UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

DECLARATION OF EDWARD J. BRONSON

I, EDWARD J. BRONSON, declare as follows:

1. I am a Professor Emeritus of Political Science at California State University, Chico.

2. I have been asked to assess the need for a change of venue in the case of *United States of America v. Dzhokhar A. Tsarnaev.* It is my opinion, based on survey data and a content analysis of media surrounding the case, that an overwhelming presumption of guilt and prejudgment as to the penalty exists in the District of Massachusetts, and that in order to protect the fair trial rights of Mr. Tsarnaev, his trial should be transferred to a site outside the District of Massachusetts. Based on data obtained and reviewed in investigating whether a change of venue was appropriate in this case, the District of Columbia appears to be the least prejudiced venue for the trial of this case.

3. This declaration will be divided into five sections, as follows:

I. Qualifications
II. Standards for Determining Prejudice in Media Coverage
III. Analysis of the Pretrial Publicity
IV. Survey Results
V. Recommendation.

I. Qualifications

4. I will begin by briefly reviewing my qualifications, and I have attached a curriculum vitae to this affidavit as Exhibit 1. After my undergraduate education, I received a J.D. from the University of Denver; an L.L.M. from New York University; and a Ph.D. in Political Science, emphasizing Public Law, from the University of Colorado. As part of the study for my doctorate, I received training in various types of social scientific analysis.

5. In my research, dating back to 1968, I have studied the attitudes of jurors toward relevant issues of criminal justice, the effects of those attitudes on verdicts, and the way that various processes, including voir dire and publicity, affect jury behavior. I have done research and published articles about these subjects, a number of which are set forth in the accompanying curriculum vitae. I have previously qualified as an expert witness in nearly 300 cases, and have submitted declarations and consulted on jury issues in a large number of cases in both state and federal courts around the country.

6. In addition, I have acted as a consultant on ways to improve the fairness of voir dire and jury selection. I have testified as well as submitted pretrial and post-trial affidavits on these matters in many cases, have reviewed transcripts of jury voir dire in preparing written and oral expert testimony on the efficacy of voir dire in post-conviction proceedings, and have lectured on jury voir dire and jury selection issues at various academic and professional organizations.

7. I have been studying and doing research on pretrial publicity for 44 years. I have

- published and presented research papers at various academic and professional meetings;
- analyzed pretrial and post-conviction publicity for attorneys involved in hundreds of cases;
- made recommendations about the need for a change of venue or other remedy in many cases;
- developed, conducted, and evaluated surveys to measure the extent and nature of pretrial publicity;
- qualified over 100 times as an expert witness on change-of-venue motions in state and federal cases;

- submitted several additional affidavits in post-conviction proceedings where the issue involved possible prejudicial pretrial publicity; and
- testified several times on the need to close various hearings (preliminary, competency, and venue) or seal various documents and other matters in high-profile cases.

8. I have for many years authored the chapters on both venue and pretrial publicity in *California Criminal Law Procedure & Practice* (15th ed. 2014), published under the auspices of the University of California and the State Bar of California, and widely used by California lawyers and judges.

9. I have previously qualified in courts around the country to provide expert testimony on content analysis of pretrial publicity.

10. I have also qualified as an expert on conducting and critiquing of public opinion surveys. I have training and extensive experience in this area, and have conducted research and presented professional papers in the field. I am a member of the American Association of Public Opinion Research, and have spoken at the group's national and state meetings, as well as those of other social science and legal professional groups. I was a member of a four-person group that was commissioned to write standards for venue surveys which have subsequently been published after being adopted by the American Society of Trial Consultants.[1]

11. I have also done much research on voir dire procedures, published in this area, lectured on the topic at professional meetings both for lawyers and social scientists, taught Continuing Legal Education classes on the topic, and testified many times as an expert witness concerning the effectiveness of voir dire as a remedy for prejudicial pretrial publicity or misjoinder, and concerning its effectiveness in particular cases.

II. Standards for Determining Prejudice in Media Coverage.

12. I use both legal and social science standards to assess the impact of possibly prejudicial pretrial publicity. The legal standard comes from the decisions of appellate courts. The social science standards are a product of a substantial body of research on the topic.

[1] ASTC Code of Professional Standards at 9, www.astcweb.org/userfiles/image/ASTCFullCodeFINAL20131.pdf.

13. Legal Standards. In response to *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the American Bar Association published standards for a change of venue.[2] Both the federal and state courts have promulgated overlapping but similar standards for change of venue over the years. Venue transfer in federal court is governed by Federal Rule of Criminal Procedure 21 which instructs that a "court must transfer the proceeding … to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." In addition, the due process right to a fair trial may require a transfer of a proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial. *See Skilling v. United States*, 561 U.S. 358 (2010), citing *In re Murchison*, 349 U.S. 133, 136 (1955). A presumption of prejudice, requiring a change of venue on the defendant's motion, "attends only the extreme case." *Skilling.*

14. The Social Science Standards for Prejudice from Pretrial Publicity: General Problems of Pretrial Publicity. In a major review of the social science research spanning over 30 years on the effects of pretrial publicity (PTP) on jurors' consideration of evidence and their ultimate decisions, the authors did a meta-analysis[3] of 44 empirical studies, representing 5,755 subjects, conducted by dozens of scholars using a variety of methodologies.[4] They concluded that, "Subjects exposed to negative PTP were significantly more likely to judge the defendant guilty compared to subjects exposed to less or no PTP."[5] The prejudicial impact

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[2] The American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (the Reardon Report) (1966), Section 3.2(c), Standards for granting the motion.

[3] A meta-analysis is a means by which both social scientists and natural scientists are able to combine many studies by different investigators to get the greater statistical power that comes from a much larger number of subjects. That is a means by which a regulator might decide with greater confidence whether a particular drug was safe and effective. While a single study might have an undetected flaw, or might represent some statistical anomaly, the meta-analysis mitigates such problems.

[4] N. Steblay, et al., "The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytical Review," 23 *Law & Human Behavior* 219 (1999). For an updating study, *see* T. Daftary-Kapur & S. Penrod, "Are Lab Studies on PTP Generalizable? An Examination of PTP Effects Using a Shadow Jury Paradigm," 26 *The Jury Expert* 1 (2014).

[5] *Id.*

was found at all three stages: pretrial, post-trial but prior to deliberations, and post-deliberation.

15. The authors suggested that PTP leads to the development of a "story model," like the idea of an evidentiary prism, discussed below. The story model has been explored in a variety of recent work on memory.[6] The model provides the means by which negative publicity provides not just isolated fragments of information, but a belief framework about the defendant's guilt. Those exposed to PTP construct a story to make sense out of a particular event. Once that belief is formed, it is very difficult to dislodge. New information that is consistent with the story is readily absorbed, while inconsistent information tends to be rejected.

16. The story of the case thus becomes the prism through which trial evidence and legal theories are viewed at trial. If our story model leads us to believe that the defendant is guilty, then the credibility of prosecution witnesses is enhanced, and alibis or other defenses will not ring true, regardless of their actual veracity. Forming a story model is both useful and inevitable for a juror, but that process should be accomplished at trial, not well before through exposure to the media.

17. A review of the way memory works, based on themes or "schema," shows that "themes distort memory."[7] Thus, it is likely that jurors hearing the defense evidence will not use the evidence in ways that conflict with their story model. This is particularly troubling not just because of the powerful impact, but because of the great difficulty a voir dire questioner will have in discovering the information or attitude.

18. Research has demonstrated the danger of "conformity prejudice" – fear of community disapproval for rendering an unpopular verdict and has shown the limitations of voir dire to weed out jurors biased by such adverse publicity. *See*, N. Vidmar, *Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation*, 26 L. & Hum. Behav. 73, 81-82 (2002). It is not much of a leap to conclude that individuals with a close personal connection to the Boston Marathon and, thus to the bombings, will be less able to set aside preconceived notions regarding guilt and punishment. Thus, in this case, I believe that even a well

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[6] *See* some of the citations at *id*., 231.

[7] *Id.*

conducted, probing voir dire by the parties and the Court, may well fail to surface bias and prejudice against Mr. Tsarnaev.

19. Additional considerations why voir dire will not solve the problem in this case. Some might suggest that a thorough voir dire is a solution that can adequately remedy the effects of intense, pervasive, prejudicial pretrial publicity, but there are problems with that approach. Community prejudice can affect jurors who do not themselves harbor bias, even assuming those jurors can be accurately identified. Jurors may feel pressure from their community, and in this instance, from the individuals they know and see in their daily lives who are victims, or were in the zone of danger at the time of the explosions. Jurors should not have to consider how they will face victims or potential victims of the events in this case, who may be their friends, co-workers or family members, if they render a verdict that is favorable to the defendant. Finding jurors in the Boston area who have not read or watched extensive media coverage, have not engaged in community efforts to assist those affected by the bombing, who do not know members of their community affected by the events of this case may be people who are generally uninterested and disconnected. These individuals hardly comport with our ideal of jurors serving as a cross-section and as the conscience of the community.

There are also practical concerns with waiting until voir dire to determine whether it is possible to empanel an impartial jury to decide whether Mr. Tsarnaev is guilty, and if so, to decide whether he should live or die. A trial of this magnitude, with the expected duration being several months, could not be moved to another venue on short notice. If this were to occur, a change of venue after an unsuccessful voir dire would only create additional pretrial publicity, and would have involved a great deal of expense, and investment of time and resources on the part of all parties involved.

III. Analysis of the Pretrial Publicity in this Case.

20. In deciding which areas to consider for the change of venue motion, I selected four areas, the Eastern Division of the District of Massachusetts (referred to as Boston), the Western Division of the District of Massachusetts (referred to as Springfield), the Southern District of New York (referred to as Manhattan), and the District of Columbia District (referred to Washington, D.C). The four areas surveyed were selected based on their obviousness (Boston and Springfield) plus alternative sites that are reasonably close, are conveniently accessible to witnesses and interested attendees, and are sites that can accommodate a trial of this

magnitude and public interest (Manhattan and Washington, D.C.). Inclusion of additional sites beyond the four sites chosen was not possible, given the time limitations imposed.

21. I examined the coverage in major newspapers in each of the four venue areas, the Boston Globe, the Springfield Republican, the New York Times, and the Washington Post. Although other media, including electronic, social media, and many other newspapers also covered the case, these newspapers were selected as major sources in the selected venues.[8]

22. The huge volume of media dealing with the case, and the limited time and resources available precluded made a more exhaustive search. I also initially underestimated the amount of time it would take to complete a more detailed analysis. Downloaded copies of the articles from all four newspapers are provided in Exhibit 2, and logs and breakdowns of those articles are provided in Exhibit 3.[9]

23. Content Analysis of the Media Coverage: Introduction. When confronted with a substantial amount of material, such as the media coverage of this case, social scientists and others use a technique called content analysis. Content analysis is a research tool devised to analyze large amounts of material in a manner that is objective, neutral, and systematic.[10] It is widely used in the social sciences and elsewhere to investigate areas as diverse as the interpreting of open-ended comments in a public opinion survey, or whether certain network news coverage is politically biased.

24. Where the issue is whether the media coverage of a case has biased the community sufficiently to require a change of venue, the means for measurement are the social science and legal criteria. The review is scientific rather than impressionistic. It is selective only by being specific about what it is in the publicity that is prejudicial (or exculpatory), doing a systematic review, and identifying the sources. In this instance, the sharp time limitations and immense amount of pretrial publicity, I was less able to identify all the specifics.

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[8] It should be noted that in Boston and New York the Globe and the Times are more down-the-middle than their competitors such as the Boston Herald and New York Post.

[9] The Logs list each article by an index number, date, headline, and other characteristics. The breakdown part summarizes patterns and characteristics of the articles.

[10] *See generally* R. Weber, *Basic Content Analysis* (1985).

25. Extent of the Newspaper Coverage. Examining first the extent of the coverage, I counted the total number of articles in each of the newspapers from April 15, 2013 through mid-July, 2014, shown in Table 1.[11]

Table 1. Extent of Coverage in Each Newspaper

Newspaper	No. of Articles	Front Page[12]
Boston Globe	2,420	793
Springfield Republican	324	148
New York Times	467	88
Washington Post	427	111

26. As can be seen from the above table, the number of newspaper articles collected from only the Boston Globe and covering a period of a bit less than 15 months is 2,420. [13] That is extraordinarily high. By comparison, in the Oklahoma City Bombing case, there were 2,213 articles – some 200 fewer than in this case, and that press collection involved a longer period of time, and there were multiple newspapers throughout the entire state, not just one newspaper in Oklahoma City. In the many change of venue motions in which I have been involved, and which dealt with high-profile cases, the median number of articles has been 91. In almost all of those other cases, the number of newspapers in each venue analyzed was multiple, sometimes covering a whole area or state, and the period of time covered was much longer than the 15 months in this case. But in this case I have only included articles from one newspaper in each of the four venues, not the many articles from several other local newspapers which residents regularly read and subscribe to, and were the same sort of article that I have included and counted in

[11] The end dates varied slightly. Coverage for the Boston Globe ended 7/26/2014, 7/11/2014 for the Springfield Republican and New York Times, and 7/19/2014 for the Washington Post.

[12] Or front page of interior section.

[13] I need to point out that many of the articles were not about the bombing but only referred to it. Obviously a passing reference is not prejudicial, but does show the pervasive impact of the case -- it touches on so much else, especially in Boston.

most of my previous venue cases.[14] However, several of the references to the bombing case were quite short and not prejudicial. Even so, those articles provide some further indication of the centrality of the bombing and how it has become a frame of reference in the Boston area.

27. As shown in the table, while the Boston Globe had 2,420 articles, the Springfield Republican had 324, the New York Times had 467, and the Washington Post had 427.[15] That means that the Globe published approximately **5.2 articles per day** referring to the bombing, over five times as many per day as the other three newspapers. In fact, the other three newspapers in Springfield, Manhattan and Washington, D.C. combined had 1,218 articles, just half of the articles in the Boston Globe alone.[16]

28. In most cases the publicity and resulting prejudice tends to abate over time, but in the Tsarnaev case, the news events have only somewhat diminished, and major new ones have occurred. These include the anniversary of the bombing commemorated at many sites, and the government's prosecution of related cases prior to this trial, with resultant release of prejudicial information. For example, the trial of Azamat Tazhayakov recently concluded with a guilty verdict. Despite the relatively minor charges, this prosecution became a high-profile case, and the news media highlighted evidence throughout that presumed the guilt of the defendant in this case, Dzhokhar Tsarnaev.

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[14] There was not sufficient time to download and analyze the articles in the other newspapers, nor was there time to do so with the electronic coverage, television and radio. Also, the extensive number of comments emailed to the newspaper and mostly available were not downloaded or analyzed.

[15] A few of the included articles are not relevant to the Marathon Bombing case. To download and collect the articles, we used a list of search terms connected to the case. That list is Exhibit 2e. In the ordinary case I review each article to check that it pertains to the case, but here, with over 3,600 articles and extremely limited time, I determined to accept the small over count.

[16] The circulation of the four newspapers is shown below, but it does show the number of readers, both because many readers view the paper on-line and the average number of adult readers per newspaper is 3.3 (Scarborogh Research, 2010).

Boston Globe - Circulation: 225,482 copies
Springfield Republican - Circulation: 55,449 copies
New York Times - Circulation: 1,586,757 copies
Washington Post - Circulation: 507,615 copies

29. Also indicated in the above table is the prominence of the articles. In Boston, 713 of those articles were on the front page or the front page of an interior section of the newspaper, indicating that the articles were more likely to be read and reflecting an editorial judgment by the newspaper editors that the public was especially interested in the case. In Springfield the figure is 148 on the front page, in New York 88, and in Washington 125. Furthermore, many of the articles were carried in parts of the newspaper that rarely cover major criminal cases, like the sports pages. This is important because many readers skip the news pages and go to special sections like sports or the obituaries first. I also note that there were 1,691 pictures that accompanied the articles in Boston, 214 in Springfield**,** and 584 in Manhattan. The number could not be determined for the Washington Post.

