying only this Court's existing precedents, without regard to the First Circuit's supervisory rule or whether this Court should create a similar one, this case is straightforward. *Mu'Min* v. *Virginia*, *supra*, is on point and fatal to the defendant's case. See also Brief for United States 32-35. For the reasons discussed in Part I, this case is even more clearly within the trial judge's discretion than *Mu'Min*. Much coverage that would be prejudicial in a case of disputed guilt was not prejudicial in a case about penalty only.

---

9. See Emshwiller, An Audacious Enron Defense: Company's Moves Were All Legal, Wall Street Journal, Jan. 20, 2006, online at https://www.wsj.com/articles/SB113772974804651717 ("$40 Million War Chest").

III. Rules under the supervisory power should be made rarely, if ever, and none is called for in this case.

A. This Court's Supervisory Power.

"Supervisory power," sometimes phrased "supervisory authority," is a term with multiple meanings. As used here, it means "the power of an appellate court to supervise lower courts by prescribing procedures for them above and beyond those required by statutory and constitutional provisions," Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 330 (2006), and, we would add, rules of court established under the Rules Enabling Act.[10]

This power was asserted in *McNabb* v. *United States*, 318 U. S. 332, 340 (1943), with remarkably little to back it up. See Barrett, *supra*, at 329. *McNabb* was "a self-conscious exercise of supervisory rulemaking in the context of adjudication rather than in the process of promulgating court rules." *Ibid*. *McNabb* established a rule excluding confessions that resulted from prolonged detention, 318 U. S., at 341-342, long before this Court invoked the Bill of Rights to establish detailed rules regarding custody and questioning. See generally *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) (Sixth Amendment, counsel during questioning); *Miranda* v. *Arizona*, 384 U. S. 436 (1966) (Fifth Amendment, rules for questioning); *Gerstein* v. *Pugh*, 420 U. S. 103 (1975) (Fourth Amendment, hearing for prolonged detention).

Whether the supervisory power has any constitutional justification is debatable. Compare Barrett,

---

10. A marked departure from accepted practice calling upon this Court to exercise an error-correcting function rather than promulgate a rule of procedure is a different use of the term. See Supreme Court Rule 10(a).

supra, with Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433 (1984). That debate need not be resolved in this case. As a practical matter, this Court's interest in promulgating rules this way has waned through the years. The most recent of the examples discussed in Barrett, 106 Colum. L. Rev., at 328-333, was nearly 20 years old at the time of the 2006 article, and most were much older. Green, Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution that Might Have Been, 49 Stetson L. Rev. 241, 255-261 (2020), traces the decline in use.

Two reasons suggest themselves for this declining invocation of the power. First, the need for "establishing and maintaining *civilized* standards of procedure and evidence," *McNabb*, 318 U. S., at 340 (emphasis added), is greatly reduced after decades of intense scrutiny of criminal procedure by this Court. The chances are infinitesimal that any *uncivilized* practices remain at large in the federal courts. *Cf. Edwards* v. *Vannoy*, 593 U. S. __, (No. 19-5807, May 17, 2021) (slip op., at 15).

Second, where nationwide uniform standards of practice are needed, the Rules Enabling Act, 28 U. S. C. §§ 2071-2077, provides a superior mechanism for establishing them. A system of deliberate consideration and public notice and comment has been established that provides a better exploration of the full consequences of a proposed rule. See Judicial Conference of the United States, How the Rulemaking Process Works, online at https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works. In the event that experience shows that the rule needs revision, the rulemaking process provides a smoother path to making that adjustment, rather than waiting

for a case to reach this Court presenting the issue and then grappling with complex issues of *stare decisis* to overrule a precedent.

Most important of all, use of the Rules Enabling Act allows for prospective-only application, avoiding the injustices that follow from retroactive application of new rules announced in caselaw. A rule must apply to the case in which it is announced. See *Teague* v. *Lane*, 489 U. S. 288, 315 (1989) (plurality opinion). Then the rule must generally be applied to all defendants similarly situated, which typically means, at a minimum, all cases pending on direct appeal. *Griffith* v. *Kentucky*, 479 U. S. 314, 322 (1987).

Reversing judgments in criminal cases that were tried correctly under all applicable statutes and constitutional provisions as interpreted at the time because the interpretation changes later is a heavy cost to society. Retrying cases is not only a cost in time and money, but justice may be defeated altogether if the staleness of the case results in the wrongful acquittal of a guilty criminal. See *Edwards* v. *Vannoy*, *supra* (slip op., at 6-7). Such results weaken public confidence in our judicial system. These costs may be necessary to correct mistaken interpretations of the Constitution while maintaining principled decision-making, but they are not necessary to establish new rules of procedure. Congress has provided a better way, and that better way should be used if a new rule is needed.

A just result in the present case can be achieved by simply assessing the adequacy of the *voir dire* under this Court's existing precedents, as described in Parts I and II, *supra*. Creating a new bright-line rule under the supervisory power is unnecessary and improper.

