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Supreme Court of the United States.

United States of America, Petitioner,  
v.  
Dzhokhar A. TSARNAEV, Respondent.

No. 20-443.  
August 27, 2021.

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

**Brief of Amici Curiae Shirin Bakhshay, Tarika Daftary-Kapur, Yael Danieli, Angela Jones,  
Margaret Bull Kovera, Steven D. Penrod & Christine L. Ruva in Support of Respondent**

[Benjamin Peacock](#), Meredith George, Clifford Chance US LLP, 31 W 52nd St, New York, NY 10019.

[Stephen M. Nickelsburg](#), Counsel of Record, Karina Bashir, Clifford Chance US LLP, 2001 K Street NW, Washington, DC 20006, (202) 912-5000, [@cliffordchance.com](mailto:steve.nickelsburg), Counsel for Amici Curiae.

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### \*1 INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Amici* are psychologists whose research focuses on understanding the psychological phenomenon of bias, in particular the impact of bias on fairness in our criminal justice system. Controlling this impact can be especially difficult in cases where, as here, the crime is especially heinous. *Amici* also include psychologists whose experience and expertise concern the impact of trauma on evaluating victim stories. *Amici* respectfully submit this Brief to explain several well-established principles from the field of psychology that inform one of the issues presented: whether content-based *voir dire* questioning is necessary to identify potential juror bias arising from prejudicial pre-trial publicity in this uniquely high-profile case.

Individual *Amici* are:

*Shirin Bakhshay* is the Thomas C. Grey Fellow Lecturer in Law at Stanford Law School. She earned her B.A. in Political Science from University of California Berkeley, J.D. from Yale Law School, and her Ph.D. in Psychology from University of California at Santa Cruz. As an interdisciplinary scholar, she employs a socio-psychological lens to understand criminal justice attitudes, norms, and institutions and inform criminal justice and sentencing policy. She utilizes both quantitative (e.g., experiments and surveys) and qualitative (e.g., content analysis and thematic analysis) methods in her work. Her recent \*2 work focuses on capital juror decision-making, factors affecting sentencing decisions in non-capital cases, and attitudes towards restorative justice and noncustodial criminal justice outcomes. She has received numerous grants and awards for her work and has been published in periodicals such as *Psychology*, *Public Policy*, and *the Law* and *The Prison Journal*.

*Tarika Daftary-Kapur* is an Associate Professor of Justice Studies at Montclair State University. She earned her M.A. in Psychology from the University of Dayton and her Ph.D. in Psychology from John Jay College of Criminal Justice, Graduate Center, City University of New York. Her interests lie primarily in adolescent decision-making and legal competencies, and guilty-plea decision-making. Her secondary area of research is jury decision-making with a focus on pre-trial publicity and decision-making in death penalty cases. She is currently working on a multiyear project examining the resentencing and reentry process of juveniles sentenced to life without parole. Her research has been published in multiple outlets including *Law and Human Behavior*; *Behavioral Sciences and the Law*; *Journal of Applied Psychology*; and *Psychology*, *Public Policy*, and *Law*.

*Yael Danieli* is a clinical psychologist, victimologist, and traumatologist. She earned her Ph.D. in Psychology from New York University and has done extensive psychotherapeutic work with survivors and children of survivors of trauma. She has lectured and published, and is translated worldwide, in numerous books and journals on victims' rights and optimal care and training for work with victims and survivor populations. She is the co-founder and director of the Group Project for Holocaust Survivors and their \*3 Children, a founding director and past President of The International Society for Traumatic Stress Studies (ISTSS), a founding co-president of the International Network of Holocaust and Genocide Survivors and their Friends, and founder and director of the International Center for the Study, Prevention, and Treatment of Multigenerational Legacies of Trauma. She



has served as a senior representative to the United Nations, of the World Federation for Mental Health, the ISTSS, and the International Organization for Victim Assistance. She served as a consultant to the International Criminal Court and as Advisor to the Office of the United Nations Secretary-General on victims of terrorism. Among other awards, Dr. Danieli received a Lifetime Achievement Award from the ISTSS in 2002 and the Award for Lifetime Achievement in Trauma Psychology from the American Psychological Association in 2012.

*Angela Jones* is an Assistant Professor in the School of Criminal Justice and Criminology at Texas State University. She earned her Ph.D. in Psychology from the Graduate Center, City University of New York. Her research interests lie at the intersection of psychology and the legal system. She applies expertise in experimental and survey methodology to design studies assessing public perceptions of procedural justice concerning police and courts, as well as evaluations of unreliable evidence that could lead to wrongful convictions. She also evaluates methods to improve juror decision-making, such as instructions, expert testimony, and implicit-bias training. Her research has been published in interdisciplinary journals such as *Criminal Justice and Behavior*; *Journal of Experimental Criminology*; and *Psychology, Crime \*4 and Law*. She has been recognized by the American Society of Criminology Division of Experimental Criminology and American Psychology-Law Society (APLS) for her scholarly contributions.

*Margaret Bull Kovera* is a Presidential Scholar and Professor of Psychology at John Jay College of Criminal Justice at the City University of New York. She earned her B.A. in Psychology from Northwestern University and Ph.D. in Social Psychology from University of Minnesota. For over 25 years, she has had continuous funding from the National Science Foundation for her research on eyewitness identification, jury decision-making, and scientific evidence. Her research on these topics has been published in *Law and Human Behavior*; *Journal of Applied Psychology*; *Journal of Experimental Psychology: Applied*; ***Applied Cognitive Psychology***; and *Psychology, Public Policy, and Law*. She is a Past-President of the APLS and former Editor-In-Chief of *Law and Human Behavior*. She is the recipient of the Saleem Shah Award for Early Career Achievement in Psychology and Law (APLS and the American Academy of Forensic Psychology), the Outstanding Teacher and Mentor in Psychology and Law Award (APLS), the APLS Book Award, the Distinguished Teaching Award (John Jay College), and the Distinguished Service Award (Society for the Psychological Study of Social Issues).

*Steven D. Penrod* is a Distinguished Professor of Psychology at John Jay College of Criminal Justice at the City University of New York. He earned his B.A. from Yale College, J.D. from Harvard Law School, and Ph.D. in Social Psychology from Harvard University. He has over 150 publications and is a co-author of books on juries, eyewitnesses, and social psychology. \*5 He currently teaches graduate-level courses on jury decision-making; eyewitness reliability; experimental psychology and law; and media, psychology and law. His research focuses on decision-making in legal contexts, and he has written about the effects of jury size and decision rules on jury decision-making; death penalty decision-making; juror's use of probabilistic and hearsay evidence; comprehension of legal instructions; and the impact of extra-legal influences such as pre-trial publicity on jurors. Professor Penrod has also been a law school professor at various universities and was the Director of the Law and Psychology Program at University of Nebraska.

*Christine L. Ruva* is a Professor of Psychology and Sarasota-Manatee campus chair at the University of South Florida. She earned her Ph.D. in Psychology from the University of South Florida in the area of Cognitive and Neural Sciences, where she focused on the application of cognitive psychology to the legal system. For over 20 years she has explored the effects of pre-trial publicity on jurors' perceptions, emotions, memories, interpretation of trial evidence, deliberation behavior, and verdicts. Her research also explores how individual differences of jurors and defendants influence jurors' perceptions, deliberation behaviors, and verdicts. Her research also explores the effectiveness of remedies available to the courts for reducing juror bias (e.g., deliberation, expert testimony, jury instructions, *voir dire*, and implicit bias remedies). She utilizes both quantitative and qualitative (i.e., content analysis of jury deliberations) methods. Her research has been published in a variety of high-impact psychology and criminology journals including the following: *Criminal Justice and Behavior*; *Journal \*6 of Experimental Psychology-Applied*; *Law and Human Behavior*; *Psychology, Crime and Law*; and *Psychology, Public Policy, and Law*.

## INTRODUCTION

During the annual Boston Marathon on April 15, 2013, two homemade pressure-cooker bombs detonated 14 seconds and 210 yards apart, near the finish line of the race. The bombs killed three people and injured hundreds of others, including 17 who lost limbs. This grotesque attack on an iconic Boston event, and the ensuing community lockdown while the perpetrators remained at large, generated whitehot, nonstop, inescapable media coverage of both the carnage and the manhunt that followed.

The bombing was unique in its horror, and *Amici* have profound sympathy for its victims. *Amici* also understand the difficulty inherent in conducting a trial of this importance, complexity, and emotional impact. *Amici* do not attempt to address the Eighth Amendment or statutory issues presented by this case, nor do *Amici* address how supervisory rules interact with constitutionally-mandated requirements for *voir dire*.

Rather, this Brief will set forth several well-established principles from the field of psychology that bear on certain key issues in this case: the existence and effect of pre-trial publicity-related bias; whether jurors are able to self-identify bias based on pre-trial publicity; the difficulty of absorbing and evaluating traumatic experiences; and therefore whether jurors need to be asked what they have heard and seen in those rare cases where pre-trial publicity is sufficiently prejudicial to give rise to a significant \*7 likelihood of juror bias. These questions are critical to identifying and seating an unbiased jury. And an unbiased jury is fundamental to the fairness of our criminal justice system.




## SUMMARY OF ARGUMENT


Decades of research by cognitive psychologists into the causes and impacts of bias, as well as individuals' ability to self-identify bias, support requiring content questioning of potential jurors in cases where pervasive and inflammatory pre-trial publicity has occurred.

*First*, pervasive and inflammatory pre-trial publicity can lead to deep-seated bias. This bias is not merely an affinity for the victim or aversion to the defendant. It is cognitive, and as such, it fundamentally affects how jurors will process evidence during the trial and deliberate in the jury room.

These effects are heightened in cases involving notorious crimes such as terrorism and violence against children. And, in today's world of pervasive social media, where information is ubiquitous, is pinpoint-tailored to the fears and beliefs of the reader and viewer, and may well be inaccurate, the impact of pre-trial publicity is especially acute.

*Second*, cognitive bias can be unconscious, making it difficult even for the most self-aware and wellintentioned potential juror to identify and self-report in response to general questions about bias. In fact, individuals with unconscious bias may be unduly confident in their ability to disregard pre-trial publicity and judge impartially. Once seated, it can be difficult or impossible for jurors to set this bias aside.

\*8 In short, scientific research into bias confirms what logic and good sense suggest: questioning potential jurors individually about their exposure to media is necessary where substantial and prejudicial pretrial publicity has occurred. The rule that the trial judge, in cases presenting “a significant possibility that jurors have been exposed to potentially prejudicial material,” must question each potential juror “to elicit the kind and degree of his exposure to the case or the parties,” is necessary to identify those jurors who have experienced the factors that cause bias.  *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968); see also  *United States v. Dixon*, 596 F.2d 178 (7th Cir. 1979);  *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970);

 *United States v. Clark*, 398 F. Supp. 341 (E.D. Pa. 1975). Scientific research confirms the necessity of this rule in cases such as this one, where potential jurors state they were exposed to publicity, and the case involves a notorious crime with an immense quantity of sensational information and misinformation saturating the media. In such cases, individual, content-based questioning is crucial to ensuring that a fair and impartial jury is empaneled.

## ARGUMENT

### I. PRE-TRIAL PUBLICITY OF NOTORIOUS CRIMES CAN CAUSE BIAS.

#### A. Media Coverage of Notorious Crimes Can Be Pervasive, Slanted, Sensational, and Emotional-All of Which Can Lead to Bias.

Media coverage of notorious crimes is different. The news media, and today, social media, cover crimes every day, and a steady drumbeat of even serious \*9 crimes makes most criminal coverage routine. But some crimes receive sensational coverage because they are especially heinous, extraordinarily violent, or threaten the community at large. And sensational coverage, by its sheer volume and by its content, has impacts that the everyday crime beat does not.

The volume of coverage in notorious cases can be overwhelming.<sup>2</sup> And studies show that the quantity of pre-trial publicity to which jurors are exposed affects their level of bias. Across studies extending back several decades, researchers have demonstrated that individuals exhibit a greater propensity to pre-judge defendants when they are exposed to more publicity both as a general conclusion (*i.e.*, showing a general propensity to pre-judgment based on an increase in the amount of exposure<sup>3</sup>), and in response to specific thresholds (*i.e.*, showing that prospective jurors exposed to at least three newspaper articles about a crime were more likely to believe there was ample evidence against a defendant<sup>4</sup>). This effect has been demonstrated in both naturally occurring and \*10 controlled settings, confirming the validity of the proposition.<sup>5</sup>

Media coverage of notorious crimes is likely to be sensational and slanted against the defendant. A 2018 content analysis of over 1,800 pre-trial newspaper articles regarding 20 California capital cases from 1979 to 2005 found that certain highly prejudicial elements recur repeatedly in the coverage. Seventyfive percent of the articles contained some form of negative information, and 50 percent included information that the study authors classified as “sensationalism,” which they defined as “any description of the crime that uses extreme, heinous, shocking, or emotional language.” Negative character statements about the suspect, such as “cop killer” or “monster,” appeared in 32 percent of the articles. By contrast, only 19 percent of the articles included positive statements about the suspect.<sup>6</sup> Similarly, a 1995 survey of \*11 news stories about crime across 14 different newspapers over an eight-week period found that 27 percent of the reports about a criminal suspect contained content that the ABA described in its then-most recent Model Rules as “potentially prejudicial,” including negative statements about the suspect's character and guilt.<sup>7</sup>

The rise of social media has exponentially increased the quantity and quality of information regarding notorious crimes available to the public. And social media not only is pervasive, it also spreads misinformation. A study in the aftermath of the Boston Marathon Bombing showed that misinformation related to the bombing was rampant on Twitter, and largely went uncorrected. For example, a false rumor circulated about a young girl killed while running the marathon, accompanied by a picture of a young girl. Over 92,000 tweets about this story followed the attacks. Of those, 90,668 (or 97.7 percent) included misinformation, and only 2,046 (or 2.2 percent) included corrections.<sup>8</sup> In addition, several major news sources-including CNN, The New York Post, and The Boston Globe-tweeted inaccurate reports after the bombing.<sup>9</sup>



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\*12 In short, the volume and nature of traditional and social media coverage of notorious crimes greatly increases the risk that prospective jurors for these cases may already have formed beliefs about the case-which can lead to biased decision-making.<sup>10</sup> “*Predecisional distortion theory*” predicts that jurors will weigh trial evidence to support their pre-existing beliefs rather than objectively;<sup>11</sup> and studies show that jurors exposed to negative pre-trial publicity weigh the evidence to support anti-defendant outcomes. A study of 30 mock-jury deliberations found that mock jurors exposed to anti-defendant pre-trial publicity were significantly more likely than unexposed \*13 jurors to discuss ambiguous trial evidence in a manner that supported the prosecution; and the exposed jurors rarely interpreted new evidence in a manner supporting the defendant.<sup>12</sup> Another study found that jurors exposed to pre-trial publicity distorted witness testimony in the direction consistent with their exposure-i.e., jurors exposed to anti-defendant pretrial publicity demonstrated a pro-prosecution bias, while jurors exposed to pro-defendant pre-trial publicity exhibited a pro-defense bias.<sup>13</sup>

Research also shows that pre-trial publicity that generates emotions such as anger and disgust has a significant impact on judgments-more so than purely factual publicity-and notorious crimes subject to exhaustive reporting can generate substantial emotional responses.<sup>14</sup> A 2014 study asked over 300 participants to read press articles about a criminal trial in France and found that (a) the news stories aroused negative emotions, and (b) reading the stories was a predictor of adverse judgments. At the first step, the study analyzed the articles for “incriminating” versus “crime story” information, with “incriminating” information simply designating the defendants as \*14 having committed a crime and “crime-story” information presenting the story of the crime, often in graphic fashion. Study participants then were assigned to read one of the articles, rate their anger arousal, and report their judgment about the defendant. While both incriminating information and crimestory information increased juror propensity to judge the defendant as guilty, crime-story information aroused anger and corresponded with higher guilty judgment rates.<sup>15</sup>

Similarly, a 2003 study analyzed 50 mock jurors' recall of factual versus “affective” pre-trial publicity. The 50 mock jurors were naturally exposed to “extensive and prolonged” pre-trial publicity about a fraud case and then interviewed to determine what they remembered about the case from that publicity. Their recall was coded as either *factual* or *affective / evaluative*, with factual recall referring to neutral data points about the crime (e.g., “The defendants are accused of fraud.”) and affective recall meaning memories reported with an emotion or opinion (e.g., “They were all in on it ... ruthless con-artists.”). The mock jurors then watched a highly realistic depiction of the actual trial and were interviewed throughout about their reasoning processes, whether they thought the defendants were guilty, and how confident they were in their verdict. The study found that those mock jurors who had affective recall of publicity were more likely to be pro-prosecution and were more confident in finding the defendant guilty after \*15 watching a mock trial.<sup>16</sup> Mock jurors who demonstrated that they recalled purely factual information from pre-trial publicity, as opposed to more affective or emotional information, did not show the same tendencies. Therefore, the study found that “an affective response to [pre-trial publicity] appears to have greater influence on subsequent reasoning about trial evidence and verdict judgment than does purely factual recall.”<sup>17</sup>

Indeed, studies consistently find that jurors who have experienced anger and disgust prior to hearing the evidence are more likely to be punitive than jurors who report less anger.<sup>18</sup> Some scholars theorize that these emotions lead to a desire to place blame, which finds an outlet in the criminal defendant.<sup>19</sup> Other researchers suggest that anger increases one's sense of certainty, leading one to consider fewer factors \*16 when forming judgments-i.e., that individuals experiencing anger do not readily accept new information or process all information systematically.<sup>20</sup>

Research also shows that the passage of time does not dampen the effect of emotional pre-trial publicity.<sup>21</sup> A 1990 study found that waiting twelve days between exposure to emotional publicity and trial did not reduce the biasing effects of that publicity, while the wait did reduce the effect of factual publicity. Nearly 800 mock jurors were exposed to either emotional or factual

publicity before watching a highly realistic mock criminal trial. The jurors were asked to report their verdict, their confidence in their verdict, and an estimate of the likelihood of defendant's guilt. \*17 Some of the mock jurors deliberated immediately after observing the trial, and others waited twelve days before deliberating. The results showed that the negative emotions of those exposed to emotional publicity remained relatively constant, meaning “subjects' memory of their emotional reactions was not diluted by the passage of several days.”<sup>22</sup> In fact, for individuals suffering from acute stress and trauma, further addressed below, the correlation between trauma and anger may *increase* over time.<sup>23</sup>

### **B. Publicity of Terrorist and Other Mass Acts of Violence May Cause Significant Fear and Related Bias.**

Conventional and social media publicity of traumatic events such as terrorism and other mass acts of violence can cause emotional responses such as anger, disgust, and fear that distort decision-making and lead to bias. Frequent viewers of stories relating to terrorism and other mass incidents risk the “abnormal consolidation of fear conditioning that is associated with development of acute and [post-traumatic stress] responses” and can contribute to trauma-related disorders.<sup>24</sup> Psychological effects in the aftermath \*18 of a terrorist attack are “virtually certain” even if individuals are not aware they are experiencing them.<sup>25</sup>

This effect has been documented with respect to the Boston Marathon Bombing itself. A nationwide study found that media exposure and graphic images of the bombing affected the cognitive function of exposed individuals. One survey even showed that event-related media exposure was associated with a higher likelihood of acute stress than direct exposure to the bombing.<sup>26</sup>

Furthermore, exposure to traumatic evidence at trial can trigger unexpected, negative reactions from jurors suffering from trauma-related disorders, affecting their decision-making. Triggers vary depending on the type of trauma experienced and may be directly or indirectly related to the origin event itself. For example, people could be triggered by sounds, smells, tastes, colors, places and specific objects, as well as evidence related to the traumatic event. In this mental state, individuals may be unable to precisely articulate what they are thinking and feeling, and, of particular significance here, may even be unaware that the traumatic event is the source of their anxiety.<sup>27</sup> Of significance to trials, traumatized individuals may have a cognitive bias toward emotionally \*19 charged memories; and exposure to evidence may cause flashbacks, trigger overwhelming feelings, and cause threat arousal—all of which can impact cognition and information processing.<sup>28</sup>

## **II. PRE-TRIAL PUBLICITY BIAS IS DIFFICULT TO RECOGNIZE AND SET ASIDE AND CAN DISTORT JURY DELIBERATIONS.**

### **A. Biased Jurors Interpret Information Differently than Unbiased Jurors.**

The impact of bias on juror decision-making is immense and difficult to overcome. This is because jurors exposed to pre-trial publicity interpret new evidence at trial in a different way than jurors who have not been exposed. In fact, bias from pre-trial publicity may persist even when squarely contradicted by trial evidence.<sup>29</sup>

Research into the “*story model theory*” and the “*primacy effect*” help explain why pre-trial publicity bias is “sticky” and difficult to overcome. The *story model theory* posits that the “central cognitive process in juror decision-making is story construction.” This means that jurors turn information gleaned at trial \*20 into a narrative, and “the story the juror constructs determines the juror's decision.”<sup>30</sup>

To test this theory, its originators showed study participants a mock trial and asked them to reach a verdict while discussing their rationale out loud. Each participant's reasoning was mapped to determine whether the jurors processed the evidence presented chronologically, in the structure of the legal argument, in terms of character sketches, or in a story narrative. The results demonstrated that jurors analyze evidence in the structure of a story, not in terms of legal arguments or any other alternative, and-significantly-that jurors fill in gaps in the story with information not presented at trial.<sup>31</sup>

Research into the *primacy effect* demonstrates that it is difficult for individuals to overcome their first impressions once they form initial opinions, and they therefore interpret later information to be consistent with those first opinions.<sup>32</sup> Individuals remember early information better than later information, and thus, early information holds a bigger influence on decision-making and impressions.<sup>33</sup> When the primacy effect is combined with the story-model understanding \*21 of juror decision-making, the juror who has a mediaformed narrative of events due to pre-trial publicity is at risk of prioritizing this narrative over subsequent, contradictory evidence presented at trial, even when the juror endeavors to consider only the evidence from trial.

Media-exposed jurors also may discount information presented at trial due to “*belief persistence*,” which is the tendency to maintain a belief even after subsequent facts show it to be incorrect,<sup>34</sup> or “*confirmation bias*,” which is the tendency to form a belief early in the decision-making process and then evaluate new information in a manner favorable to that belief.<sup>35</sup> In all, potential jurors tainted by pre-trial publicity face substantial hurdles in overcoming those biases.<sup>36</sup>

### **B. Biased Jurors May Not Recognize Their Biases-Undermining *Voir Dire* and the Effectiveness of Limiting Instructions.**

Prospective jurors may find it particularly difficult to recognize their own biases, or may overestimate their capacity to set biases aside, in cases involving \*22 traumatic events.<sup>37</sup> Moreover, decades of studies have shown that neither jury instructions nor deliberation reduce the impact of factual and emotional publicity.<sup>38</sup>

Biased jurors may not answer *voir dire* questions accurately because their bias is subconscious and they do not know or understand the impact that pre-trial publicity has had. In a quintessential study, \*23 researchers exposed approximately 150 mock jurors to either neutral or negative pre-trial publicity, asked them to complete typical *voir dire* questionnaires, excused those jurors who said they could not be impartial, and then asked the remaining jurors for their verdict.<sup>39</sup> Among those jurors-all of whom reported that they could be impartial-those who were exposed to negative pre-trial publicity returned guilty verdicts at more than twice the rate of those who had been exposed to neutral pre-trial publicity.<sup>40</sup>

Even if jurors are given instructions not to use information learned outside of trial in making their decisions, they may be unable to comply, despite best efforts. *Source memory errors* occur when jurors misattribute the source of information, mistaking information learned from pre-trial publicity with information presented at trial.<sup>41</sup> Studies have found \*24 that even when jurors remember information learned from both pre-trial publicity and trial well, they mistakenly believe-with a high degree of confidence-that information learned from pre-trial publicity is learned at trial.<sup>42</sup>

Death-qualified jurors may present an additional challenge. According to another study, death-qualified jurors were more likely than excludable jurors to answer negatively the question whether pre-trial publicity \*25 could impact a defendant's due process rights.<sup>43</sup> A potential juror who does not recognize the impact of pre-trial publicity may be more confident in his or her own lack of bias, and may be more likely to be mistaken in affirming his or her ability to set bias aside in response to standard

*voir dire* questioning. Supporting this conclusion, death-qualified jurors who showed pre-trial publicity bias in their verdicts overwhelmingly self-reported an ability to be impartial.<sup>44</sup>

### C. Biased Jurors Distort Jury Deliberations.

The adverse effects of pre-trial publicity do not stop with the biased juror. Studies show that pretrial publicity bias can spread among the jury and even increase through a process called “*group polarization*,” which occurs when group decision-making leads to a more extreme result than the original views of the group’s members. Through this process, pre-trial \*26 publicity bias can spread to others not originally affected.<sup>45</sup>

A 2021 study analyzing mock jury deliberations involving some mock jurors who had been exposed to slanted pre-trial publicity and others who had not found that (a) when mock jurors exposed to slanted pre-trial publicity introduced facts into the deliberation which came from pre-trial publicity but were not in the trial record, they were corrected less than 50 percent of the time; (b) mock juries that included some members exposed to pre-trial publicity slanted against the defendant and others exposed to no pre-trial publicity were more likely to find the defendant guilty than juries with no exposed members; and (c) juries comprising some members exposed to pre-trial publicity slanted against the victim and others who had been exposed to no pre-trial publicity were more likely to find the defendant not guilty than juries with no exposed members. Together, these findings suggest that rather than correcting for the bias introduced by \*27 pre-trial publicity, jury deliberations in fact spread individual jurors’ biases to others.<sup>46</sup>

### III. INDIVIDUAL QUESTIONING REGARDING CONTENT EXPOSURE IS ESSENTIAL IN CASES INVOLVING SUBSTANTIAL, PREJUDICIAL PRE-TRIAL PUBLICITY.

The research on the psychological effects of pretrial publicity makes clear that (a) pre-trial publicity may cause bias, (b) the bias may adversely affect jurors’ interpretation of the evidence and jury deliberations, and (c) potential jurors may not recognize their bias, rendering general *voir dire* questioning ineffective. To address these circumstances, individual questioning regarding a potential juror’s exposure to pre-trial publicity is crucial, so that the parties and the court, rather than the juror himself, can make these assessments.<sup>47</sup>

Questions targeting exposure to pre-trial publicity would address not whether the jurors believe themselves biased, and if so whether they can set that bias aside; such questions do not reveal unconscious bias. Rather, questioning should focus on the nature and extent of the publicity to which potential jurors were exposed-allowing the judge to determine, based on the nature and extent of that exposure (including whether it included inadmissible material, a determination a juror is unlikely to be able to make on his or \*28 her own) and not on the individual’s self-assessment, whether pre-trial publicity bias is sufficiently likely to require exclusion of the potential juror.<sup>48</sup> At the very least, this would include asking potential jurors as a threshold matter, as Respondent requested, “what they remembered hearing about the case.”

### CONCLUSION

For the foregoing reasons, *Amici* support the arguments of Respondent that individual questioning is required in cases of substantial pre-trial publicity.

Respectfully submitted,

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STEPHEN M. NICKELSBURG

*Counsel of Record*

KARINA BASHIR

CLIFFORD CHANCE US LLP

2001 K Street NW

Washington, DC 20006

(202) 912-5000

steve.nickelsburg

@cliffordchance.com

BENJAMIN PEACOCK

MEREDITH GEORGE

CLIFFORD CHANCE US LLP

31 W 52nd St

New York, NY 10019

*Counsel for Amici Curiae*

August 27, 2021

### Footnotes

- 1 Pursuant to S. Ct. Rule 37.6, all parties have provided blanket consent to the filing of *amicus curiae* briefs in this case. No counsel for any party authored this brief in whole or in part and no person or entity other than the *Amici* or counsel made a monetary contribution to its preparation or submission.
- 2 Dorothy J. Imrich et al., *Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. COMM. 94, 104 (1995), <https://doi.org/10.1111/j.1460-2466.1995.tb00745.x> (finding that, over an eight-week period, 27 percent of suspects described in crime news stories were associated with prejudicial publicity, as defined by the American Bar Association at that time).



- 3 See, e.g., Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW & SOC'Y REV. 9, 36 (1980-81) (finding a strong connection between the amount of pretrial publicity exposure and propensity to prejudge a defendant).
- 4 Gary Moran and Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCHOL. 345, 359 (1991), <https://psycnet.apa.org/doi/10.1111/j.1559-1816.1991.tb00524.x>.
- 5 Tarika Daftary-Kapur et al., *Examining Pretrial Publicity in a Shadow Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability*, 38 LAW & HUM. BEHAV. 462, 474 (2014) (comparing mock jurors who were naturally exposed to pre-trial publicity with mock jurors who were exposed to pre-trial publicity as part of the study, and finding that both groups were significantly influenced by the slant and quantity of the publicity to which they were exposed). See also Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 223 (1999) (metaanalysis of 44 empirical studies representing 5,755 subjects finding that subjects exposed to negative pre-trial publicity are more likely to find a defendant guilty than subjects exposed to less or no negative pre-trial publicity).
- 6 Shirin Bakhshay & Craig Haney, *The Media's Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCHOL., PUB. POL'Y, & L. 326, 333 (2018), <https://psycnet.apa.org/doiLanding?doi=10.1037@law0000174>.
- 7 Imrich et al., *supra* note 2, at 110.
- 8 Kate Starbird et al., *Rumors, False Flags, and Digital Vigilantes: Misinformation on Twitter after the 2013 Boston Marathon Bombing*, presented at ICONFERENCE (2014), <https://faculty.washington.edu/kstarbi/StarbirdiConference2014-final.pdf>.
- 9 Mary Kate Brogan, *How Twitter is Changing Narrative Storytelling: A Case Study of the Boston Marathon Bombings*, 6 ELON J. UNDERGRADUATE RES. COMM. 28, 44 (2015); David Carr, *The Pressure to Be the TV News Leader Tarnishes a Big Brand*, N.Y. TIMES, Apr. 21, 2013, <https://www.nytimes.com/2013/04/22/business/media/in-boston-cnn-stumbles-in-rush-to-break-news.html>.
- 10 Greg Barns & Kaylene Downey, *Participation in Social Media by Potential Jurors*, 5 GRIFFITH J. OF L. & HUM. DIGNITY 88, 96 (2017) (noting the unique challenges posed by social media because unlike other forms of publication, the cumulative nature of social media commentary renders it difficult to isolate specific prejudicial material).
- 11 See, e.g., Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91, 96 (2001) (foundational study finding that potential jurors distort trial evidence in support of the side currently leading in their minds instead of weighing each piece of evidence individually for its probative value); Lorraine Hope et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. EXPERIMENTAL PSYCHOL.: APPLIED 111, 115 (2004), <https://doi.apa.org/doi/10.1037/1076-898X.10.2.111> (finding that study participants who viewed negative pre-trial publicity before a mock trial were more likely to view the prosecution as the leader during trial than a control group); Christine L. Ruva et al., *Positive and Negative Pretrial Publicity: The Roles of Impression Formation, Emotion, and Predecisional Distortion*, 38 CRIM. JUST. & BEHAV. 511, 526 (2011), <https://doi.org/10.1177/0093854811400823>.
- 12 Christine L. Ruva & Michelle A. LeVasseur, *Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations*, 18 PSYCHOL., CRIME & L. 431, 445 (2012).
- 13 Ruva et al., *supra* note 11, at 526.