30. Consideration of the extent of the newspaper articles referencing the case provides overwhelming evidence that Boston area residents have been massively exposed to pretrial publicity about the case, and that all of the other three venues carried far fewer of articles about the case.

31. Nature of the Newspaper Coverage. The nature of the coverage is obviously a necessary focus because even massive coverage would not damage the fair trial rights of the defendant unless it is also prejudicial. Under this topic I have developed a hierarchy of prejudice that reflects how courts consider this issue. The four elements in that hierarchy are publicity that is (1) inflammatory, (2) inadmissible at trial, (3) inaccurate, and (4) likely to generate a presumption of guilt.

32. Inflammatory Coverage. At the top of the hierarchy is coverage that is inflammatory, that is, containing elements of sensationalism or hostile, inflated, emotional, or loaded terms, themes, or language. The primacy of such material is clear because of court decisions and social science research, but is also intuitive. Emotionally-laden coverage has more saliency to readers, affects them more powerfully, and is more likely to be remembered. It cannot be displaced in our memories. The salience of this case to Boston residents is unprecedented in my experience, given the number at the crime scene, the number wounded, the number experiencing the lockdown, and the importance of the event to the local population. Only the Oklahoma City bombing is comparable in the cases I have consulted in over 44 years. It is truly sui generis.

33. The Boston Marathon case involves inflammatory overload in the coverage's themes, words, phrases, and passages. For example, on April 16, 2013,

the very first day of coverage of the bombing, the following opening passage was printed on the front page of the Boston Globe:

> The woman's eyes stared vacantly into the sky.... When the first boom shattered the bliss and the haze of white smoke washed over the finish line, I could see in the eyes of the woman what had happened. She wasn't breathing. She wasn't moving. Her eyes appeared lifeless as she lay beside the metal barriers on the sidewalk, where dozens of people were sprawled on the concrete, their limbs mangled, blood and broken glass everywhere.

34. This is not some second-hand hearsay account, but an eye-witness description of the crime and the resultant horror. Indeed, there were 118 uses of the word "horror" in the Globe coverage about the bombing, plus 65 uses of horrible, and 88 uses of horrific. "Terror" and related terms were used 1,414 times in the Globe, including terrorist, terrible, terrorism, terrorized, and terrifying. Tragic or tragedy has been used 746 times.

35. The frequency that such inflammatory terms have been used just in the Boston Globe is simply overwhelming. Just to select a few others as examples, consider anger (544 uses), fear (428), shock (213), devastated and related terms (122), heartbreaking (94), awful (69), carnage (58), brutal (50), senseless (41), depravity (8).[17]

36. A few more of these inflammatory and emotionally charged terms are evil (164)[18], nightmares (48), senseless (41), anguish (32), chilling (34), heinous (28), gruesome (18), savage (16), and grisly (14). There were 12 references to mangled, 269 references to the stressful manhunt, 88 uses of the term lockdown (to which residents were subjected to during the search), and a broad discussion of

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[17] The number inserted in text in parentheses is the number of times that word appeared in the Boston Globe. Where a number appears after a sentence, that is the article number for the single Boston Globe article in which it appears, found in Exhibit 2a. If the passage appeared more than once, the article numbers are in a footnote.

[18] Including a few related terms like vile, revile or devil, but approximately 20 uses of the term were irrelevant to the case.

PTSD symptoms among local children as a result of the bombing, along with several references to the emotional impact to adults.

37. The use of these inflammatory and emotive terms is so extensive, varied, and almost uniformly prejudicial in that it matches or exceeds any other capital case I have studied in over 40 years.[19] I looked at the content analysis of some other capital cases in which I have testified to compare the extent of the use of the worst of these inflammatory terms. In one involving five victims including three young children (one a six-week-old infant), I found the terms horrifying, horrible, horror, or horrendous being used 10 times and terrible just once. In another capital case involving the racially-motivated killings of five victims, I found horrendous, horrible, and horrific six times, terror terrible, rampage 53 times, and nightmare once. The inflammatory coverage of the Boston Bombing case, even viewed solely through the Globe's content, was overwhelming and thus extremely prejudicial.

38. Possibly Inadmissible Coverage. It is unclear how much of the prejudicial material is admissible, but probably most of it will be, albeit without inflammatory embellishments. However, certain admissions that have been published could be inadmissible:

> Under questioning from FBI agents, Dzhokhar Tsarnaev allegedly admitted that he and his brother were behind the bombings. He claimed that he and his brother acted alone and that his brother had become a follower of radical Islam in part because of his opposition to US wars in Iraq and Afghanistan, the Globe has reported. Those statements came before investigators informed Tsarnaev of his rights to counsel and to remain silent, which could make them inadmissible in a trial.[20]

39. Inaccurate Coverage. I do not know how much material in the coverage was inaccurate and also prejudicial. Certainly there were rumors related to the case which apparently proved false, for example the repeated allegation that the

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[19] While I consulted on and testified in the Oklahoma City Bombing case, I did not have the same opportunity to study the media coverage there, which might have been comparable.

[20] Articles 901, 916 (Boston Globe).

defendant wrote "f*** America" and other opinions expressed by law enforcement who will not be witnesses in the case.[21]

40. Presumption of Guilt. A major concern in the nature of the media coverage and a source of substantial prejudice in the case is the fact that much of the coverage was guilt oriented, creating a strong presumption of the defendant's guilt.

41. Prejudice can arise even when publicity is non-inflammatory, is admissible, and is accurate. Even if the media coverage is less prejudicial than it was in this case, conclusory, guilt-oriented characterizations, assumptions, and implications still can lead to prejudice if they create a strong presumption of guilt. It would be very difficult for any juror exposed to much of the significantly and consistently prejudicial publicity to accord to the defendant any meaningful presumption of innocence. That is so despite the willingness of jurors to make such a theoretical commitment in voir dire. Cases should be tried in the courtroom on evidence adduced therein, not tried in the newspapers. Where, as here, the defendant might be tried and convicted in the media's court of public opinion, the trial is inherently unfair. That is because, in effect, the burden of proof has shifted to the defendant, who must convince the jury that he is innocent.

42. One may well ask how media publicity can be prejudicial when it is what jurors will hear in the courtroom, assuming it is admissible and accurate. Leaving aside the fundamental legal precept that a trial is not fair if guilt is not adjudicated on the basis of evidence that is properly admitted and tested in court, trial by news media is also qualitatively different. What is learned from the media is likely to be uncritically absorbed and become a key factor in building a story model of the case,[22] especially since such beliefs will be enhanced by the primacy effect, and thus difficult to change.

43. Confession[23]. Media reports of a confession are particularly prejudicial and strongly supportive of the need for a change of venue. *Rideau v. Louisiana,*

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[21] The assertions in this sentence are based on information provided to me by defense counsel.

[22] *See* discussion at paragraphs 15-18 *supra*.

[23] This section also includes references to admissions. Lawyers know the difference, but most of the public treat the words as fungible.

373 U.S. 723 (1963). The Government in fact argued in its Opposition Motion at page 7 that, "While news stories about Tsarnaev have not all been kind, they have 'contained no confession or other blatantly prejudicial information' as in Rideau."

In fact, the Globe's coverage was replete with references to Mr. Tsarnaev's alleged admissions of guilt, both spontaneous and in response to custodial interrogation after his arrest:

> The 30-count indictment alleges that Tsarnaev had been inspired by Al Qaeda publications and that he left a confession in the boat in a Watertown backyard, where he was captured days after the bombings, saying, "I don't like killing innocent people."[24]
>
> He noted that "it is forbidden" in Islam to kill innocent people, but he justified his actions as a response to US military involvement in Muslim countries, according to the indictment. "The US government is killing our innocent civilians," Tsarnaev allegedly wrote, ". . . I can't stand to see such evil go unpunished. . . . We Muslims are one body; you hurt one, you hurt us all. Stop killing our innocent people, we will stop."[25]

44. The Globe also reported that "prosecutors wrote ... that Tsarnaev *admitted* his own role in the blasts under questioning" (2347). "A law enforcement official said the carjack victim has told police that the brothers pointed guns at him and *admitted* to the bombing in an apparent effort to intimidate him. The brothers allegedly forced the man to turn over his ATM card and password. By the time officers confronted the brothers early Friday morning, 'we already knew these guys had *admitted* to killing three civilians and a police officer and that they were prepared to kill many others,' the senior official said" (377).