B. The Court of Appeals' Supervisory Power.

This brings us, finally, to the Court of Appeals' actual basis of decision, its own supervisory-power rule in *Patriarca* v. *United States*, 402 F. 2d 314 (CA1 1968). If the existence of a supervisory rulemaking power in this Court is debatable, the existence of such a power in the courts of appeals is even shakier. See Barrett, 106 Colum. L. Rev., at 335, n. 48. The posture of the present case illustrates one reason for caution with regard to such powers.

A question of law is now presented to this Court for decision. Let us assume that there is no basis in the Constitution, statutes, formally established rules of court, or this Court's precedents to conclude that the District Court committed a reversible error and further assume that this Court does not promulgate a supervisory-power rule of its own, as argued in the previous parts of this brief. Can this Court uphold the reversal of the District Court's judgment on the basis of the First Circuit's supervisory rule? Can this Court uphold the reversal when the facts of the case would not require reversal if the trial were held in a district court in a different circuit? That would be more than a little strange.

Providing a uniform rule on federal law for all courts to follow nationwide is the principal reason this Court was created in the first place. See J. Story, Commentaries on the Constitution of the United States § 827, pp. 589-590 (abridged ed. 1833) (reprint 1987). Assuming for the sake of argument that the courts of appeals have a supervisory rulemaking power over the district courts at all, such rules should be considered tentative until the issue reaches this Court. This Court should decide the present case without regard to *Patriarca*, and the resulting precedent should control the question thereafter in all federal circuits. So considered, the District

Court did not commit error at all, much less "manifest error."

IV. Exclusion of evidence under the criterion of § 3593(c) is constitutional.

The Government has amply explained why the District Court's exclusion of evidence of an unrelated crime committed by the defendant's deceased accomplice/brother was well within the judge's ample discretion under 18 U. S. C. § 3593(c). See Brief for the United States 38-45. However, because the Court of Appeals relied on *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), for this point, see *Tsarnaev III*, 968 F. 3d, at 73, *amicus* will add a few words on why potentially misleading language in that opinion should not be considered to cast any constitutional doubt on the statutory standard.

In the penalty phase of federal capital cases, § 3593(c) waives all rules of evidence except for one of its own creation: "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." This is the familiar standard of Federal Rule of Evidence 403 with the conspicuous omission of the requirement that the outweighing be substantial. "Thus, the presumption of admissibility of relevant evidence is actually narrower under the [Federal Death Penalty Act] than under the [Federal Rules of Evidence]." *United States* v. *Fell*, 360 F. 3d 135, 145 (CA2 2004).

Skipper noted the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and then noted a "corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigation evidence.' " 476 U. S., at 4 (quoting *Eddings* v. *Oklahoma*, 455 U. S.

104, 114 (1982)). Taken literally, this language could be interpreted to mean that the Eighth Amendment completely preempts *all* rules on the admissibility of mitigating evidence save only the very minimal threshold of relevance. See Federal Rule of Evidence 401 (definition of relevant evidence). However, *Skipper* and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), have not been understood that way and they should not be now.

Whenever considering the *Lockett* line, it is worth noting that the mandate of that case is a high-handed act of judicial activism without a shred of justification in the text or history of the Constitution. See *Walton* v. *Arizona*, 497 U. S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in the judgment); Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131, 153 (2019). Although intended to produce clarity, *Lockett* has sown chaos from the day it was decided. That case and its numerous progeny have been accurately described as "a dog's breakfast of divided, conflicting, and ever-changing analyses." *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 267 (2007) (Roberts, C.J., dissenting). Whether *Lockett* should be overruled may be considered in due course, but in the interim it and its progeny should be confined to their present scope and not expanded.

As for *Skipper*, both state and federal courts have continued to permit trial courts to exercise discretion to exclude marginally probative or unreliable evidence under applicable rules, subject to the due process limitation of *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). See *People* v. *Smithey*, 20 Cal. 4th 936, 995-996, 978 P. 2d 1171, 1208-1209 (1999); *State* v. *Davis*, 175 Wash. 2d 287, 320-321, 290 P. 3d 43, 57-58 (2012); *United States* v. *Purkey*, 428 F. 3d 738, 756-757 (CA8

2005); *United States* v. *Fell*, 531 F. 3d 197, 219-220 (CA2 2008).

Skipper and *Eddings* were not really evidence cases in the traditional sense of the word. They were actually cases about what factors come under *Lockett*'s broad umbrella of the defendant's character and record. In *Eddings* it was the defendant's youth and family history. See 455 U. S., at 112-113. In *Skipper* it was post-crime good behavior in jail pending trial. See 476 U. S., at 4-5. The question of what factors must be considered and what evidence is admissible to support those factors are analytically distinct. A case that is really about the former should not be read to make a constitutional ruling on the latter, even if it uses somewhat imprecise language that could be read that way in isolation.

Section 3593(c)'s Rule 403-like standard is constitutional. The District Court applied it within its discretion for the reasons briefed by the Government. There is no reversible error in the exclusion of the marginally relevant evidence at issue.

CONCLUSION

The decision of the Court of Appeals reversing the judgment of the District Court should be reversed.

June, 2021

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation