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A 2021 study by Pew Research Center found that nearly 90% of Americans use the internet, social media, or smartphones regularly to access the news. [1] The proliferation of online information is particularly influential in high publicity cases—cases that involve terrorism or violent crime, garnering high levels of national media attention—in which juries may be skewed by the media they consume. In *United States v. Tsarnaev* (2021), the case of the Boston Marathon bomber currently on appeal in the U.S. Supreme Court, the risks of media bias are especially clear. In Tsarnaev’s case and similarly high publicity cases, trial judges ought to exercise more rigorous *voir dire* questioning on media consumption in order to protect defendants’ Sixth Amendment right to a “trial by an impartial jury.”

In *United States v. Tsarnaev*, the Supreme Court will determine whether the juror questioning process in the trial of Dzhokhar Tsarnaev was sufficiently rigorous. Tsarnaev is one of two brothers who planted bombs at the 2013 Boston Marathon, killing three people and injuring over two hundred. [2] While jurors in Tsarnaev’s case were asked surface-level questions about whether they had consumed media reports of the bombing, they were not questioned about the content or extent of their media consumption. *United States v. Tsarnaev* deals largely with the thoroughness of *voir dire*, a process in which lawyers and judges question a body of potential jurors on their ability to be fair and

post information about ongoing trials. [7] In one particularly astonishing case, *Dimas-Martinez v. State* (2011), the Arkansas Supreme Court overturned a capital murder conviction in part because of a juror's Twitter posts throughout the trial. The juror failed to stop his Twitter activity even after being told that he was threatening the integrity of the trial. The court ruled this behavior to be "juror misconduct that calls into question the fairness of [the] trial," arguing that "it is in no way appropriate for a juror to state musings, thoughts, or other information about a case in such a public fashion." [8]

The risk of bias from social media postings was of issue in Tsarnaev's case. Juror #286, for example, repeatedly shared posts about the Boston Marathon bombing—including a post referring to Tsarnaev as a "piece of garbage"—on her social media account. Juror #286 then knowingly concealed these posts during *voir dire* by lying on a questionnaire regarding her social media activity on the topic of the bombing. [9] However, while the posts made by Juror #286 clearly established her prior knowledge of the case, she was not dismissed because her posts were shared over a year before juror selection took place. [10] The inclusion of Juror #286 on Tsarnaev's jury highlights the obstacle social media poses to the ability to rule solely based on the facts presented at trial, as the *Smith* standard requires. [11]

In response to these risks, lawyers and judges should adopt more rigorous *voir dire* questioning practices that examine the content of media consumption as outlined in the

media coverage and the role of the internet and social media, the *Patriarca* standard is applicable. The First Circuit Court's decision in *United States v. Tsarnaev* even recognized that "the pretrial publicity in *Patriarca* pales in comparison to the pretrial publicity surrounding [Tsarnaev's] case." [16] The First Circuit Court thus advocated for content questioning, recognizing that such questioning may not be necessary in cases like *Mu'Min* involving only local coverage, but becomes an important safeguard from bias in cases "where pretrial publicity creates a significant possibility of prejudice." [17]

The ultimate burden for selecting a fair jury in cases of high publicity must fall on the trial judge. In *Rosalez v. Lopez* (1981), by examining how successful jury selection could prevent prejudiced rulings against undocumented immigrants, the Supreme Court determined that "without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." [18] Trial judges can ensure juror impartiality in high publicity cases by overseeing lawyers' questioning and providing jurors with questionnaires about their media consumption habits. To limit issues involving social media posts, lawyers and judges can inform potential jurors that they would be obligated to avoid social media for the duration of the trial. Peremptory strikes can then be used for any potential juror who suggests an inability to refrain from social media usage. [19]



[7] Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible*, SMU Law Review (2014), online at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1045&context=smulr> (visited October 29 2021).

[8] *Erickson Dimas-Martinez v. State of Arkansas*, No. CR 11-5 (Supreme Court of Arkansas 2011), 16.

[9] *United States v. Tsarnaev*, No. 16-6001 (1st Cir. 2020), 35, 220.

[10] Mackenzie K. McCoy, *Boston Bomber's Death Sentence Should Not Have Been Vacated Based on Insufficient Voir Dire*, Washburn Law Journal Online (May 25, 2021), online at <https://www.washburnlaw.edu/publications/wlj/online/volume/60/mccoy-boston-bomber.html> (visited October 29, 2021).

[11] *Smith v. Phillips*, 455 U.S. 209 (1982).

[12] *United States v. Tsarnaev*, No. 16-6001 (1st Cir. 2020).

[13] Zachary D. Tripp, Colin F. McGrath, and Barbara J. Howard, *Brief of American Bar Association as Amicus Curiae in Support of Neither Party*, Supreme Court of the United States No. 20-443 (2021), online at <https://www.americanbar.org/content/dam/aba/administrative/news/2021/06/amicus-us-v-tsarnaev.pdf> (visited October 29 2021), 13.

[14] *Mu'Min v. Virginia*, 500 U.S. 415 (1991).



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