45. Under questioning from FBI agents, Dzhokhar Tsarnaev allegedly *admitted* that he and his brother were behind the bombings. He claimed that he and his brother acted alone and that his brother had become a follower of radical Islam

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[24] Articles 1205, 1254, 1258 (Boston Globe).

[25] Articles 1205, 1254 (Boston Globe).

in part because of his opposition to US wars in Iraq and Afghanistan, the Globe has reported (901).

46. A man who was allegedly carjacked by the brothers also told authorities that Tamerlan Tsarnaev *admitted* to the bombings and to killing Collier. (901, 916).

47. "And what we already know is that this 19-year-old, who looks just like any other 19-year-old, is beyond complicated, the heinous crimes he allegedly *admitted* to utterly confounding" (1282).

48. Officials say he scrawled a note on a boat shortly before his capture, in which he *admitted* to his role in the attacks and referred to the Marathon victims as "collateral damage," likening them to Muslims killed in the wars in Iraq and Afghanistan, according to published reports (1922).

49. He also allegedly *admitted* his guilt to the FBI, before being advised of his rights to counsel and to remain silent.[26]

50. There were 63 references in the Globe to the wounded Defendant being captured in a dry-docked boat while hiding to escape law enforcement searchers. He "confessed in a bloody scrawl inside the boat where he was hiding."

51. Extra-judicial Comments on Guilt by Law Enforcement. A good deal of the guilt-orienting information came directly from public statements made by law enforcement officials.[27]

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[26] Articles 1922, 2347, 2363 (Boston Globe).

[27] The A.B.A. Standards on Fair Trial and Free Press ban statements by attorneys and law enforcement personnel of extrajudicial statements "that a reasonable person would expect will have a substantial likelihood of prejudicing a criminal proceeding." This specifically deems improper an opinion "on the guilt of the defendant, the merits of the case or the merits of the evidence in the case." In many jurisdictions, prejudicial statements by prosecutors and law enforcement officials are one of the major criteria in considering whether to grant a change of venue, e.g.: "In exercising sound discretion, the trial court is to consider the following "discrete factors: ... whether such (prejudicial) information is the product of reports by the police and prosecutorial officers." *Commonwealth of Pennsylvania v. Cohen*, 489 Pa. 167, 178 (1980) [citations omitted].

52. The prejudicial statements by law enforcement generally went well beyond appropriate function of informing and reassuring the public in the aftermath of the bombing and manhunt.

53. Leaks and other apparently-unauthorized dissemination of prejudicial material included interviews with recently retired FBI officials and others on the Marathon bombing investigation on 60 Minutes and the National Geographic Channel, a broadcast regarding an FBI analysis of the bombs, and the release of photos of writings from inside the boat where Mr. Tsarnaev was found. There followed a Los Angeles Times story about the gun allegedly used in the MIT and Watertown shootings. Most recently, the arrest of Stephen Silva on drug and gun possession charges triggered an immediate series of law enforcement leaks to the effect that Silva had provided Dzhokhar Tsarnaev with the gun later used to kill MIT police officer Sean Collier, and that Tsarnaev had told Silva that he had robbed drug dealers with the gun.[28]

54. While of course it is not within my purview to express a view on how the Court should deal with these and prior apparently inappropriate statements and violations of the Court's orders, it is my opinion that the media reports emanating from law enforcement sources are prejudicial and provide further support for the need for a change of venue.

55. There is one additional matter that should be added, an allegation about the Defendant's prior violent and criminal acts. There were 41 references in the Globe to an alleged confession by Ibragim Todashev implicating Tamerlan Tsarnaev and himself in a triple slaying in Waltham. That led to extensive coverage of the highly controversial killing of Todashev by law enforcement while in their custody, adding further to the pretrial coverage surrounding this case. There are other elements relating to the media providing material promoting the guilt of the defendant, such as the reported sense of relief at the Defendant's capture.

56. Summary of Nature of the Publicity. Substantial media coverage of a case like this is likely to lead to much informal discussion at home, at work, and everywhere else where people congregate. The rules of evidence and judicial

[28] These facts are detailed in the defendant's Renewed Motion for Hearing to Address Leaks by Law Enforcement filed on July 25 of this year, and will not be further set forth here.

instructions do not control such informal discussions, and gossip, rumors, hearsay, and the like are the currency of that "trial." The elements of those discussions are likely to include material that is emotional, and inflammatory, content speculative, and expressing shared outrage. The stories and opinions of friends, relatives, neighbors, and coworkers may have a special credibility, and future jurors can learn the community values with respect to the "proper" result. This could lead to a sort of pressure to convict or to face a perceived need to explain the verdict to those family members, friends, neighbors, and fellow workers.

57. The survey done in this case showed that in the four venues surveyed, almost two-thirds (Q7f, 63.8%) of all respondents said they have "talked about the case with relatives, friends, or co-workers." Of course we have no record of what those jury-eligible respondents said to each other. In Boston, since 52% of the residents were at the scene or knew someone who was there, it may be inferred that some of these discussions were people with first-hand knowledge and personal fears.[29] Many of them had been in the zone of danger, potential victims and perhaps traumatized by the experience. There may also be a fair-trial problem with half the jury pool previously having had discussions with eye-witnesses to the crime or its effects.

58. Such prior discussion of the case would not automatically disqualify a person from serving on the jury, but it would be disquieting. Not even jury members are supposed to discuss the case with each other before it is submitted to them, and those jury discussions are likely to be much less prejudicial than those held at a neighborhood bar.

59. My analysis under the category Nature of the Publicity demonstrates an extraordinarily high level of inflammatory publicity that also describes the defendant's apparent guilt. I saw few references to any exculpatory facts or evidence.[30] The other venue factors which must be weighed are the nature and gravity of the crime, the status of the victims and defendant, and the size and nature of the community.

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[29] See Table 7, *infra.*

[30] However, there were several references to the Defendant's young age (then 19), the fact that he was a younger brother who could have been influenced by this older brother, and had no prior record of violence or criminal convictions.

60. Nature and Gravity of the Crime. The second major category to consider in deciding whether there is sufficient media prejudice to support a change of venue is the nature and gravity of the crime. Thus, there are two parts to this criterion: The *gravity* of the crime is measured by its status in the relevant penal code and is discussed below.

61. Nature of the Crime. Under the *nature* of the crime criterion, we are interested in whether there are aspects of the case charged that make it particularly bad as compared with other cases of the same category in the penal code. As compared with other murder cases, even other murders capitally charged, this case stands virtually alone as one of historical and memorable significance in and to the Boston area. Among other factors, there was the number of victims, including those grievously injured, plus the number of people traumatized by the bombing itself and by the lockdown that followed. There was also the fact that the crime itself is widely regarded as a political attack on Boston, the nation, and its institutions. While it may have fallen short of 9/11 stature, it should be considered a crime of the highest rank. It is important to note that the case also includes the killing of a police officer, which is a sufficient charge, standing alone, to provide strong support for a change of venue in many situations. There were also over 50 references to hate in connection with this case. All of these factors lend support for the need for a change of venue.

62. Gravity of the Crime. The next aspect to be evaluated is the *gravity* of the crime. A death penalty case is, of course, the most serious of all cases in the law, and thus of the highest gravity. A capital case tends to attract more media coverage and usually leads to more public exposure of prejudicial news. The penalty itself becomes an independent focus of the news, as it certainly was in this case. There were stories of political candidates' views of whether the government should seek death for the defendant, polls on the subject, editorials, and letters to the editor.

63. I did a count of many of the various references to the death penalty in the Boston Globe's coverage of the case. There were 441 references to "death penalty," 76 references to "capital punishment," 23 references to "death sentence," 64 references to "execution," 16 references to "lethal injection," and 12 references to "put to" or "sentenced to" "death."[31]

[31] A few of these references are to the use of terms like execution to mean other than the death penalty.

