**IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**
**APPEAL NO. 2021-2**

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| **UNITED STATES OF AMERICA,**<br><br>**Appellee**<br><br>**v.**<br>**BLUE JONES,**<br><br>**Defendant-Appellant** | **Appeal from the U.S. District Court for the Eastern District of Orange** |

## OPINION OF THE COURT

BEFORE: PINK, FUSCIA, and CRIMSON, Circuit Judges.

FUSCIA, Circuit Judge

## I. OVERVIEW

Together with his older brother Green Jones, Blue Jones detonated two homemade bombs at the 2013 Yellowville Marathon thus committing one of the worst domestic terrorist attacks since the 9/11 atrocities. Radical jihadists bent on killing Americans, the duo caused battlefield-like carnage. Three people died. And hundreds more suffered horrific, life-altering injuries. Desperately trying to flee the state of Orange, the brothers also gunned down a local campus police officer in cold blood. Reports and images of their brutality flashed across the TV, computer, and smartphone screens of a terrified public — around the clock, often in real time. One could not turn on the radio either without hearing something about these stunningly sad events.

Blue eventually got caught, though Green died after a violent confrontation with the police.

Indicted on various charges arising from these ghastly events, Blue stood trial about two years later in a courthouse just miles from where the bombs went off. Through his lawyers,

he conceded he did everything the government alleged. But he insisted Green was the radicalizing catalyst, essentially intimidating him into acting as he had. *See* 18 U.S.C. § 3592(a)(4) (providing that relative culpability is a mitigating factor relevant to the imposition of a death penalty). Apparently unconvinced, a jury convicted him of all charges and recommended a death sentence on six of the seventeen death-eligible counts — a sentence the district judge imposed (among other sentences).

A core promise of our criminal-justice system is that even the very worst among us deserves to be fairly tried and lawfully punished. To help make that promise a reality, decisions long on our books say that a judge handling a case involving prejudicial pretrial publicity must elicit "the kind and degree" of each prospective juror's "exposure to the case or the parties," if asked by counsel, *see Patriarca v. United States*, 402 F.2d 314, 318 (14th Cir. 1968) — only then can the judge reliably assess whether a potential juror can ignore that publicity, as the law requires, *see United States v. Vest*, 842 F.2d 1319, 1332 (14th Cir. 1988).[1] But despite a diligent effort, the judge here did not meet the standard set by *Patriarca* and its successors. This first error requires us to vacate Blue's death sentences.

A second error compels the same conclusion. The district court abused its discretion by excluding potentially mitigating evidence – information about Green's alleged participation in a previous horrific crime – at the penalty phase of Blue's trial.

On remand, then, the district court must empanel a new jury and preside over a new trial strictly limited to what penalty Blue should get on the death-eligible counts.[2] And just to be crystal clear: Because we are affirming the convictions and the many life sentences imposed on those remaining counts (which Blue has not challenged), Blue will remain confined to prison for the rest of his life, with the only question remaining being whether the government will end his life by executing him.

## II. HOW THE CASE CAME TO US

### A. Bombings

On April 15, 2013, the Jones brothers set off two shrapnel bombs near the finish line of the Yellowville Marathon. BBs, nails, metal scraps, and glass fragments littered the streets and sidewalks. Blood and body parts were everywhere — so much so it seemed to one witness as if "people had just been dropped like puzzle pieces onto the sidewalk. The smell of smoke and burnt flesh filled the air. Screams of panic and pain echoed throughout the site.

[1] For simplicity's sake, we will occasionally call this the "*Patriarca* standard."

[2] "Remand" is legalese for "[t]he act or an instance of sending something (such as a case, claim, or person) back for further action." *See* Remand, *Black's Law Dictionary* (11th ed. 2019).

The first bomb killed two women. K.C was “complete[ly] mutilat[ed]” from the waist down. She bled to death at the scene. L.L.’s leg was “filleted open down to the bone.” She too died at the scene despite heroic efforts to save her.

The second bomb also sent BBs and nails tearing through eight-year-old M.R.'s body, cutting his spinal cord, pancreas, liver, kidney, spleen, large intestine, and abdominal aorta, and nearly severing his left arm. He bled to death on the sidewalk — with his mother leaning over him, trying to will him to live.

Not only did the Jones brothers kill K.C., L.L., and M.R., they also consigned hundreds of others to a lifetime of unimaginable suffering. Some lost one or more limbs, blown off as they stood near the finish line or amputated later because they were so badly mangled. Others lost sight, still others hearing. And years after the bombings, many still had debris in their bodies. One survivor had shrapnel in her that occasionally worked its way to the surface and had to be removed; another had a ball bearing stuck in his brain.

### B. Manhunt and Capture

Back at college the next day, Blue resumed his normal routine. He worked out with a friend at the campus gym, for example. “I'm a stress free kind of guy,” he tweeted.

Aided by a witness’ description and videos from security cameras and bystanders' cell phones, law enforcement released images of the bombers two days later, on April 18, and asked the public to help identify them and provide information about their whereabouts. The FBI posted a “wanted poster” on its website and asked the local community to give any details that could lead to their arrests.

That night, still April 18, Green and Blue put pipe bombs, a handgun, and a shrapnel bomb into Green's Honda Civic and drove off from Green’s home in Chestnut Town. Passing by the Orange Institute of Technology (“OIT”), they spotted a campus police officer’s squad car, approached the car from behind, and shot the officer, S.C., dead at close range. They tried and failed to take his gun. Startled by a passerby, they drove away in the Honda.

The brothers then drove to Beigeville where they carjacked Dave Magenta, who was sitting in his parked Mercedes SUV. Eventually, Green stopped for gas, and Magenta made a break for it, sprinting across the street to a different gas station where he begged the attendant to call the police. Green and Blue took off in the Mercedes.

Magenta told the arriving officers that the carjackers were the Yellowville Marathon bombers. He also told them that his Mercedes had a built-in tracking system.

The police located the Jones brothers in Browntown, where the two had returned to get the Honda. The Jones brothers engaged in a shootout with police, which ended when Blue, trying to escape, ran over Green with the SUV. Green died hours later.

Blue could only drive about two blocks, because the police had damaged the Mercedes' tires. So he exited the car and fled on foot. In a nearby backyard, he found a boat shrink-wrapped in plastic and climbed inside. He stayed there overnight, bleeding from his wounds.

Blue did, however, have enough strength to write a manifesto justifying his actions. On two wooden slats attached to the boat he carved the words, “Stop killing our innocent people and we will stop.” “God has a plan for each person,” he wrote on the fiberglass hull (with a pencil he found on the boat). “Mine was to hide in this boat and shed light on our actions.” “[J]ealous” of Green's martyrdom, he accused “[t]he U.S. Government [of] killing our innocent civilians.” Stressing that he could not “stand to see such evil go unpunished,” he warned that “we Muslims are one body, you hurt one, you hurt us all.” And finishing up, he wrote, “Now I don't like killing innocent people it is forbidden in Islam but due to said [ ] it is allowed.” [3]

With Blue still at large, then-Orange Governor Dennis Maroon asked nearly a million citizens of Yellowville and the five neighboring locales (Siennaville, Chestnut Town, Tan City, Taupeville, and Browntown) to “shelter in place” — that is, he told them to remain behind closed doors and “not to open the door for anyone other than a properly identified law enforcement officer.” He also asked schools and businesses to close — only hospitals and law enforcement would stay open.

Later that day, on April 19, Browntown resident David Scarlet noticed that his boat had some loose shrink wrap and went out to fix it — by this time Governor Maroon had lifted the shelter-in-place order, even though Blue was still a fugitive. As Scarlet climbed up a ladder, he saw blood in the boat and a person lying there with a hooded sweatshirt pulled over his head. He raced back inside and called 911.

Officers responded rapidly. And after Blue ignored repeated requests to surrender, they threw flash-bang grenades into the boat and fired a barrage of bullets at it. Officers finally arrested Blue about 90 minutes after Scarlet's call.

Unsurprisingly, the bombings and their aftermath dominated Yellowville-area TV, radio, newspapers, and magazines — not to mention web and social-media sites.

### C. Legal Proceedings

A Yellowville-based federal grand jury charged Blue with multiple crimes including several specific allegations necessary for seeking capital punishment under the Federal Death Penalty Act (“FDPA”), 18 U.S.C. §§ 3591- 99.