- 14 See, e.g., Rafaele Dumas et al., *Press Articles and Influence Processes: The Different Effects of Incriminating Information and Crime Story Information on Judgments of Guilt*, 20 PSYCHOL., CRIME & L. 659, 666-67 (2014), <http://dx.doi.org/10.1080/1068316X.2013.854790>; Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 431-32 (1990), <https://doi.org/10.1007/BF01044220>.
- 15 Dumas et al., *supra* note 14, at 667.
- 16 Terry M. Honess et al., *Factual and Affective/Evaluative Recall of Pretrial Publicity: Their Relative Influence on Juror Reasoning and Verdict in a Simulated Fraud Trial*, 33 J. APPLIED SOC. PSYCHOL. 1404, 1412-13 (2003), <https://psycnet.apa.org/doi/10.1111/j.1559-1816.2003.tb01955.x>.
- 17 *Id.* at 1414.
- 18 See, e.g., Narina Nunez et al., *The Impact of Emotions on Juror Judgments and Decision Making*, 2 ADVANCES IN PSYCHOL. & L. 55, 59-60 (B. H. Bornstein & M. K. Miller eds., 2016), [https://doi.org/10.1007/978-3-319-43083-6\\_3](https://doi.org/10.1007/978-3-319-43083-6_3).
- 19 *Id.* at 60. See also Julie H. Golberg et al., *Rage and Reason: The Psychology of the Intuitive Prosecutor*, 29 EUR. J. SOC. PSYCHOL. 781, 789 (1999), [https://doi.org/10.1002/\(SICI\)1099-0992\(199908/09\)29:5<6781::AID-EJSP9603.0.CO;2-3](https://doi.org/10.1002/(SICI)1099-0992(199908/09)29:5<6781::AID-EJSP9603.0.CO;2-3) (finding participants previously primed to be angry were more punitive in later judgments when they believed the individual responsible for the first offense went unpunished versus when they believed justice had already been served).
- 20 Neal Feigenson, *Jurors' Emotions and Judgments of Legal Responsibility and Blame: What Does the Experimental Research Tell Us?*, 8 EMOTION REV. 26, 26 (2016), <https://doi.org/10.1177/1754073915601223>. See also Jessica M. Salerno & Liana C. Peter-Hagene, *The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments*, 24 PSYCHOL. SCI. 2069, 2074 (2013) (measuring how anger and disgust predict moral outrage and how all three influence confidence in a guilty verdict). Salerno and Peter-Hagene found that disgust consistently produces moral outrage in mock jurors, regardless of anger levels, but that anger requires at least moderate levels of disgust to produce moral outrage. However, both anger and disgust increase the mock jurors' confidence in a guilty verdict when combined with moral outrage. *Id.*
- 21 Tarika Daftary-Kapur et al., *supra* note 5, at 474 (2014), <https://doi.org/10.1037/lhb0000081> (finding that even when a trial took place 14 months after a publicized crime, the impact of pre-trial publicity was not dampened). The study analyzed the persistence of the effects of pre-trial publicity by assessing participants' guilt ratings two weeks before trial, during the course of the trial, and immediately after the trial and found that pre-trial publicity effects persisted throughout the course of the trial.
- 22 Kramer et al., *supra* note 14, at 421, 431-32.
- 23 Ulrich Orth & Elias Wieland, *Anger, Hostility, and Posttraumatic Stress Disorder in Trauma-Exposed Adults: A Meta-Analysis*, 74 J. CONSULTING & CLINICAL PSYCHOL. 698, 703 (2006), <https://doi.apa.org/doi/10.1037/0022-006X.74.4.698>.
- 24 E. Alison Holman et al., *Media's Role in Broadcasting Acute Stress Following the Boston Marathon Bombings*, 111 PROC. NAT'L ACAD. SCI. U.S. 93, 93 (2014), [www.pnas.org/cgi/doi/10.1073/pnas.1316265110](http://www.pnas.org/cgi/doi/10.1073/pnas.1316265110).
- 25 U.S. INSTITUTE OF MEDICINE COMMITTEE ON RESPONDING TO THE PSYCHOLOGICAL CONSEQUENCES OF TERRORISM, PREPARING FOR THE PSYCHOLOGICAL CONSEQUENCES OF TERRORISM 34, 62 (Adrienne Stith Butler et al. eds., 2003), <https://www.ncbi.nlm.nih.gov/books/NBK221638/>.

- 26 Holman et al., *supra* note 24, at 94-95.
- 27 Bessel A. Van Der Kolk, *Trauma and Memory*, 52 J. PSYCHIATRY & CLINICAL NEUROSCI. S52, S60 (2002), <https://doi.org/10.1046/j.1440-1819.1998.0520s5S97.x>.
- 28 Jasmeet P. Hayes et al., *Emotion and Cognition Interactions in PTSD: A Review of Neurocognitive and Neuroimaging Studies*, 6 FRONTIERS INTEGRATED NEUROSCI., October 2012, at 1, 4, <https://doi.org/10.3389/fnint.2012.00089>; see also Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice: An Update*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 38, 54 (Carla Ferstman & Mariana Goetz eds., 2020).
- 29 Daftary-Kapur et al., *supra* note 5, at 474.
- 30 Nancy Pennington and Reid Hastie, *The Story Model for Juror Decision Making*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 193, 193 (Reid Hastie ed., 1993), <https://doi.org/10.1017/CB09780511752896.010>.
- 31 *Id.* at 204-06.
- 32 Daftary-Kapur et al., *supra* note 5, at 464; Mark J. Hurlstone et al., *Memory for Serial Order Across Domains: An Overview of the Literature and Directions for Future Research*, 140 PSYCH. BULLETIN 339, 356-57, 373 (2014), <https://doi.org/10.1037/a0034221>.
- 33 Daftary-Kapur et al., *supra* note 5, at 464.
- 34 Hope et al., *supra* note 11, at 112; see also Ramon J. Rhine & Laurence J. Severance, *Ego-Involvement, Discrepancy, Source Credibility, and Attitude Change*, 16 J. PERSONALITY & SOC. PSYCHOL. 175, 186-87 (1970), <https://doi.org/10.1037/h0029832>; Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 889 (1975), <https://doi.org/10.1037/0022-3514.32.5.880>.
- 35 *Id.* See also Barns & Downey, *supra* note 10, at 91.
- 36 Pennington & Hastie, *supra* note 30, at 193-99.
- 37 See generally David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L. J. 245, 246 (1980), <https://www.repository.law.indiana.edu/ilj/vol156/iss2/2>; Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 669-70 (1991), <https://www.wcl.american.edu/journal/lawrev/40/kerr.pdf>; see also Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Admissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 486 (2006), <https://doi.org/10.1007/s10979-006-9039-7> (finding that when inadmissible evidence significantly influences jurors, judicial instruction to disregard the evidence does not completely eliminate the impact of the evidence; despite judicial instruction, inadmissible evidence had a significant impact on verdicts); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL., PUB. POL'Y, & L. 677, 685 (2000), <https://doi.org/10.1037/1076-8971.6.3.677> (summarizing literature regarding jury responses to inadmissible information and the limits of judicial instruction). Lieberman and Arndt found that once jurors are exposed to pre-trial publicity, it may not be possible to eliminate the biasing effect, and judicial instructions to disregard pre-trial publicity or other inadmissible evidence are relatively ineffective.