64. The fact that the Defendant is facing the death penalty is a factor that has special significance in a venue motion because the jurors' role in a penalty phase is different from their role in the guilt-innocence part of a trial. At the penalty phase, the jurors' role is not merely to determine facts, but to make an individualized normative decision on whether the defendant should live or die.[32]

65. That issue is independent of the impact of the media coverage of the issue. The *fact* that this is a capital case weighs in favor of a change of venue. However, it is significant to note that jurors who have been repeatedly and extensively exposed to the fact that Mr. Tsarnaev is facing the death penalty will desensitize them to that punishment and make them more likely to vote for it.[33]

66. Status of the Victims. The third major factor to weigh in this case is the status of the victims. In any capital case, the prosecution will attempt to portray the victims as sympathetically as possible, and will do so long before the victim-impact part of the trial. In the bombing case the media strongly aided in that task. As would have been expected, the victim coverage was extremely sympathetic, given the number of victims killed or wounded. Also, Boston and its major institutions were significant victims, including the venerated Marathon itself. All of its major sports teams – the Red Sox, the Celtics, the Patriots, and the Bruins – were very actively involved in fundraising, memorials, commemorations, and a large numbers of symbolic efforts that continue, all strongly supportive of the victims.

67. In most capital cases, there tend to be few or no eyewitnesses to the crime. In this case, in addition to the three killed in the blast, the Globe frequently reported there were over 170 living victims, many with horrible wounds and devastating personal stories. Many poignant and tragic individual tales were featured in the newspaper. A number of the victims were children, and the community responded in many ways, including fundraising, tributes, and memorials.

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[32] *See* Haney, C., "On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process," 8 *Law and Human Behavior* 121 (1984).

[33] *Id*.

68. There are many articles that describe the pathos of these victims and the community response. Here is an excerpt from one:

> Maybe it is the photo, or the equally vivid character sketches beneath it of Patrick Downes and Jessica Kensky Downes, newlyweds critically injured as they watched the Boston Marathon at the finish line Monday. Jess, an MGH nurse from the West Coast, spirited and confident; Pat, a Boston College graduate and Cambridge boy, gentle, generous, and goofy; the two together, selfless and warm, cherished by their friends. Something about them – not just their plight, but their seemingly boundless joy and photogenic charm – leapt from thousands of screens and propelled people to donate and to write. Friends, friends of friends, BC alumni, complete strangers. Within a few hours, a fund-raising page established to defray the couple's out-of-pocket expenses had raised $23,000. By Thursday morning, it hit $150,000; by Thursday night, $300,000 (158).

69. Status of the Defendant: Negative or Hostile. The fourth factor to weigh in resolving the venue issue is the status of the defendant, Dzhokhar Tsarnaev. Just as the media has provided a portrayal of the victims, they have also portrayed the Defendant. The Globe used the term "monster" 34 times about him. There were 627 references to "terrorist" (although some were referring to some other terrorist attack or other uses). There were eight characterizations of him as depraved (or depravity), 10 references to him as callous, and a few employing the words vile, revile, or devil.

70. A major aspect of the prejudicial view of the defendant is the characterization of him as an outsider. In most venue cases, being an outsider simply means he is not a local person, and that factor tends to be a consideration favoring a change of venue. That is so because local citizens might judge outsiders or "strangers" as more of a danger and less trustworthy. But Mr. Tsarnaev is a relatively extreme example of an outsider.

71. Despite his American citizenship, he is viewed as a foreigner, is an ethnic Chechen (255 references) born in the former Soviet territory now known as

Kyrgyzstan (77 references).[34] His Muslim religion is a special source of prejudice in the United States, especially since 9/11. I counted 400 references to Muslim, several directly evincing hostility. A gentle example of this problem is evinced by the following quote:

> Like many extremists before, they began to interpret their experiences through the lens of a radical Islamist ideology that holds that the West is determined to oppress Muslims, destroy their faith, and occupy their lands (1821).[35]

72. Tsarnaev was not just a Muslim, facing possible discrimination over his religion, but he is characterized an extreme and violent anti-American Jihadist.[36] When he allegedly confessed in a bloody scrawl inside the boat where he was hiding, it was reported that he wrote, "I can't stand to see such evil go unpunished . . . We Muslims are one body, you hurt one, you hurt us all . . . [Expletive] America."[37]

73. "Terrorist," "terror" and related terms were used to characterize Mr. Tsarnaev 1,414 times in the Globe including terrorist, terrible, terrorism, terrorized, and terrifying. The specific word terrorist is used 627 times in the Globe, although often the word was not used to characterize Mr. Tsarnaev, but as part of phrases like terrorist attack.

74. In general, he is portrayed as disloyal, ungrateful for his citizenship and privileged status and being a college student. I note that the prosecution did not accept that view, arguing in its venue response that the media "demonized" McVeigh and Nichols in the Oklahoma Bombing case, while it "humanized" Tsarnaev. Yet the only demonizing of McVeigh cited was his association with "right wing militia groups." There was no reference to the facts that Mr. McVeigh, in contrast to Mr. Tsarnaev, was white, American, Christian, a super-patriot, and

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[34] Unless indicated otherwise, all citations to references are found in the Boston Globe.

[35] When numbers are added at the end of a phrase, as 1821 above, that refers to the newspaper article number, which is found on each article in Exhibit 2a, the Boston Globe articles.

[36] There were 65 references to Jihad in the Globe coverage.

[37] Articles1205, 1254, 1258, 1282, 1749, 1663, 1898.

an Army veteran. In Oklahoma, Mr. McVeigh's personal qualities, though overwhelmed by what he did, could hardly be characterized as demonizing.

75. Mitigating, Positive, or Helpful. There were repeated references to Mr. Tsarnaev's age at the time of the bombing – 19. That makes him barely eligible for the death penalty and could be a strong mitigating factor. Also, he may well claim that he was led, or at least heavily influenced, by his older brother, and there were 110 uses of "older brother" in the Globe coverage. Furthermore, Mr. Tsarnaev has no criminal record, and no known violence in his background.

76. On balance, the Defendant's status in the community, as portrayed in the media coverage, is heavily weighted in negative terms that damage his fair trial rights.

77. Size of the Community. The size of community is another factor to weigh. The population of the four venues under consideration is as follows:

Table 2. Population Size

	Population[38]
Boston	5,055,937
Springfield	827,721
Manhattan	5,183,415
D.C.	646,449

78. As to the significance of population in assessing a possible need for a venue change in this case, I became interested in the issue several years ago and concluded that in some cases a larger population provided only marginal additional protection from community prejudice.[39] Only when a case lacks salience in a high-population community does the larger population tend to protect against bias. This is because larger locales tend to be more diverse than smaller ones, and cases that

[38] County populations forming the area was obtained from the website of U.S. Census Bureau Quick Facts.

[39] E. Bronson, "Size of the Community As a Factor in Change of Venue: When a Large Community Becomes Small for Purposes of Venue." California State University, Chico Discussion Paper Series, 1999.

may be highly relevant to one part of the community may not be salient to other groups.

79. That means as a practical matter that, first, in a small community, major and highly emotional crimes happen far less frequently, and when they do, they receive more attention and are often seared into the psyche of the community. Cases in large communities have their 15 minutes of fame and then fade with the possible bias that accompanied them. Second, a larger proportion of the small community tends to have some direct connection to the case as witnesses, medical personnel, those who know the victims, who are familiar with the locale, etc. Third, the informal communication system – over the back fence, at work, in the coffee shop – tends to take over and involve local folks with gossip, rumors[40], and uncontrolled speculation. Fourth, the small town community members are much more likely to become involved in events such as contributions, commemorations, and the like. Also, prospective jurors may feel they face undue scrutiny from their friends and neighbors for their verdict. Fifth, the salience of the case to the local community is usually much greater in a small town.

80. The reason that the large population of the Boston area is not as likely to provide the usual safeguards for the defendant's fair trial rights in this case, as would happen in most high-profile cases, is that every one of the factors listed above that would ordinarily make the larger community less vulnerable to bias is substantially absent or much weaker in the Boston Marathon case.

81. Under the first criterion, no one can think this case will fade from the collective memory of Boston area residents prior to trial.[41] Under the second criterion, over half people in the Boston area were either at the crime scene or had a friend who was. Another large percentage either suffered from the lockdown or were inconvenience or frightened by it.[42] On the third criterion, over three-fourths of the community discussed the case with others, and, fourth, the number of

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[40] There were 27 references to rumors in the Boston Globe articles, all but four related to the bombing.

[41] As an article in the Boston Globe said: "The image of the dead and wounded will be burned into the memory of Americans for decades to come" (3).

[42] There were 88 references to lockdown, and most dealt with the area-wide lockdown during the massive manhunt for the bombers, but others dealt with lockdowns elsewhere in response to a fear of spreading bombings. One of these was a lockdown of the White House.

commemorations, remembrances, fund-raising, community images and slogans, and other events was extremely large.[43]

82. Salience. Finally, the factor which in my experience is highly important in assessing whether there is a need for a change of venue, is the salience of the case to local residents. Cases are salient when they seem especially relevant to our lives. Salience may arise because of propinquity, it could happen to me, people like me are involved, I've been there or in that situation, and other factors. Salience adds to our interest of the case, our personal and emotional involvement, and our knowledge. It is the reason that editors put local stories on the front page. While everyone in the country knew about the Oklahoma City bombing, it had special salience to the people of Oklahoma. They lived through, identified with the local victims, and were suffused with coverage. In my own research, I have long found that pretrial prejudice in high profile cases varies dependent on their closeness to home and how the case resonates in the personal lives of survey respondents and thus in the local community. Such salience leads to greater awareness of the case, more focus on news accounts about it, more of a personal reaction to it, and thus more bias about the case. It is a factor I have focused on and researched for many years.[44]

83. This case had a remarkably high salience in Boston, comparable to what I found in the Oklahoma City bombing case. The Boston Marathon race is now 117 years old, and is the world's oldest annual marathon. According to the Boston Athletic Association (www.baa.org):

> The Boston Marathon is the world's oldest annual marathon and ranks as one of the world's most prestigious road racing events. …. The Boston Marathon has distinguished itself as the

[43] Examining the fifth criterion, jurors facing possible community obloquy for a making an "error" in a verdict vote, that is a speculative judgment, but recall the case of a certain first baseman named Bill Buckner who still faces eternal infamy for an "error" committed in 1986. It has taken a quarter century for Buckner to be forgiven by Boston fans.

[44] E. Bronson & R. Ross, "Gender and Salience As Factors in Jury Pool Bias: A Preliminary Investigation," California State University, Chico. Discussion Paper Series, 1999. Presented at Southwestern Political Science Association, San Antonio, 1999; and "Justice in the Era of the High-Profile Defendant: Will a Change of Venue Help?" California State University, Chico. Discussion Paper Series, 1991. Also published as part of Proceedings of the Annual Meetings, American Political Science Association 1991, presented at national meeting, American Political Science Association, Washington, D.C. (1991).

> pinnacle event within the sport of road racing by virtue of its traditions, longevity and method of gaining entry into the race…The 2013 Boston Marathon had 27,000 official entrants, and the special 118th Boston Marathon (in 2014 had) 36,000. Approximately one million spectators line the (course).

84. That explains the large number of Boston-area residents, as found in the survey (52%), who had participated in the Marathon or had friends or relatives who did so as runners or spectators, enhancing the salience factor in the case.

85. The Marathon attack was portrayed, and likely perceived, as virtually a direct attack on Boston, its institutions, its traditions, and each of its residents. Furthermore, there was an unprecedented number of people who had been, or knew someone at the crime scene, and thus would have been witnesses, or heard accounts first hand from witnesses, and who experienced the reaction of "it could have been me, or my sister or child." This leads to high salience.

86. The high salience led to widespread local community participation and support. There were innumerable ceremonies, commemorations, honors, fundraisers, other events, some held in connection with sports events attended and supported by tens of thousands of supporters. The motto "Boston Strong," which was mentioned 421 times in the Globe appeared on T-shirts, other shirts, uniforms, including sports, some with the 617 area code.

87. All of these references illustrate the fact that in many ways, the Boston area reacted to the bombing like a small town on the prairie with so much local concern, cooperation, and volunteerism.

88. As one writer wrote in the Globe Magazine, it "reminded us what a small interconnected town Boston really is" 547.

89. In summary, this case is more like the Oklahoma City bombing case, where a whole state was found by the trial court to be biased, than the city of Houston in the *Skilling* case. The media coverage in the Boston Marathon case provides extremely strong support for the need for a change of venue.[45] Simply

[45] It is important to note that the media coverage reviewed above comes only from the articles in the Boston Globe. In addition there are other newspapers that covered the case extensively and have many readers and subscribers in the Boston venue. Also, I have not yet done any

based on the media coverage, before examining the survey results, if this case does not demonstrate the need for a change of venue, it is hard to believe that any case does.

IV. Survey Results.

90. I will next describe the central results of the surveys of the four potential venues – the Eastern Division of the District of Massachusetts, the Western Division of the District of Massachusetts, the Southern District of New York and the District of Columbia Federal District, referred to as Boston, Springfield, Manhattan, and Washington, D.C. The survey demonstrated high levels of prejudice. Boston ranked the most prejudiced on all of the criteria I used for my measurements:

- case awareness,
- case knowledge,
- prejudgment of Mr. Tsarnaev's guilt,
- case-specific support for the death penalty for Mr. Tsarnaev if convicted, and
- case salience.

These were the criteria I had identified in advance as those that would be determinative to me in deciding whether to recommend that the defendant seek a change of venue. For the reasons set forth below, the results of this scientific survey support the conclusion that the Court should, first, grant the motion to transfer the venue, and, second, should transfer the venue to Washington, D.C. I will discuss the survey methodology and its findings below.

91. Survey Methodology. As noted earlier, I am one of the drafters of the standards of the American Society of Trial Consultants' (ASTC) Professional Code for Venue Surveys, and as I have attested in Exhibit 4g, this survey was conducted in full compliance with them.

92. I wrote the actual survey, using appropriate procedures and standards based on my previous experience in gathering and presenting survey data to federal

significant analysis of the three newspapers collected in the alternative venues, plus other papers in those areas. Beyond that I have not analyzed the electronic coverage, radio and television.

and state courts in well over 150 cases. Further description of the methodology will be presented after a description of the findings.

93. Results. The screening forms and substantive questionnaire are attached as Exhibit 4a-d, and the results are provided in Exhibit 4f. I note that the survey questioning was completed on May 27. Since that time the coverage of the case has continued, and there is no reason to assume that the prejudice measured in the survey has abated.

94. I will focus on the key findings that I have relied upon to demonstrate my main conclusions:

- The pretrial prejudice to Mr. Tsarnaev's fair trial rights in the Boston area is extremely high.
- While the prejudice in the three other divisions or districts surveyed, Springfield, Massachusetts; Manhattan, New York; and Washington, D.C., is somewhat high, the differences justify a change of venue.
- Washington, D.C. is generally the least prejudicial venue, and
- Springfield, Massachusetts is the site with prejudice closest to that in the Boston area.

95. Survey Findings Demonstrating Relative Prejudice. I identified four primary areas of possible differential levels prejudice I wished to explore when I constructed the survey. I believe they are appropriate standards to use in making that decision. The first one is based on differences in *prejudgment of guilt*, the second one is differences in *death penalty prejudgment*, the third is *knowledge of facts about the case*, and the fourth is *salience of the case* to residents in then jurisdiction.

96. The survey results are shown in Exhibit 4f, and I will review the key findings. These are the variables that I had decided to focus on before the results became available to avoid cherry-picking results that support a predetermined desired result.

97. Prejudgment of Guilt. The first one is shown in the results from Q3, which is as follows: The authorities believe that two brothers set the blast. The older brother was killed shortly afterwards in a gun fight, and the younger brother, named Dzhokhar Tsarnaev (ZO-kar Ja-HAR Sar-NIGH-ev), was captured and

charged with murder and other crimes. Based on what you have read, seen, or heard about the case, do you believe Dzhokhar Tsarnaev is definitely guilty; probably guilty; definitely not guilty, or probably not guilty of murder?[46]

98. Focusing on the "definitely guilty" responses, Boston (57.8%) and Springfield (51.7) are both very high, compared with Manhattan (47.6%) and much lower Washington, D.C. (37.4%). Obviously, this is a critical factor in deciding whether Boston has been more prejudicially affected by the media coverage locally, as compared to the other possible venues. Springfield runs a close second to Boston, while Washington, D.C. seems least affected. See Table 3, below.

Table 3. Definitely Guilty

	Def. Guilty[47]
Boston	57.8%
Springfield	51.7%
Manhattan	47.6%
D.C.	37.4%

99. Favor the Death Penalty for Mr. Tsarnaev. The second highly critical factor to assess is how much jury-eligible residents in the four communities support the death penalty for Mr. Tsarnaev. Respondents were asked in Q5 the following question: The prosecutors are seeking the death penalty for Dzhokhar Tsarnaev. Let's assume the jury finds him guilty of first-degree murder. Then there will be just two possible sentences, either the death penalty or life without the possibility of parole. Based on what you know about the case and the defendant from the media, which sentence do you believe the jury should select for Dzhokhar Tsarnaev, the death penalty or life in prison without the possibility of parole?

100. Once again, Boston (36.7%) and Springfield (35.1%) are on a different and higher plane of favoring the death penalty for Mr. Tsarnaev than Manhattan

[46] I ignored the case recognition question (Q2) because of what is called the ceiling effect, which is when almost all respondents are likely to answer a question the same way, differences are likely to be de minimis and thus of little interest. This is related to a ceiling effect, when a high proportion of subjects in a study have maximum scores on the observed variable. Over 90% recognized the case in all four venues.

[47] Def. Guilty = Those who recognized the case were asked if they believed the defendant was definitely guilty, probably not guilty, or definitely not guilty.

(27.7%) and Washington, D.C. (19.0%), is again substantially lower. See Table 4, below.

Table 4. Death Penalty for Defendant

	Death Penalty[48]
Boston	36.7%
Springfield	35.1%
Manhattan	27.7%
D.C.	19.0%

101. Note that we are not comparing some relatively liberal communities with those in the Deep South or Southwest, which might offer some other explanation for such large variations other than differences in the nature and extent of the pretrial publicity and the impact of the salience of the case on survey respondents. Of the four communities selected to survey, two were necessary (Boston and Springfield), and the other two are relatively large and able to handle a trial of this size and public interest, culturally diverse, and relatively easily accessible from Boston, but all four tend to be regarded as politically liberal.

102. The Government argued in its venue opposition filing that it saw an "obvious flaw" (p. 14) in the poll by the absence of what it called "control data," and it cited what it called "the most recent poll the government could find," showing 53% support the death penalty, to demonstrate that the Boston defense poll showing support for the death penalty at 37%[49] if Mr. Tsarnaev is convicted undercuts its position of claiming that he is biased if he is tried in Massachusetts because of residents' support for death. Apparently the Government is asserting that it should be the Government that is seeking the transfer since "only" 37% support the death penalty for Mr. Tsarnaev, when the norm of death penalty support is really over 50% in Boston.

103. That argument is flawed on several levels. To begin with, the "most

[48] Death Penalty = Those who recognized the case were asked if they believed that if the defendant were convicted he should receive the death penalty or life without possibility of parole.

[49] The 37% figure is based on the original survey report. That initial report of the survey results improperly included the responses of self-identified ex-felons, who are not eligible for jury duty. When they were excluded from the report, the correct number supporting the death penalty in the Boston venue drops to 36.7.

recent poll" the Government used was dated 2003, 11 years ago. Over the last several years there has been a considerable drop in support for the death penalty across the country. This clear trend makes the use of the Government's "control" inappropriate.

104. A second reason the "control" figure of 53% is meaningless is because many studies show that when surveyors give respondents a choice of an alternative penalty, such as life without the possibility of parole, support for the death penalty drops significantly. The survey question used in this case included just such an option.

105. A third reason to ignore the "control" is more complicated. When people are asked if they support the death penalty, there is an unarticulated premise. They are being asked if they support giving the prosecutors the power to seek death in the worst of the worst cases. Respondents may believe that capital punishment may serve as a just desert in the cases involving awful crimes, or it may be useful to deter future killers. Their general support for the death penalty has only limited applicability to their decision to sentence an individual killer.

106. But in case-specific surveys such as the one utilized in this case, respondents are asked specifically if the defendant, Mr. Tsarnaev, in this case, if convicted by a jury, and based on what they already know about the case, and given the option of choosing life without parole, are willing to choose the death penalty as his punishment. That is a very different question from the Government's "control" question, and both common sense and empirical evidence should convince us that respondents would demonstrate a much lower level of case-specific support for the death penalty than their abstract support for it.

107. The three reasons noted above explain why the 37% figure in support of the death penalty here are significant and disturbing, especially in light of the fact that only half that many (19%) chose death for Mr. Tsarnaev in Washington, D.C.

108. Strength of Support for the Death Penalty for Mr. Tsarnaev. In Q5a, those respondents who chose the death penalty in their response to Q5 were asked the following question: Q5a. On a scale of 1 to 5, with 5 being that you strongly prefer that the jury select the death penalty for Dzhokhar Tsarnaev, and 1 being a slight preference for the jury to select the death penalty, how would you rate your own preference for the death penalty?

109. There are several ways to do a comparative assessment of the responses to this question. I compared the four venues based on the percentages of those responding with the highest intensity of support for their choice of the death penalty. See Table 5, below. The results demonstrate that the Boston area has the highest percentage of those with the most intense support of the death penalty, with over a quarter of all Boston respondents (26.3%) showing the highest level of support for the death penalty for Mr. Tsarnaev if he is convicted, dropping down to less than half of that in Washington, D.C. (12.9%).

Table 5. Intensity of Support for Death Penalty

	% of Respondents Strongly Favoring Death Penalty[50]
Boston	26.3%
Springfield	18.4%
Manhattan	18.0%
D.C.	12.9%

110. Knowledge of Additional Facts. The third factor I focused on in the survey is the respondents' additional knowledge of facts about the case. I considered four of the questions in the survey to assess the ranking of the four venues. These four questions are Q1e, the respondents' recognition of the name of the defendant, Q7a, the fact that the two Tsarnaev brothers are Muslim, Q7b, that an M.I.T. police officer was killed, and Q7c, that the defendant was 19 years old at the time of the bombing. The results are shown below in Table 6, below.

[50] Those who chose the death penalty on Q5 were asked in Q5a to rate the strength of their preference from 1 to 5. The % of all respondents in that venue who chose 5 is shown in Table 5. In Table 4, the number for each venue is much larger, because the percentage shown is that of just all those favoring the death penalty on Q5 who strongly favor the death penalty on Q5a.

Table 6. Knowledge of Additional Facts.

	Q1e Name Rec.	Q7a Muslim	Q7b M.I.T Officer	Q7c 19-Yrs-Old	Average Avg. %
Boston	88.6%	74.4%	96.6%	79.0%	84.7%
Springfield	57.9%	67.2%	77.0%	65.6%	66.9%
Manhattan	44.3%	73.7%	73.0%	72.3%	65.8%
D.C.	33.7%	63.6%	67.7%	67.0%	58.0%

111. Of course it is true that no correct answer to any of the four questions demonstrates any prejudicial knowledge, but in all of the past venue surveys I have conducted, the more additional knowledge respondents had about the case, the stronger their belief that the defendant was guilty.

112. Table 6 shows the percentages within each of the four venues of the recognition of the four case-related questions or information from this survey. As can be seen, Boston residents show on all four questions and overall a considerably higher recognition of case specifics than those in the other three venues, and as was true as to the definitely-guilty and penalty issues, Springfield was second, and Washington, D.C. residents showed the least exposure to the case.