Because of the extensive pretrial publicity in the Yellowville area, Blue filed motions to change venue (that is, the location of the trial) before the guilt phase of the trial started (a capital trial has two phases, a guilt phase and a penalty phase) — motions that the judge

[3] The bracket represents a portion obscured by a bullet hole.

denied, though he did promise to conduct a thorough and searching voir dire.[4] A French phrase that (roughly translated) means "to speak the truth," voir dire "is a process through which a judge or lawyer examines a prospective juror to see if the prospect is qualified and suitable to serve on a jury." *See United States v. Parker*, 872 F.3d 1, 3 n.1 (14th Cir. 2017) (quotation marks omitted). But the judge stopped Blue's counsel from asking prospective jurors questions like "[w]hat did you know about the facts of this case before you came to court today (if anything)?" and "[w]hat stands out in your mind from everything you have heard, read[,] or seen about the Yellowville Marathon bombing and the events that followed it?"

During the guilt phase of his trial, Blue's lawyers did not dispute that he committed the charged acts. Rather, their guilt-phase defense rested on the idea that he participated in these horrible crimes only under Green's influence. But they said that his terrorist path was "created by his brother." Ultimately the jury convicted him on all counts. Later, the jury reconvened and recommended the death penalty on six of the seventeen death-eligible counts —those corresponding to the bomb Blue personally placed. The judge, for his part, sentenced Blue to die, while also giving him multiple concurrent and consecutive prison terms on the remaining counts — including 20 life terms.

## III. DISCUSSION

As we have previewed already, the judge's *Patriarca*-based error compels us to vacate the death sentences. We start with venue but pivot to the jury-selection process — because the judge's promise to hold a searching voir dire helped drive his decision to deny a venue change, but his handling of voir dire did not measure up to the standards set by *Patriarca* and other cases.

### A. Trial Venue and Jury Selection

#### 1. Background

It is no exaggeration to say that the reporting of the events here — in the traditional press and on different social-media platforms — stands unrivaled in American legal history. The highlights of the coverage include:

[4] Blue twice petitioned unsuccessfully for a writ of mandamus compelling the judge to grant a change of venue (with one judge dissenting each time). *See In re Jones,* 780 F.3d 14, 29 (14th Cir. 2015) (per curiam) ("*Jones II*"); *In re Jones*, 775 F.3d 457, 457 (14th Cir. 2015) (mem.) ("*Jones I*"). *See generally* Mandamus, *Black's Law Dictionary* (11th ed. 2019) (explaining that a mandamus is a "writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act"). We did say, though, that if a jury convicted him "on one or more of the charges against him," he could "raise the venue argument again" in an appeal to us. *Jones II*, 780 F.3d at 28.

- Starting with the bombings themselves, the reporting covered the carnage-filled terror scene — with the sights and sounds of the wounded and the dying in full display.[5]

- The reporting then covered the ensuing search for the bombers — with images of Blue leaving a backpack behind M.R. and walking away before it exploded, with Governor Maroon's press-conference statements about sheltering-in-place, and with at-the-scene videos showing agents removing a bloodied Blue from the dry-docked boat.

- The reporting did not get every detail right, however — for example, some falsely claimed that Blue scrawled "Fuck America" in the boat.

- The reporting also explored the lives and deaths of K.C., L.L., M.R. and S.C. — describing their families' pain. And the reporting anticipated much of the testimony from badly-injured survivors — though it sometimes spotlighted accounts from survivors who would never testify.

- The reporting captured the views of prominent community members about the penalty Blue deserved. For instance, the *Yellowville News* reported that despite his past opposition to capital punishment, the then-Yellowville mayor thought Blue should "serve[ ] his time and [get] the death penalty." And the *News* reported as well that a former Yellowville police commissioner believed the government did the right thing in seeking Blue's execution, given the evidence's strength.

- More still, the reporting generated lots of stories where everyday people in the area called Blue a "monster," a "terrorist," or a "scumbag[ ]." One article even asked if a particular photo of Blue was "what evil looks like."

### 2. First Venue Motion

In June 2014, Blue moved for a change of venue because of this avalanche of negative pretrial publicity. He argued that his expert's polling data showed potential jurors in the court's Eastern Division (where the trial was to be held) were more likely to consider him guilty than those in the district's Western Division, the Southern District of New York, and the District of Columbia.

Applying the factors outlined in *Skilling v. United States*, 561 U.S. 358 (2010), the judge denied Blue's motion in September 2014.[6] Among other points, the judge noted that the

[5] To help lend perspective: four of the *Yellowville News's* five most-watched videos posted on its YouTube channel deal with the bombings, nearly getting a combined 30 million views.

[6] On the presumption-of-prejudice issue, the factors *Skilling* discussed included the size and characteristics of the community where the crime happened; the nature of the pretrial publicity; whether the passage of

district's Eastern Division has about "five million people," with many of them living outside of Yellowville — so, he emphasized, "it stretches the imagination to suggest that an impartial jury cannot be successfully selected from this large pool of potential jurors." And, the judge wrote, neither the defense expert's polling nor his newspaper analysis "persuasively show[ed] that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore." Moreover, some of the expert's results, the judge stressed, clashed with Blue's "position" because they showed that respondents in other jurisdictions were almost as likely to believe him guilty as respondents in Orange's Eastern Division. Also, while "media coverage ha[d] continued" in the 18 months since the bombings, "the 'decibel level of media attention,'" the judge said (quoting *Skilling*), had "diminished somewhat." For the judge, Blue had "not proven that this [was] one of the rare and extreme cases for which a presumption of prejudice is warranted." "[A] thorough evaluation of potential jurors in the pool," the judge continued, "will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection."

### 3. Second Venue Motion, First Mandamus Petition, And Joint Proposed Jury Questionnaire

A few months later, in December 2014, Blue filed a second venue-change motion, again focusing on the effect of pre-trial publicity. Without waiting for the judge's ruling on the second motion, Blue petitioned this court for mandamus relief. *See Jones II*, 780 F.3d at 17. With Blue's petition pending, the judge — now in early January 2015 — rejected his second venue-change bid. *See id.* Again, the judge again expressed his confidence that the voir dire process would ensure jury impartiality. Subsequently, a divided panel of this court denied Blue's mandamus petition, concluding he had "not made the extraordinary showing required to justify mandamus relief." *See Jones I,* 775 F.3d at 457.

While all this was going on, the parties — in December 2014 — submitted a joint proposed questionnaire for use in voir dire. Some of their suggested questions touched on the potential jurors' exposure to pretrial publicity — questions like: "What did you know about the facts of this case before coming to court today (if anything)?"[7]

The judge focused on the jointly-proposed question asking what potential jurors knew "about the facts of this case before coming to court today (if anything)." Conceding that this question "might get very interesting answers," the judge worried that it could "cause trouble because it will be so unfocused." "But if you want to live with it," the judge said to defense counsel, "this is a question that we'll probably be asking every voir dire person."

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time had lessened media attention; and the outcome of the case. *See id.* at 382-83. According to *Skilling,* "[a] presumption of prejudice...attends only the extreme case." *Id.* at 381.

[7] From now on we refer to questions of this type as "content-specific questions" (or some variant).

Despite having had a hand in submitting the questionnaire, the government switched gears and argued that the question could cause the parties to have to "follow[ ] up on every fact asserted" — something that "would take forever." Apparently persuaded by the government's argument, the judge — after noting that the question could generate "unmanageable data" — ultimately struck the question, explaining that prospective jurors' "preconceptions" could instead be gauged by asking whether, "[a]s a result of what you have seen or read in the news media,...you [have] formed an opinion" about Blue's guilt or the proper penalty, and if so, whether "you [can] set aside your opinion and base your decision...solely on the evidence that will be presented to you in court." The defense objected, saying that "in a case like this[,] where...you really have no idea what the juror may have swirling around in [his or her] head, it makes the juror the judge of [his or her] own impartiality." "To a large extent that's true," the judge countered, but "the other questions will help us" see if the potential jurors can set aside any preconceived notions about the case — which is "the biggest issue in voir dire, obviously."

#### 4. Start of Jury Selection, Third Venue Motion, And Second Mandamus Petition

1,373 potential jurors reported to the U.S. Courthouse in very early January 2015 for the start of jury selection. As a preliminary matter, the judge twice told them that Blue was "charged in connection with events that occurred near the finish line of the Yellowville Marathon...that resulted in the deaths of three people." And the judge had them fill out a 100-question questionnaire covering their backgrounds, social-media habits, exposure to pretrial publicity,[8] and thoughts on the death penalty. The questionnaire also gave a "summary of the facts of this case," including that "two bombs exploded...near the Yellowville Marathon finish line" and that "[t]he explosions killed K.C. (29), L.L. (23), and M.R. (8), and injured hundreds of others." "OIT Police Officer S.C. (26) was shot to death in his police car," the questionnaire's summary added, and Blue "has been charged with various crimes arising out of these events." The questionnaire then asked prospective jurors their views on the death penalty for someone convicted of intentional murder and whether they could "conscientiously vote for life imprisonment without the possibility of release."

The judge called back 256 of the original 1373 potential jurrors for individual voir dire — which lasted 21 days. The judge, to his credit, asked virtually every prospective juror—

[8] The parts of the questionnaire that touched on pretrial publicity required prospective jurors to (1) list their "primary source[s] of news," with specific follow-ups about print, television, radio, and internet sources and (2) "describe the amount of media coverage [they] have seen about this case" by checking one of the following boxes: "a lot," a "moderate" amount, a "little," or "[n]one." And Question 77 asked each prospective juror (1) whether "[a]s a result of what [he or she] ha[d] seen or read in the news media," he or she had "formed an opinion" that Blue was "guilty" or "not guilty," or "should" or "should not" "receive the death penalty," and (2) if so, whether he or she would be "able or unable to set aside [that] opinion and base [his or her] decision about guilt and punishment solely on the evidence that will be presented. . . in court."

including all those ultimately seated—to expand on his or her answer to Question 77.[9] However, the judge rejected Blue's request to ask all prospective jurors content-specific questions about pretrial publicity — for example, "What stands out in your mind from everything you have heard, read[,] or seen about the Yellowville Marathon bombing and the events that followed it?"[10] In rejecting the request, the judge said that "[w]e have detailed answers in the questionnaire concerning...exposure to the media"; that he saw no need to "repeat" questions "covered in the questionnaire"; and that he thought "digging for details...will not likely yield reliable answers."

While individual voir dire was ongoing, Blue filed a third venue-change motion because 68% of those who filled out jury questionnaires already thought he was guilty, and 69% had strong connections to the people, places, or events at issue in the case. The government argued that of the 68% who thought Blue was guilty, fully 60% said they could set aside that opinion and decide the case solely on the trial evidence. So as the government saw it, the questionnaires and voir dire could protect Blue's right to an impartial jury.

Before the judge ruled on the motion, Blue filed a second mandamus petition with us in early February 2015. Individual voir dire continued.

A day later, with Blue's mandamus petition still pending, the judge denied Blue's third venue-change motion — "for reasons both old and new." We focus here on the judge's new reason. Conceding both that "[c]hecking a box" on a questionnaire "may result in answers that appear clearer and more unambiguous than the juror may have intended or than is actually true," and that handwritten "answers" frequently "can...be unclear, inapposite, or incomplete," the judge concluded that the voir dire underway was "successfully identifying potential jurors who are capable of serving" fairly and impartially.

In the last week of February 2015, the judge provisionally qualified 75 prospective jurors. He excused 5 of these for hardship, leaving a group of 70 from which the parties would choose a jury.

That same week, a divided panel of this court denied Blue's second mandamus petition because he had not shown a clear and indisputable right to a venue change (which is what he had to show to get mandamus relief). *See Jones II*, 780 F.3d at 15, 19-20.

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[9] For example, in response to the district court's request that he elaborate on his answer to Question 77, one person who became a member of the jury acknowledged a preliminary impression that "obviously [Blue] was involved in something," but emphasized that he nevertheless viewed Blue as "innocent until proven guilty." The district court did not simply accept the juror's assurance but probed more deeply, asking "how would you handle whatever ideas you've had from before the trial?" The juror answered that he would make his decision "based on the evidence presented" after "listening" to the witnesses "and what they say."

[10] This was a paraphrase from a question in *Skilling. See* 561 U.S. at 371 (noting that the defendant there asked the district court to ask prospective jurors "'what st[ood] out in [their] minds' of 'all the things [they] ha[d] seen, heard or read about'" the company the defendant had worked for (alterations in original)).

### 5. Fourth Venue Motion, and Peremptory Strikes

In early March 2015, the defense filed a fourth venue-change motion — essentially arguing that of the 75 provisionally qualified jurors, 42 "self-identified...some connection to the events, people, and/or places at issue in the case"; 23 "stated...that they had formed the opinion that [Blue] 'is' guilty, with...1...of those...23 stating...that he would be unable to set aside that belief"; and that 48 "either believe that [Blue] is guilty, or have a self-identified connection, or both." The government opposed, contesting (among other things) the defense's statistical methodology.

While that motion was pending, the defense used all 20 of its peremptory strikes, *see* Fed. R. Crim. P. 24(b)(1).[11] The judge denied the defense's request for 10 more peremptories. The government used all its peremptory challenges too.

Of the 12 jurors the judge seated, 9 got there without disclosing the specific content of the media coverage they had seen[12] — recall how the judge rejected the defense's efforts to learn not just *whether* prospective jurors had seen media coverage of this case but *what specifically* they had seen. And of those 9, 4 believed based on pretrial publicity that Blue had participated in the bombings. All 12 did say they could adjudicate on the evidence as opposed to personal biases or preconceived notions.

On the first day of trial — also in early March 2015 — the judge orally denied the defense's pending venue-change request, without an on-the-spot explanation.

### 7. Basic Appellate Argument

Relying on *Patriarca* and its offspring, Blue argues the judge erred in denying his request to ask all potential jurors content-specific questions about "what they had seen, read, or heard about his case." The pretrial publicity, he writes (quoting *Patriarca*), created a "significant possibility that jurors [had] been exposed to potentially prejudicial material" and so "trigger[ed]" a "duty to inquire." This, according to him, means that the judge had to ask, "not just *whether* prospective jurors had seen media coverage of this case, but also *what*, specifically, they had seen." And by not doing so, the judge (in Blue's words) produced "a jury biased by prejudicial publicity." Trying to meet this argument, the

[11] A peremptory challenge is defined generally as "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." *See* Challenge, *Black's Law Dictionary* (11th ed. 2019) (second definition).

[12] The defense asked one of the seated jurors what "st[ood] out in [her] mind, if anything, about this case from anything you've heard, seen." She replied, "The only thing that I definitely can remember from that time is probably after the fact when they showed the finish line." Another seated juror volunteered that she had watched "the shootout in Browntown" on TV. And another seated juror volunteered that she had seen "video evidence" and Blue's "being in the boat."

government — citing *Mu'Min v. Virginia*, 500 U.S. 415 (1991) — principally contends that Supreme Court precedent "reject[s] the claim that such an inquiry is required."

### 8. Analysis

We start by acknowledging, "it is not required...that the jurors be totally ignorant of the facts and issues involved" for a defendant to receive a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Instead, the Sixth Amendment requires an "impartial jury." And "juror impartiality...does not require ignorance." *Skilling*, 561 U.S. at 381. For well over a century, the U.S. Supreme Court has recognized that "every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity," such that "scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155-156 (1879); *see Irvin*, 366 U.S. at 721 (similar). The "widespread and diverse methods of communication" that make that so, *Irvin*, 366 U.S. at 722, have multiplied immeasurably in recent years, increasing the potential depth and breadth of media coverage in a high-profile case. In light of those realities, to "hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, [is] sufficient to" disqualify a juror would "establish an impossible standard." *Irvin*, 366 U.S. at 723. It would also have the harmful effect of "exclud[ing] intelligent and observing" people capable of reaching a verdict "according to the testimony," *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J.)—the very people "best qualified to serve as jurors," *Irvin*, 366 U.S. at 722. The critical issue in jury selection thus is not whether jurors lack preexisting impressions or opinions, but instead whether "jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." *Skilling*, 561 U.S. at 398-399 (emphasis added; brackets and citation omitted).

Here, even assuming the judge did not reversibly err on the venue question, he still had to oversee a voir dire process capable of winnowing out partial jurors through careful questioning — indeed, in denying Blue a venue change, the judge premised his analysis in part on a pledge to run a "voir dire sufficient to identify prejudice." But performance fell short of promise, providing a sufficient ground to vacate Blue's death sentences — even on abuse-of-discretion. *See United States v. Casanova*, 886 F.3d 55, 60 (14th Cir. 2018). *See generally United States v. Connolly*, 504 F.3d 206, 211-12 (14th Cir. 2007) (noting that "an erroneous view of the law" is always an abuse of discretion).

*Patriarca* is the key. A pretrial-publicity case*, Patriarca* involved an organized-crime prosecution where the press called one of the defendants "'Boss' of the New England 'Cosa Nostra'" and reported how a lawyer for a government witness nearly died in a car-bomb incident. *See* 402 F.2d at 315-16. Convinced the news accounts might make prospective jurors think (wrongly, apparently) that the defendants had something to do with the bombing, the defense teams moved to change the trial's venue — and lost. *Id.* at 316-17.

The defendants appealed, relevantly arguing that the judge "erred in denying" the change-of-venue motion "because of prejudicial publicity." *Id.* at 315. We noted "that the amount of coverage diminished sharply after the week following the bombing." *Id.* at 317. We also noted that the defense had the chance "to mitigate any possible effect of pretrial publicity — [namely,] on the voir dire." *Id.* Counsel for one of the defendants had asked the judge to "ask a question of the jury in connection with this case, in the light of all the publicity." *Id.* at 317-18. And the judge said that he would ask the jurors "if there is any member... who feels that he would not be able to give the defendants a fair and impartial jury." *Id.* at 318. Counsel said "thank you." *Id.* The judge put the question to the jury, got "[n]o response" from the members, and so saw no reason not to proceed to trial. *See id.* Given this set of circumstances, we found no sign of abused discretion in the judge's venue decision. *Id.*

But crucially, we felt "bound" to address "sua sponte" — *i.e.*, without prompting from either side — the scope of voir dire judges should conduct "[i]n cases where there is, in the opinion of the [judge], a significant possibility that jurors have been exposed to potentially prejudicial material." *Id.* Specifically, we directed that

> on request of counsel,...the [judge] should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting ***the kind and degree of his exposure to the case or the parties***, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence.

*Patriarca,* 402 F.2d at 318 (double emphasis added).

And in driving this directive home, we explicitly endorsed section 3.4 of the American Bar Association's ("ABA's") then-recent *Standards Relating to Fair Trial and Free Press*. *See id.* (emphasizing that "we are in accord with the suggestions of section 3.4"). Section 3.4, in turn, said that in cases involving prejudicial pretrial publicity, voir dire "questioning shall be conducted for the purpose of determining what the prospective juror has *read and heard about the case*." *See Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press* § 3.4(a), at 130 (Tentative Draft Dec. 1966) (emphasis added).

The rationale for the *Patriarca* standard is obvious. Decisions about prospective jurors' impartiality are for the judge, not for the potential jurors themselves. *See, e.g., United States v. Rhodes,* 556 F.2d 599, 601 (14th Cir. 1977). And that is because prospective jurors "may have an interest in concealing [their] own bias" or "may be unaware of it." *Smith v. Phillips*, 455 U.S. 209 (1982) (O'Connor, J., concurring); *see also Sampson v. United States,* 724 F.3d 150, 164 (14th Cir. 2013) ("*Sampson II")* (emphasizing that "a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit her lack of objectivity"). So asking them only "whether they had read anything that might influence their opinion" does not suffice, for that question "in no way elicit[s] what, if anything," they have "learned, but let[s] [them] decide for themselves the ultimate question whether what they [have] learned had prejudiced them." *Rhodes*, 556 F.2d at 601.

With these principles in mind, we have held that a judge in a high-profile case "fully complied with" *Patriarca* by asking potential jurors if they "had read or heard anything about the case in the newspapers, on television[,] or radio" — and if so, by "*prob[ing] further* as to the extent of such knowledge." *See United States v. Medina,* 761 F.2d 12, 20 (14th Cir. 1985) (emphasis added). We have also found "no inconsistency" with *Patriarca* when a judge in another high-profile case "asked the prospective jurors, collectively," if they "had heard 'anything at all' about the case" — and then asked those who had "to recount" at side bar "*all that [they] knew* about the case." *See Vest*, 842 F.2d at 1332 (emphasis added). And we have held that a judge in yet another high-profile case satisfied *Patriarca* when he asked potential jurors if they "had seen or read anything about the case" — and then asked those who had about "*the circumstances* under which [they] had been exposed to publicity." *See United States v. Orlando-Figueroa,* 229 F.3d 33, 43 (14th Cir. 2000) (emphasis added).

Despite his best intentions, Blue's judge did not meet the *Patriarca* standard, however — even though the case met *Patriarca's* conditions for requiring extensive inquiry. Blue, do not forget, "request[ed]" voir dire on the contents of the material that the potential jurors had seen. And there was "a significant possibility" that the prospective jurors had been "exposed to potentially prejudicial material." Again, the pervasive coverage of the bombings and the aftermath featured bone-chilling still shots and videos of the Jones brothers carrying backpacks at the Marathon, of the maimed and the dead near the Marathon's finish line, and of a bloodied Blue arrested in Browntown. Also, while the media (social, cable, internet, etc.) gave largely factual accounts, some of the coverage included inaccurate or inadmissible information — like the opinions of public officials that Blue should die.

The judge fell short. He qualified jurors who had already formed an opinion that Blue was guilty — and he did so in large part because they answered "yes" to the question whether they could decide this high-profile case based on the evidence. The defense warned the judge that asking only general questions like that would wrongly "make[ ]" the potential jurors "judge[s] of their own impartiality" — the exact error that the *Patriarca* line of cases seeks to prevent. But the judge dismissed the defense's objection, saying that "[t]o a large extent" jurors must perform that function. Yet by not having the jurors identify what it was they already thought they knew about the case, the judge made it too difficult for himself and the parties to determine both the nature of any taint (*e.g.*, whether the juror knew something prejudicial not to be conceded at trial) and the possible remedies for the taint.

The government offers a number of arguments to the contrary. But none of them changes the result.

The government first argues that the voir dire here actually "elicit[ed] the kind and degree" of the potential jurors' exposure to pretrial publicity about the case. In making this claim, the government (paraphrasing the questionnaire) notes that prospective jurors had to disclose "what newspapers, radio programs, and television programs [they] viewed and with what frequency, as well as how much media coverage [they] had seen about the

case." And that suffices, the government says, because we have not read *Patriarca* to require content-specific questioning. But learning that prospective jurors read, say, the *Yellowville News* daily and have seen a lot of coverage about the case is not the same as learning that they read *News* articles quoting civic leaders saying *Blue should die* — statements that could not constitutionally be admitted into evidence. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). Moreover, the government's rejoinder rests on a misreading of *Patriarca* — an opinion that *does* require inquiry into what information potential jurors have been exposed to. Again, *Patriarca* endorsed the ABA's standards calling for content-specific questioning "for the purpose of determining what the prospective juror has read and heard about the case." Also, and critically, post-*Patriarca* caselaw clarified that the defect *Patriarca* aimed to cure was delegating to prospective jurors the job of evaluating their impartiality — a defect that content-specific questioning can fix. *See Vest*, 842 F.2d at 1332. Consider *Vest*. Following the correct approach, the district judge there did not ask potential jurors "to decide for themselves the 'ultimate question' of impartiality" — instead, "once a juror admitted to any knowledge of the case," the judge "individually questioned" him or her "as to the facts and extent of such knowledge." *Id.* And contrary to the government's characterization, *Vest* concerned not just individual versus group voir dire, but also content-specific versus non-content-specific questioning.

Next, quoting *Mu'Min,*[13] the government makes its biggest argument — namely, that this post-*Patriarca* opinion by the Supreme Court "rejected the argument that the *Constitution* requires [judges] to question prospective jurors 'about the specific contents of the news reports to which they had been exposed.'" But there is a major flaw in the government's theory. *Mu'Min* arose on direct review of a state-court criminal conviction — which meant the Supreme Court's "authority" was "limited to enforcing the commands of the [federal] *Constitution*." 500 U.S. at 422 (emphasis added). Blue, contrastingly, was "tried in federal court[ ]" — and thus was "subject to" the "*supervisory power*" of the federal appellate courts. *See id.* (emphasis added). And this distinction makes all the difference, because "[w]e enjoy more latitude in setting standards for voir dire in federal courts under our supervisory power than we have in interpreting" the federal Constitution "with respect to voir dire in state courts." *See id. at* 424 (italics omitted); *see also Kater v. Maloney*, 459 F.3d 56, 66 n.9 (14th Cir. 2006) (noting that *Mu'Min* "carefully distinguished between constitutional requirements which states must meet and the exercise of its broader supervisory authority over cases tried in federal courts").

The government relies on *United States v. Payner*, 447 U.S. 727 (1980) to support its claim that because content specific questioning is not constitutionally required, it may not

[13] In *Mu'Min*, the U.S. Supreme Court rejected a state capital defendant's claim that the U.S. Constitution requires a trial court judge to question prospective jurors "about the specific contents of the news reports to which they ha[ve] been exposed." *Id*. at 424. The Court explained that "[w]hether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case?" *Id.* at 425. And the Court held that the state court trial judge had impaneled a *constitutionally* impartial jury even though he had "refused to ask any of [the defendant's] proposed questions relating to the content of news items that potential jurors might have read or seen." *Id.* at 419; *see id.* at 420-421, 431-432 (recounting the trial court's more limited inquiry).

be required as a supervisory matter.[14] But *Payner* is not that broad. It held only that a court may not use supervisory authority to re-weigh interests that the Court has held do not justify suppressing evidence under the Fourth Amendment. *Id.* at 735-736. That makes sense: because suppressing evidence imposes substantial costs on the truth-seeking process, those costs are justified only by a constitutional violation. The voir dire context is different. Asking an additional question obtains more information, costlessly.

Shortly after *Payner*, the Supreme Court acknowledged this difference in *Rosales-Lopez* a case where the defendant requested voir dire questions about racial prejudice where such questions were not constitutionally mandated. *Rosales-Lopez v. United States*, 451 U.S. 182, 190-191 (1981).[15] When affirming the lower courts, the Supreme Court explained that cost-benefit weighing does not drive voir dire supervisory rules and that voir dire rules further interests *beyond* those animating constitutional rules, such as "the appearance of justice in the federal courts," *Rosales-Lopez*, 451 U.S. at 190. That a

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[14] In *Payner*, the defendant's guilt or innocence hinged on evidence improperly seized from a third party. The trial court acknowledged the seizure did not violate the ***defendant's*** Fourth Amendment right to be free of illegal search and seizure but still suppressed the evidence under its supervisory powers. The Supreme Court reversed stating:

> We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices... The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same. The District Court erred, therefore, when it concluded that "society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence." This reasoning, which the Court of Appeals affirmed, amounts to a substitution of individual judgment for the controlling decisions of this Court. Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far.

*United States v. Payner*, 447 U.S. 727, 735-37 (footnotes omitted).

[15] The U.S. Supreme Court has addressed the danger of bias arising from racial prejudice by holding that in capital cases involving interracial crimes and noncapital cases featuring racial issues, the [Six Amendment to the U.S.] Constitution requires jurors be asked about racial prejudice. *Turner v. Murray*, 476 U.S. 28, 33 (1986); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). The Court has further held that in cases not involving those circumstances, the Constitution does not *require* the question. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). Nonetheless, the Court has used supervisory authority to extend greater protection to the right to an impartial jury in federal court, and to protect "the appearance of justice in the federal courts," by requiring racial-bias questioning whenever there is a "reasonable possibility" of racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 190-191 (1981) (plurality opinion); *Ristaino,* 424 U.S. at 597 n.9; *Aldridge v. United States*, 283 U.S. 308, 314-315 (1931) (applying supervisory rule). That supervisory rule thus *requires* racial-bias questions in cases in which the Constitution does not.

question is not constitutionally mandated therefore does not foreclose a supervisory rule requiring it.

The government also defends some (not all) of the judge's reasons for declining to ask content-specific questions. But concerns about "unmanageable data" from content-specific questions — in a case where 1,373 prospective jurors each completed a 100-question questionnaire and the judge designated 21 days for voir dire — seem misplaced. So too does any fear that content-specific questioning could accidentally create bias where none existed. If potential jurors recall a particular piece of reporting well enough to bring it up at voir dire, and the reporting is prejudicial, then potential bias was already present. Far from "reinforc[ing] potentially prejudicial information," content-specific questioning would have brought such material front and center. The parties and the judge could then assess the publicity's effect on the prospective jurors' ability to reach a fair verdict, thus putting the judge in a position to take any necessary measures to protect Blue's fair-trial rights.

*Patriarca* was a noncapital case, unlike Blue's. And the pretrial publicity in *Patriarca* pales in comparison to the pretrial publicity surrounding Blue's case. Surely then, with his life at stake, Blue deserved the type of voir dire that *Patriarca* calls for. *See generally Sampson II,* 724 F.3d at 159-60 (suggesting that protections are generally heightened in capital cases, because death is different from other kinds of penalties).

## B. Mitigation Evidence About Green's Possible Homicidal Past

We shift our focus to Blue's second claim in this appeal: the judge damaged the defense's mitigation case by barring evidence tying Green to a triple murder in 2011, and by keeping the defense from seeing a confession Green's friend made to the FBI about how he and Green had committed those crimes.

### *1. Background*

On September 11, 2011 — the tenth anniversary of the 9/11 terrorist attacks — someone robbed and killed three drug dealers in an apartment in Taupeville, Orange. All three were found bound, with their throats slit. These crimes remain unsolved to this day.

Fast forward to 2013. Soon after the Marathon bombings, federal and state law-enforcement officers interviewed Green's friend, Ike Aqua — a mixed-martial-arts fighter who had come to the United States from Chechnya in 2008 and met Green shortly afterwards. Officers interviewed Aqua, then living in Florida, four separate times in April and May. The first two interviews focused on his relationship with Green and his possible knowledge of the bombings. At some point, agents began suspecting that Aqua had a hand in the 2011 murders. During the final interview on May 21, Aqua said he knew something about the murders and asked if he could get a deal for cooperating.

After waiving his *Miranda* rights, Aqua gave the following account. Green recruited Aqua to rob the men. They drove to a Taupeville apartment, held the men at gunpoint (with a

gun Green had brought), beat them, and bound them with duct tape. Not wanting to leave any witnesses, Green cut each man's throat while Aqua waited outside (Aqua did not want any part of the throat cutting, apparently). Green then waved Aqua back in to help remove all traces of evidence.

Aqua agreed to write out a confession. But as he was doing so, he attacked the agents — one of whom shot and killed him. The FBI documented Aqua's statements in memos known as 302 reports. And a state trooper recorded most of his statements at his final interview.

Before trial, Blue's lawyers repeatedly asked the judge to make the government produce all reports and recordings of Aqua's statements about the Taupeville crimes, either directly to them or to the judge for an in-camera inspection.[16] The government opposed each of the defense's motions, arguing that the sought-after materials were not discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963). In the government's telling, because prosecutors had informed the defense that Green had "participated in the Taupeville triple homicide," it did not have to disclose the actual reports and recordings. After inspecting some of the items in camera, the judge refused to disclose any of the materials documenting Aqua's statements. Agreeing with the government that prosecutors had "conveyed the fact and general substance of Aqua's statements," the judge said that the FBI's 302 report of Aqua's final interview did "not materially advance [the mitigation] theory beyond what is already available to the defense."

While all this was going on, a lawyer representing Blue's college friend Dias Turquoise — who faced prosecution for hiding Blue's backpack and computer — told the government that his client "may be able to provide" some information, including that "Turquoise learned in the fall of 2012 from Blue...that Green...was involved in the Taupeville murders" and that "Blue...told Turquoise that [Green] 'had committed jihad' in Taupeville." The government disclosed Turquoise's lawyer's proffer to Blue's counsel.

But because of the judge's rulings, the defense never learned key details about the murders (as disclosed by Aqua) — including:

- Green brought the "tools" he and Aqua used to commit the crimes (a gun, knives, duct tape, cleaning supplies).

- Green and Aqua got into the apartment because Green knew one of the victims, B.M. — Green and B.M. were close childhood friends.

- Green had Aqua duct tape one of the victim's hands and feet. And Green duct taped the others.

- Green beat B.M. to try to get him to say where more money was in the apartment.

[16] In camera means "in a chamber." *See* In Camera, *Black's Law Dictionary* (11th ed. 2019).

- Aqua had agreed with Green to rob the men. But after they had bound and robbed them, Green decided to kill the men — a decision that made Aqua shake with nerves, because while he did not want to participate in the murders, he felt he "had to" since he "did not have a way out."

- Green slashed each man's throat.

- Green gave Aqua $20,000 from the money they had stolen.[17]

The government later moved in limine to bar Blue from introducing any evidence about the Taupeville murders at the guilt or penalty phases. Among other theories, the government called Aqua's statements about Green's role "unreliable" since he had an obvious motive to pin the murders on someone else (what the government did not tell the judge, however, was that agents had previously relied on Aqua's statements in applying for a search warrant to look for evidence from the Taupeville homicides in Green's car). The government also argued that, apart from Aqua's statements, it had no "evidence that Aqua and/or Green...actually participated in the Taupeville triple homicides." The government further claimed that Aqua's statements should not come in because he "cannot be cross examined," because he "obviously was not of sound mind" since he attacked armed agents, and because admitting this evidence would confuse the jurors by opening the door to "a great deal of information having nothing to do with" Blue's crimes. And the government claimed that "[t]here's no evidence that the defense can point to anywhere, including...Aqua's own statement, that Green...controlled him in any way."

Blue's lawyers argued in opposition that evidence showing Green's having committed the crimes was highly probative of the brothers' respective roles in the bombings and was sufficiently reliable to be admitted under the evidentiary standards applicable at the penalty phase. They also stressed that the jury should decide whether to credit Aqua's statements.

The judge orally granted the government's in limine[18] motion, finding that "there simply is insufficient evidence to describe what participation Green may have had" in the Taupeville murders. From his check of the evidence — which "include[d] an in-camera review of some Aqua 302s," but not the recordings of the confession — the judge thought that "it [was] as plausible...that Aqua was the bad guy and Green was the minor actor." So the judge concluded that the murder evidence "would be confusing to the jury and a waste of time,...without any probative value."

[17] Following an order from us, authorized counsel got to review the in-camera materials for the first time.

[18] In limine means "at the outset" — "a motion ..raised preliminarily, esp[ecially] because of an issue about the admissibility of evidence believed by the movant to be prejudicial." *See* In Limine, *Black's Law Dictionary* (11th ed. 2019).

Blue's mitigation theory portrayed him as influenced by Green to take part in the Marathon bombings. “[I]f not for Green,” said his lawyer to the penalty-phase jury, “this wouldn't have happened.” And the defense sought to prove several mitigating factors about their relationship and their relative culpability — including:

- Blue “acted under the influence of his older brother.”
- “Because of Green's age, size, aggressiveness, domineering personality, [and] privileged status in the family,” Blue “was particularly susceptible to his... influence.”
- “Blue['s]...brother Green planned, led, and directed the Marathon bombing[s].”
- “Blue...would not have committed the crimes but for his older brother Green.”
- “Green...became radicalized first, and then encouraged his younger brother to follow him.”

Without the Taupeville evidence, the defense supported its mitigation theory with testimony like:

- Green became radicalized first, began proselytizing his views, and sent jihadi materials to Blue.
- The oldest brother in a Chechen family like the Jones usually receives deference (an associate professor from Princeton University testified that “it's expected that the younger brothers will listen to the older brother”).
- Green occasionally broke the rules of the gym he belonged to (he used other members' equipment without asking, for instance).
- Green sometimes got argumentative at a mosque (for example, he twice called the Imam a “hypocrite”).
- Green yelled at a store owner for selling halal turkey for Thanksgiving (halal is a term associated with Islamic dietary laws).
- Green once might have physically abused his then girlfriend (he later married her).

Conversely, the government tried to convince the jury that Blue should die because he and Green were equally culpable in the bombings and that Green had played no role in Blue's decision to participate. During the penalty phase, the government argued that the defense's mitigation evidence consisted of little more than “testimony that Green was bossy.” The government also described Green as a “handsome,” “charming,” “loud” guy who “sometimes lost his temper.” And the government implored the jurors to “ask

[themselves] if there's anything about Green...that will explain...how Blue...could take a bomb, leave it behind a row of children, walk...down the street, and detonate it." Insisting that no evidence supported the notion that Green had "coerced or controlled" Blue, the government labeled the brothers "a partnership of equals" who "bear the same moral culpability for what they did."

### 2. Basic Appellate Arguments

Blue presents essentially two arguments about the judge's handling of the Taupeville evidence. The first claim is that the judge violated his right to present a complete mitigation defense by keeping from the jury major proof of Green's brutal past, his ability to enlist others in acts of extreme cruelty, and thus his relative culpability — an error the government exploited by distorting Green's character and suggesting no evidence showed his influence over Blue. The second claim is that the judge violated his *Brady* rights by refusing to give the defense a 302 report and recordings of Aqua's confession — evidence that, "if presented," would have shown "why Green was to be feared, and his ability to influence others to commit horrific crimes."

The government takes a different view of the matter. According to the government, the Taupeville evidence was not relevant mitigation evidence because nothing suggests Green's alleged commission of the Taupeville crimes had any link to Blue's commission of the crimes here. And, says the government, even if the Taupeville evidence had some slight relevance, the judge rightly excluded it because the risks of confusing the issues and misleading the jury outweighed any probative worth. The government also thinks that any error by the judge was harmless beyond a reasonable doubt because a "overwhelming[ ]" evidence (the government's word) showed Blue willingly engaged in the crimes charged here. Wrapping up, the government says that the undisclosed "information was not discoverable under *Brady.*"

### 3. Analysis

We give abuse-of-discretion review to disputes over whether the judge wrongly excluded mitigating evidence at the penalty phase, showing "great deference" to his balancing of the evidence's probative worth against its possible prejudice. *See United States v. Sampson*, 486 F.3d 13, 42 (14th Cir. 2007) ("*Sampson I*"). We also give abuse-of-discretion review to disputes over whether the judge wrongly kept *Brady* material from the defense.

With these preliminaries out of the way, we turn to Blue's first claim: that the judge committed prejudicial error by keeping the Taupeville evidence from the jury at the penalty phase.

Because it is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision," the Supreme Court has for years said that if "the evidence introduced and the arguments made...do not prejudice a defendant, it is preferable not to impose restrictions." *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976). So

a defendant convicted of capital crime has a constitutional right to put before the jury, "*as a mitigating factor*, any aspect of [his] character or record and any of the circumstances of the offense that [he] proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (adopting the rule announced by the *Lockett* plurality). Mitigating factors include aspects of "the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence," *see* 18 U.S.C. § 3592(a)(8) — like, for instance, information bearing on the extent and nature of each defendant's role in the charged crime, *see Green v. Georgia*, 442 U.S. 95, 97 (1979) (finding a constitutional violation where the judge excluded penalty-phase evidence showing a codefendant's primary role).

This standard is broad, reflecting the idea "that punishment should be directly related to the personal culpability of the criminal defendant." *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, (2002); *see also Enmund v. Florida*, 458 U.S. 782, 801 (1982) (emphasizing that "punishment must be tailored to [a defendant's] personal responsibility and moral guilt"). And consistent with this lenient approach, mitigating information need not be admissible under the rules of evidence to get in. *See* 18 U.S.C. § 3593(c). All of which is why the normally low relevance threshold in noncapital cases is lower still when it comes to mitigation evidence in capital cases: Relevant "mitigating evidence" encompasses any "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *See Smith v. Texas*, 543 U.S. 37, 44, (2004). Once this modest "threshold...is met," the Constitution "'requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *See Tennard v. Dretke*, 542 U.S. 274, 285, (2004) (quoting *Boyde v. California*, 494 U.S. 370, 377-78 (1990)); *see also Green*, 442 U.S. at 97 (holding that a "mechanistic[ ]" use of the hearsay rule to keep a capital defendant from introducing mitigating evidence at sentencing in a capital case offends due process (quotation marks omitted)).

None of this is code for anything goes, however. For a judge can exclude "information" if "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *See* 18 U.S.C. § 3593(c); *see also Sampson I*, 486 F.3d at 45 (stating that the "low barriers to admission of evidence in a capital sentencing hearing 'do[ ] not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes'" (quoting *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005))).

The government in our case recognized that Blue's penalty-phase defense turned on what Green's role was. Which probably explains why in its own penalty-phase arguments, the government continually called the brothers equally culpable and stressed Green's lack of influence over Blue. The jurors cared about the brothers' relative culpability as well, a point made quite clear by their not recommending death for Blue on the capital counts involving Green's conduct in setting off the first bomb. And given how the proceedings played out, the probative value of showing that the bombings were not the first time Green

committed acts of brutality and persuaded others to help him is obvious. So we cannot agree with the judge that the Taupeville evidence lacks *"any"* probative force.

Inspired by his jihadi beliefs, Green's lead role in the Taupeville killings — felonies (according to the kept-out evidence) that he committed without Blue — makes it reasonably more likely that he played a greater role in the crimes charged here than Blue.[19] And evidence showing a defendant's minor role in the offense is relevant mitigating evidence under the rule of *Lockett. See Enmund*, 458 U.S. at 797-98.

But there is more to be said in Blue's favor than that. The Taupeville evidence was also highly probative of Green's ability to influence Blue. Because of the judge's decisions, Blue did not present proof showing how he learned (months after the fact, per college-acquaintance Turquoise) that Green had butchered the men, one of whom was a close friend — actions motivated by Green's vision of jihad.[20] But evidence of this sort could reasonably have persuaded at least one juror that Blue did what he did because he feared what his brother might do to him if he refused (and remember, a jury may consider any mitigating factor at least one juror found proved by a preponderance of the information). Or put slightly differently, at least one juror could reasonably have found that because of what had happened in Taupeville, Green was not just "bossy" (to use the prosecutor's word) but a stone-cold killer who got a friend to support his fiendish work. And if Green could influence Aqua (a mixed-martial-arts bruiser who followed Green because he "did not have a way out"), Green's influence over Blue (his younger brother with no prior history of violence) could be even stronger.[21] All of which strengthens two of Blue's mitigating factors — his susceptibility to Green's influence, and his having acted under Green's influence.

The government's responses do not persuade us otherwise.

The government first argues that the Taupeville evidence cannot clear the low relevancy hurdle because that evidence would have told the jurors nothing about the brothers' relative culpability here. Not so. Again, Blue premised his mitigation theory on his being less culpable than Green because he would not have committed the charged crimes but for Green's influence. And Green's earlier domineering and deadly acts had relevance to this theory. The judge admitted other, lesser evidence of Green's belligerence — like his screaming at others for not conforming to his view of how a good Muslim should act. And

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[19] As Blue tells us in his reply brief, the government never suggests that Green did not commit the killings.

[20] Defense counsel told us at oral argument that once the judge granted the government's in limine motion barring any mention of the Taupeville crimes, Blue had no basis for trying to get his statements to Turquoise admitted.

[21] Of course, when the government told the judge that he should bar the materials because "[t]here's no evidence that the defense can point to anywhere, including...Aqua's own statement, that Green...controlled him in any way," the defense did not have Aqua's statement — including his telling comment that he felt he "had to" help Green with the murder clean up because he "did not have a way out."

the judge did so because he deemed that evidence relevant to Green's "domination." Even this limited evidence convinced some jurors to find the existence of mitigating factors touching on Green's prior radicalization, leadership role in the bombings, and influence over Blue. And if Green's yelling at someone for selling halal turkeys had the effect of showing his dominance and radicalization, then evidence of his having conscripted a friend into a jihad-inspired robbery and killing scheme would have increased that effect exponentially.

The government is wrong to imply that the jury had to make leaps of imagination to connect what Green did in Taupeville to his influence over Blue. If the judge had admitted this evidence, the jurors would have learned that Blue knew by the fall of 2012 that Green had killed the drug dealers in the name of jihad. They also would have known that it was only after these killings that Blue became radicalized as well: Evidence actually admitted showed that Blue first flashed signs of radicalization — as is obvious from his texts on jihad — after spending a holiday break with Green several weeks or so after learning about the Taupeville murders.[22] So, if the jurors had heard Aqua's description of how he felt powerless to withdraw from the Taupeville crimes once Green chose to turn an armed robbery into a triple murder, at least one juror might have found that Blue felt the same way when it came to the bombings in early 2013.

And if the judge had admitted the Taupeville evidence — evidence that shows (like no other) that Green was predisposed to religiously-inspired brutality before the bombings and before Blue's radicalization[23] — the defense could have more forcefully rebutted the government's claim that the brothers had a "partnership of equals." The Taupeville evidence would have helped the defense show that Green inspired his younger brother not only to believe in jihad but also to act on those beliefs — just as he had in Taupeville (again, the government does not suggest that Green did not commit the murders). Similarly, the evidence could have helped the defense counter the government's argument that Green and Blue "bear the same moral culpability" and that Blue acted "independently" in placing the bomb at the finish line — for the evidence showed that Green, unlike Blue, had a history of horrific violence, which he justified as jihad; that Green, unlike Blue, had previously instigated, planned, and led brutal attacks; and that Green, unlike Blue, had influenced a less culpable person (Aqua) to participate in murder.

The government still could have argued to the jurors — as it does to us — that Blue was nevertheless a willing criminal. The government also could have challenged the evidence's reliability, arguing that other than his self-serving statement about thinking he "had to" help clean up the scene, nothing proves Green bullied Aqua into doing anything. *See* 18 U.S.C. § 3593(c) (providing that either party can rebut any information received at the hearing). And maybe the government could have argued that the evidence undercuts Blue's mitigation theory — saying something like, Green had to pay Aqua money to get him to go along, while Blue joined on for free; and Aqua opted not to kill,

[22] For example, texting with someone about life plans, Blue wrote: "I wanna bring justice for my people."

[23] Think back to how the Taupeville murders occurred on the decade anniversary of the 9/11 attacks.

while Blue killed with no reluctance or regret. But all of this goes to weight and credibility and not to admissibility — *i.e.,* the effect of Green's prior violence on Blue's radicalization, on his willingness to go from texting to bombing, was something the jurors should have gotten to decide for themselves. *See, e.g., United States v. Guzmán-Montañez*, 756 F.3d 1, 9 (14th Cir. 2014) (explaining that "[w]hen the issue lies on credibility of the evidence, it is up to the jury to decide" and adding that "[t]he factfinder is free to conduct its own interpretation of the evidence"); *Nelson v. Quarterman*, 472 F.3d 287, 313 (5th Cir. 2006) (en banc) (noting that the "strength" or "sufficiency" of mitigating evidence is for the jury to decide).

The government insists that because the circumstances of the Taupeville killings are too dissimilar to the bombings, the Taupeville evidence has no relevance here. Specifically, the government points out that Aqua's claim was that Green had recruited Aqua to participate in a robbery for money and then decided on the spur of the moment to kill the victims — by himself — to eliminate any witnesses. The marathon bombing, in contrast, was a pre-planned terrorist attack. But in both situations, Green committed murder with help from someone who gave no prior sign of a willingness to commit such acts. And in both situations, Green used his interpretations of Islam to justify his actions. So the too-dissimilar argument also has no merit.

Shifting from the relevancy question, the government defends the judge's actions by insisting that the Taupeville evidence's admission would have led to mini-trials over whether Aqua's version of the killings "was believable" or just a pack of lies told to minimize his responsibility for those crimes. But the concern is overblown. As Blue notes, the defense could have relied, for instance, on the government's sworn search-warrant materials (to search Green's car after the bombings) that credited Aqua's statements to the FBI.[24] The government now tries to soft-pedal its crediting of Aqua's account in the

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[24] An FBI agent swore out an affidavit saying that "there is probable cause to believe that Aqua and Green planned and carried out the murder of three individuals in Taupeville...in September 2011." "On May 21, 2013," the affidavit stated, Law enforcement agents interviewed Aqua. Aqua confessed that he and Green participated in the Taupeville murders. He said that he and Green had agreed initially just to rob the victims, whom they knew to be drug dealers.... Aqua said that he and Green took several thousand dollars from the residence and split the money. Aqua said that Green had a gun, which he brandished to enter the residence.

The affidavit further said that

> Green decided that they should eliminate any witnesses to the crime, and then Aqua and Green bound the victims, who were ultimately murdered. Aqua went on to say that after the murders, Green and Aqua tried to clean the crime scene...to remove traces of their fingerprints and other identifying details.... [T]o clean the scene, Aqua said that they used bleach and other chemicals to clean surfaces, and even poured some on the bodies of the victims. Aqua said that they spent over an hour cleaning the scene.