- 38 Kramer et al., *supra* note 14, at 434-35; Christine L. Ruva & Anthony E. Coy, *Your Bias Is Rubbing Off on Me: The Impact of Pretrial Publicity and Jury Type on Guilt Decisions, Trial Evidence Interpretation, and Impression Formation*, 26 PSYCH., PUB. POL'Y, & L. 22, 29-32 (2020), <https://doi.org/10.1037/law0000220>.
- 39 Stanley Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 PSYCH. REP. 1299, 1299-1302 (1975), <https://doi.org/10.2466/pr0.1975.37.3f.1299>.
- 40 *Id.* at 1301 (53 percent versus 23 percent guilty). The Court has recognized that self-reporting of impartiality during *voir dire* may be unreliable-including due to unconscious pressure. *See also*  [Irvin v. Dowd](#), 366 U.S. 717, 728 (1961) (“No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father.”).
- 41 Christine L. Ruva & Christina C. Guenther, *From the Shadows Into the Light: How Pretrial Publicity and Deliberation Affect Mock Jurors' Decisions, Impressions, and Memory*, 39 LAW & HUM. BEHAV. 294, 300 (2015), <https://doi.org/10.1037/lhb0000117>; Ruva & LeVasseur, *supra* note 12, at 445; Christine L. Ruva & Cathy McEvoy, *Negative and Positive Pretrial Publicity Affect Juror Memory and Decision Making*, 14 J. EXPERIMENTAL PSYCHOL.: APPLIED 226, 233-34 (2008), <https://doi.org/10.1037/1076-898X.14.3.226>; *see also* Beaton C. Thorley et al., *Misinformation Encountered During a Simulated Jury Deliberation Can Distort Jurors' Memory of a Trial and Bias Their Verdicts*, 25 LEGAL & CRIMINOLOGICAL PSYCHOL. 150, 158-61 (2020), <https://doi.org/10.1111/lcrp.12174>. The Thorley study tested 124 participant jurors by showing them a murder trial. Half of the participants were allowed to take notes, and after the trial, part of the group was given a jury deliberation transcript which contained six pieces of prosecution misinformation. The researchers found that jurors exposed to the misinformation inaccurately recalled 31 percent of it as having been from the trial, and those who misremembered at the highest rates were also the participants most likely to find the defendant guilty. The failure of jurors to recollect accurately the source of their memories could lead to biased jurors distorting other jurors' recollection of trial events during deliberation, resulting in biased verdicts. *Id.* at 150.
- 42 Ruva & McEvoy, *supra* note 41, at 223. *See also* Christine L. Ruva et al., *Effects of Pre-trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors*, 21 APPLIED COGNITIVE PSYCHOL. 45, 60 (2007), <https://doi.org/10.1002/acp.1254>; Ruva & Guenther, *supra* note 41, at 300; Christine L. Ruva & Elizabeth M. Hudak, *Pretrial Publicity and Juror Age Affect Mock-Juror Decision Making*, 19 PSYCHOL., CRIME & L. 179, 192-93 (2013) (finding that mock jurors exposed to pre-trial publicity are significantly less accurate in recalling where they learned information).
- 43 Brooke Butler, *The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCHOL. 115, 120 (2007), <https://doi.org/10.1111/j.0021-9029.2007.00150.x>.
- 44 *See id.* (finding that death-qualified participants are not only more likely to find the defendant guilty but also to believe that pre-trial publicity will have a “minimal impact” on the defendant's due process rights); *see also* David V. Yokum et al., *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 886-87 (2019), <https://dx.doi.org/10.2139/ssrn.2109894> (finding that juror self-diagnosis of bias was not correlated with actual bias). Yokum tested a group of mock jurors, exposing them to prejudicial news articles in one condition and irrelevant articles in the other. Excluding those who self-identified bias or were unsure about their level of bias, the study found the mock jurors exposed to prejudicial pre-trial publicity significantly more likely to find the defendant guilty than those exposed to irrelevant articles.
- 45 Christine L. Ruva et al., *What Drives a Jury's Deliberation? The Influence of Pretrial Publicity and Jury Composition on Deliberation Slant and Content*, PSYCHOL., PUB. POL'Y, & L., 2021, at 1, 13-14, <https://doi.apa.org/doiLanding?doi=10.1037@law0000310>; Ruva & Coy, *supra* note 38, at 32-33, <https://doi.org/10.1037/law0000220> (finding that in a criminal case simulation split among anti-prosecution pre-trial publicity, anti-defense pre-trial publicity, and one

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control group, mixed-jury deliberations do not correct juror-level errors and control biases for antiprossecution pre-trial publicity); *cf.* Ruva & Guenther, *supra* note 41, at 295; Kerr et al., *supra* note 37, at 75 (finding that for moderate cases, jury deliberations accentuated pre-trial publicity bias, but for extreme cases with more certain conviction or acquittal rates, jury deliberation attenuated pre-trial publicity bias); Kramer et al., *supra* note 14, at 14.

- 46 Ruva et al. (2021), *supra* note 45, at 14.
- 47 See, e.g., Brian P. Coffey, *Mu'min v. Virginia: Reexamining the Need for Content Questioning during Voir Dire in High Profile Criminal Cases*, 13 PACE L. REV. 605, 638-39 (1993), <https://digitalcommons.pace.edu/plr/voll3/iss2/11> (observing that contentbased questioning is a potentially effective tool for detecting bias).
- 48 The Court has long held that juror impartiality is a question of “mixed law and fact,” and therefore the trial judge must make a legal finding of juror impartiality. 🚩 *Irvin*, 366 U.S. at 723.

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