113. In order to measure some of the issues that might reflect the relative salience of the case, I first included questions that asked about the respondent's involvement with the Boston Marathon through participation or attendance, either personally or through friends. The results are shown below (Table 7) with Boston-area residents having been involved to a far greater extent than the others. This demonstrates an unprecedented percentage of people who were at the crime scene of a case or had friends who were there. Thus, many had been or had spoken to eye witnesses who had experienced the fear and devastation.

Table 7. Participation in Boston Marathon[51]

	Q7e. Partic. in 2013	Q7d. Ever Partic.
Boston	52.0%	49.5%
Springfield	19.0%	16.7%
Manhattan	9.4%	7.9%
D.C.	11.8%	5.6%

114. A third question in the survey to test for salience was whether the respondent has talked about the case with others. Boston respondents were much more likely to have done so, and on this one variable, Springfield comes out as the most favorable alternative venue, but Washington, D.C. is the second choice.[52] See Table 8, below.

Table 8. Q7f. Talked About the Case

Boston	77.4%
Springfield	46.6%
Manhattan	69.1%
D.C.	53.3%

115. I also combined the percentages for the three salience questions, as shown in Table 9. Overall, the case of the Marathon bombing is over twice as salient to respondents living in the Boston area as it is to residents in all three of the other jurisdictions, and that to Washington, D.C. residents the salience was least. See Table 9, below.

[51] Q7e. Did you or someone you know participate in or attend the Boston Marathon in 2013? Q7d. Have you ever participated in or attended the Boston Marathon?

[52] Q2f. Have you talked about the case with relatives, friends, or co-workers?

Table 9. Composite Salience

	Q7e. Partic. 2013	Q7d. Ever Partic.	Q7f. Talked About	Avg.
Boston	52.0%	49.5%	77.4%	59.6%
Springfield	19.0%	16.7%	46.6%	27.4%
Manhattan	9.4%	7.9%	69.1%	28.8%
D.C.	11.8%	5.6%	53.3%	23.6%

116. Examining the overall results of the survey, it is readily apparent that Boston residents are a significantly more biased jury pool than the other three venues. On every one of the major categories (guilt, death penalty, fact-specific knowledge, and salience) it was the highest scoring in prejudice. Also, Boston was the highest scoring of the venues on every one of the 10 survey questions used to determine the prejudice measured in those major categories. It is of special interest and persuasiveness that the measurement of bias by all four of the criteria converge in demonstrating that the bias is highest in Boston.

117. Assuming that a transfer of the case is necessary, the next question is which of the three alternative sites, or perhaps some other, is most appropriate. Of the four major criteria, guilt, death penalty, case knowledge, and salience, the most determinative would seem to be guilt and penalty. In both of those criteria, Washington, D.C. is the least biased venue of the four, and there is a substantial gap between it and the other three venues, as can be seen in the discussion and tables above. The Washington, D.C. area is also the lowest in prejudice on the other two major criteria, case knowledge and salience, but the gap between it and the lowest other venue is not as great as it was on the first two criteria.

118. Considering Springfield as an alternative, it is a clear second in ranking to Boston on bias against the defendant with respect to the two major criteria of bias, guilt and penalty. It is also second most biased on knowledge of additional facts, and it was third on salience. Its salience rating was lowered only because an unusually high number of people discussed the case in Manhattan. But the more important sub-factor of salience related to some aspect of participation in a Boston Marathon. Springfield was a close second to Boston (when compared to Manhattan and Washington, D.C.), as a negative factor that is likely to create greater salience and greater prejudice. Thus, Springfield is the least acceptable alternative venue of the three tested. Washington, D.C. has the lowest level of anti-defendant bias against Defendant Tsarnaev.

119. No matter where the trial is transferred, predictably the press will intensify in that venue, but the effect of the intense press and attention is likely to have much more impact in Springfield than in Manhattan or Washington D.C. That is because Springfield is a neighbor of Boston, only about 90 miles away, although a difficult commute. Boston is a sports, cultural, and educational center for the area, and Boston events are salient to people from Springfield. In a sense, Boston news is almost local news, at least in comparison to its impact in Manhattan and Washington, D.C. Also, in New York City or Washington D.C. the press about this trial would be diluted to a great extent due to many other attention-grabbing headlines generated locally from those cities. They produce news stories of national and international importance on a daily basis, which would deny this case the more prominent role it would have in Springfield. If the trial were to move to Springfield, this would likely instantly become the stand-out biggest news story there, and continue to be so until the conclusion of the trial. In addition, the Globe, the Times, and the Post are all national newspapers, and tend to focus more on national and international news than does the Republican. Thus, the pretrial publicity will have a greater effect on potential jurors in that venue.

This is supported by the percentage of news stories in the Springfield Republican that were, literally, front page news. In Table 1, note that of the 324 stories referring to the case in the Springfield Republican 148 (45%) of them were on the front page. In all the other papers, the news stories were not featured with that prominence as frequently (In the Boston Globe 33% were front page, in the Washington Post, 26% were front page, in the New York Times, 26% were front page stories.)

120. Methodological Considerations. To conduct the survey for this case, I selected Sentenium, a California firm that was established in 2004 that provides survey research services, including operations as a call center. I solicited bids from four firms, based on my prior experience with them, or their reputation among other experts who have used their services, and my discussions with the firm to ask about their procedures, the experience and qualifications of their team, cost, and other relevant matters.

121. I have attached to this declaration as Exhibit 4g, Sentenium's description of their procedures used in the survey for this case, plus other relevant data, including information on the persons responsible for the survey, completion rates, training of callers, and dates of the calling.

122. The target size for the venues surveyed was 300 qualified interviews for the Boston area and 200 for the other three sites. The margin of error associated with surveys of that size are ±3% for 900 in the total survey, and ±6% for the 300, and ±7% for the 200 in the sub-samples. That means that 95% of the time the results obtained will be within that margin of error.

123. I will briefly note some other possible methodological matters. In the questionnaire, respondents were asked whether they have a prior felony or current pending charge. Only those who answered no are included in the survey results. Other qualifications for the questionnaire also reflect juror required requirements for jury duty; they are laid out in the Screeners for each area surveyed. In this declaration I have used short-cut descriptions for the four areas surveyed, but on the Screeners, only respondents who lived in one of the counties in the appropriate division or district were interviewed.[53] Thus, the areas surveyed included all the counties included that court's jurisdiction.

124. The random-digit-dialing system was used to obtain a likely representative sample of target population: the jury pool in that division or district. The screeners were used to determine that respondents were jury eligible. The demographic questions were included in the survey so that we could compare the survey demographics with the demographics of the actual residents.

125. In the tables I have used and those furnished by Sentenium, the survey questions are sometimes abbreviated. The exact questions are in the questionnaire. Other standard techniques for surveys of this sort were used, and I have only listed a few.

126. A Note of Concern. I have never had such a short period in order to do the amount of work necessary to do a complete assessment, especially given that the enormous amount of publicity, and four separate venues to assess. While nearly 16 months have elapsed since the bombing, funding to prepare this evidence was not authorized by the Court until June 23rd of this year. Since I could not start until funding was approved, that left just six weeks to clear my schedule and that of co-workers, collect the rest of the media, do a content analysis of the publicity, organize the survey results into appropriate exhibits, do statistical analysis of the survey results, and complete other major tasks, such as writing this declaration. Nevertheless, while my analysis is somewhat less thorough than I would have

[53] However, Washington, D.C. is not divided by county.

wished, the data summarized here leave no doubt in my mind that by almost any measure, the case should be transferred out of the District of Massachusetts. The data in the Eastern Division overwhelming support moving the trial from the Boston area. Almost all of the indicators show that Springfield is the least desirable of the three alternative venue sites examined, and that Washington, D.C. is the best, with the lowest levels of bias, despite its being reasonably convenient, accessible, and capable of handling a trial of this magnitude.

§V. Recommendation.

127. It is my professional opinion, based on a review and analysis of the pretrial publicity and the survey results, that the Court should grant a change of venue from the District of Massachusetts, and preferably to Washington, D.C.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this seventh day of August, 2014, at Chico, California.

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EDWARD J. BRONSON