And the affidavit also noted that

> Aqua said that Green had picked Aqua up in the Target Vehicle and they traveled to the scene of the Taupeville murders together. After the robbery and murder, they left the scene in the Target Vehicle.

search-warrant affidavit as "a far cry from embracing those claims" at trial. But when the agent swore out the affidavit and the prosecutor submitted the materials to the magistrate judge, the government confirmed its belief in Aqua's veracity. *See generally Franks v. Delaware,* 438 U.S. 154, 164-65 (1978) (explaining that "[w]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing," and adding that "it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true"). We know of no reason why the sworn affidavit — which the government asked the magistrate judge to credit — should now be disbelieved. To this we add that the judge retained control over how much of this evidence could have come in. He also could have limited the evidence as appropriate or cut off the presentation if the evidence became too extensive — a more suitable remedy than barring all evidence of Green's murderous past. So in the end we think the Taupeville evidence was sufficiently reliable to go to the jurors, who could then decide whether to believe it and how much weight (if any) to assign it in mitigation. *See Guzmán-Montañez*, 756 F.3d at 9.

The government is also off-base in saying that "[t]he Taupeville evidence would have confusingly focused the jury's attention on *Green*'s character and the circumstances of an *unrelated* offense." But the parties and the judge put the mitigating factors before the jury, front and center — factors that made clear that Green's character and prior conduct were relevant because they bore on the broader circumstances of Blue's commission of the charged crimes.[25] Arguing to the jury, the government called Blue's mitigation theory (centered on Green's influence over him) baseless because no evidence supported it. But the Taupeville evidence could have been that evidence. And it would not have confused the jurors to have learned about it. Caselaw tells us to presume that juries follow instructions. *See, e.g., Richardson v. Marsh,* 481 U.S. 200, 211 (1987). And the jurors' penalty-phase verdicts — not recommending death on 11 of the 17 death-eligible counts — show they fully understood that Green's relative culpability was mitigating only to the extent it bore on the brothers' respective roles in committing the charged crimes. This compels us to reject the government's claim that the jurors would have lost sight of this distinction.

So, we find the judge abused his discretion in banning the Taupeville evidence. Compare *McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020) (stressing "that a capital sentencer may not refuse as a matter of law to consider relevant mitigating evidence"), *with United States v. Rodriguez,* 919 F.3d 629, 634 (14th Cir. 2019) (explaining "that a material error of law always amounts to an abuse of discretion").

The government thinks that any error was harmless beyond a reasonable doubt. But the government's harmlessness claim is essentially a reprise of its argument in support of

[25] We are referring here to the mitigating factors mentioned in the second bullet-point list above, which required the jurors to resolve a set of "whethers": whether Blue acted under the influence of Green; whether Green's aggressiveness made Blue susceptible to following his lead; whether Green instigated and led the bombings; whether Blue would ever have committed these crimes were it not for Green; and whether Green radicalized first and encouraged Blue to follow him.

exclusion: In its view, just as the Taupeville evidence is irrelevant because it does not show that Blue participated in the bombings under Green's influence, for the same reasons, its exclusion could not have affected the jurors' decision.[26] Again, though, the exclusion of the Taupeville evidence undermined Blue's mitigation case. Sure, as the government argues, a jury armed with the omitted evidence still might have recommended death. But the omitted evidence might have tipped at least one juror's decisional scale away from death. In other words, the government cannot show to a "near certitude,"[27] that the excluded evidence — Green cold-bloodedly killing the drug dealers in the name of jihad — would not have convinced even one juror that Blue did not "bear the same moral culpability" as Green, *see Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (holding that because the judge's ruling excluding mitigating evidence "may have affected the jury's decision to impose the death sentence," the error was "sufficiently prejudicial" to require vacatur of the defendant's death sentence).

This leaves us then with Blue's *Brady*-based challenge: that the judge also erred by denying the defense access to additional evidence both favorable and material to him — pecifically, the report and recordings of Aqua's FBI confession.

Prosecutors have an "inescapable" duty "to disclose known, favorable evidence rising to a material level of importance." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (discussing *Brady*). Material evidence includes information that creates a "reasonable probability" of a different outcome, *see Kyles*, 514 U.S. at 433 — and in a capital case that encompasses data that "play[s] a mitigating, though not exculpating, role," *see Cone v. Bell*, 556 U.S. 449, 475 (2009). But make no mistake: "A reasonable probability does not mean that the defendant 'would more likely than not have [gotten] a different [result] with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence'"

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[26] We reject the government's assertion that the following facts "overwhelmingly refute" the possibility of any juror ever concluding that Green intimidated Blue into committing the marathon bombing.

- Blue lived 60 miles away from Green, with his own car and his own friends.
- Blue used his own computer to read al Qaeda propaganda that encouraged terrorist attacks and gave instructions on making shrapnel bombs to "damage the enemy."
- Blue texted a friend and tweeted about martyrdom and jihad, saying "killing Muslims is the only promise" both 2012 presidential candidates "will fulfill'; praying for "victory over kufr [infidels]"); and seeking "[h]ighest level of Jannah".
- Blue was captured on video separating from his brother and selecting a crowded outdoor patio with children present as the target for his shrapnel bomb.
- Blue returned to college where he showed no signs of remorse, went to the gym with a friend, and tweeted "I'm a stress-free kind of guy."
- When a friend texted Blue about being a bombing suspect, he texted back "Lol [laughing out loud];"
- When officers tracked Blue to Browntown, he threw explosives at them and tried to run them (and Green) over.
- When hiding in the boat, believing that Green had died, Blue wrote he was "jealous" of Green's martyrdom, that he hoped for his own martyrdom, and that his terrorist actions were justified because of perceived wrongdoing by the American government.

[27] Proof beyond a reasonable doubt is evidence that lets a rational "factfinder . . . reach a subjective state of near certitude of the guilt of the accused." *See Victor v. Nebraska*, 511 U.S. 1, 15 (1994) (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)).

in the proceeding's outcome. *See Smith v. Cain*, 565 U.S. 73, 75 (2012) (last alteration in original) (quoting *Kyles*, 514 U.S. at 434). To find the withheld evidence not material, the judge must conclude that the other evidence is so overwhelming that, even if the undisclosed evidence had gotten in, there would be no "reasonable probability" of a different result. And this standard is not met just because the government "offers a reason that the jury *could* have disbelieved [the withheld evidence] but gives us no confidence that it *would* have done so." *Id.* at 76

We've noted how the judge ruled that the government had already given the defense the gist of Aqua's statements and so the sought-after material did "not materially advance [the mitigation] theory beyond what is already available to the defense." But as we also explained, that material had information that the defense never saw below, including: that Green planned the Taupeville crime, got Aqua to join in, and brought the key materials (gun, knives, duct tape, and cleaning supplies) to the apartment; that Green thought up the idea of killing the three men to cover up the robbery; and that Aqua felt "he did not have a way out" from doing what Green wanted. Aqua's confession showed — probably more than any other evidence — how and why Green inspired fear and influenced another to commit unspeakable crimes and thus strongly supported the defense's arguments about relative culpability. And armed with these withheld details, the defense could have investigated further and developed additional mitigating evidence. To us, this means there is a reasonable probability that the material's disclosure would have produced a different penalty-phase result. So the confession constituted *Brady* material, making it reversible error for the judge to rule the evidence off-limits from discovery.

The long and the short of it is that the judge's handling of the Taupeville evidence provides an additional basis for vacating Blue's death sentences.

## CONCLUSION

Having completed our review, the net result is this: We vacate all of Blue's death sentences with directions to hold a new penalty-phase trial consistent with this opinion and with Local Rule 40.1(k)(1) of the District of Orange.

**IN THE SUPREME COURT OF THE UNITED STATES**
**APPEAL NO. 2021-2**

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| **UNITED STATES OF AMERICA,**<br><br>**Petitioner**<br><br>**v.**<br><br>**BLUE JONES,**<br><br>**Defendant-Respondent** | **On Petition for Certiorari from the United States Court of Appeals for the Fourteenth Circuit** |

## ORDER GRANTING CERTIORARI

The petition of the United States of America for an order of certiorari to the U.S. Court of Appeals for the Fourteenth Circuit is GRANTED. Oral argument shall occur on October 27, 2021, in Crawfordsville, Indiana, and be limited to the following issues:

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

(2) Whether the District Court committed reversible error at the penalty phase of Respondent's trial by excluding evidence that Respondent's older brother, and fellow participant in the events at issue here, was allegedly involved in different crimes two years before the offenses for which Respondent was convicted.

Petitioners shall open and close the argument.

FOR THE COURT
Chartreuse Thomas
Chartreuse Thomas, Clerk of Court