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# In mitigation: convicted Tsarnaev in Boston, Massachusetts

**Sally Ramage<sup>1</sup>**

## **Abstract**

Part One of this paper can be found in the Newsletter of the *Socio-Legal Studies Association*, June 2013 and in the *Law and Society Journal*, Justr.

This paper (part two) essentially sets out mitigation for the younger Tsarnaev brother even though we knew before the trial began that the verdict would have to be 'guilty' because the people of Boston demanded that verdict and received the first lap of the verdict on 8 April 2015.

Beautiful technical rulings would not have held sway in this case, nor do breaches in disclosure, metadata queries, tampered evidenced and mitigation below. The older Tsarnaev brother was fuelled by anger and personal revenge for the mother and father having to leave the United States due to (most probably incorrect legal advice by some relative or other-given to them to leave or be deported). If the Tsarnaev mother had attended court as she was summoned to do, the outcome might have been minor compared to what has befallen her sons. Furthermore, there was a lack of money in the family and the younger Tsarnaev brother's grades at university began to fall; the older brother could not find employment, forcing his wife to seek menial and poorly paid work for 60 hours a week. The older brother was possibly brain damaged.

Most importantly, no terrorist organisation claimed responsibility for this 2013 incident at the Boston Marathon annual races. Even the local Muslim mosques did not embrace the older brother. Important also is the fact that they habitually used the chemical substance, cannabis, which may have played a part since cannabis use is known to trigger schizophrenia in those pre-disposed to mental illness.

The home-made bombings can never be condoned, as can no murder, be it the common old garden murders, terrorism murders or murders during robberies. No murder of three innocent persons and injuries to several others, can ever be condoned. All murders are heinous, including the shooting dead of innocent and unarmed persons by police officers.

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The final result is a tragedy for all concerned- the public and the Tsarnaev family, and the United States of America, and it is hoped that society and the law will learn the lessons of this incident and subsequent trial. The people of Boston, mostly Catholic, are hugely intolerant of foreigners and of other religions and this trial is feared to have sadly bolstered their intolerance. There is also an American widow who has lost her husband and a toddler who will never truly know her father, a mother and father who grieve in Russia, as do the relatives of the three people that died at the Boston Marathon in April 2013. What is more, a top-class education that might have resulted in a highly-paid job which could have assisted the whole Tsarnaev family from poverty has been lost and the younger Tsarnaev brother has denied himself from it by his own stupid loyalty to his brother's commands.

On 8 April 2015, the world's media announced that Dzhokhar Tsarnaev was found guilty of all 30 charges that he faced, many of which carry the death penalty. The global news related that the jury deliberated for just over 12 hours spread over two days. Boston Mayor Martin Walsh said in response to the verdict that he hoped this verdict provides a small amount of closure, which makes one wonder how the families of the 3,000 persons who died from the 9/11 terrorist attacks could ever have closure. Violent crime of any degree is terrible. No-one has won in this year of the celebration of the 800th anniversary of the Magna Carta. This case will highlight for the Magna Carta celebrations that the United States is a federal state divided by religion and by the death penalty. In the year 1215, eight hundred years ago, the average Englishman and Englishwoman searched for God in their great English cathedrals, which had taken thousands of workers/slaves decades to finish. They sat in their magnificent cathedrals and asked God for relief from their ailments. (Danziger, D. and Gillingham, J. (2004) *1215 The year of Magna Carta*, London: Hodder & Stoughton.).

As to capital punishment, the state of Massachusetts had long forsaken the death penalty. It was Benjamin Rush, physician and signer of the Declaration of Independence, who led the opposition to the death penalty and supported the penitentiary, but who died disconsolate and confused. Also Charles Spear, Universalist minister and prominent opponent of the gallows, devoted himself to reform for the sake of mankind. Remembering 1849, when Boston, Massachusetts was, like today, in a position of considering the death penalty for a sailor, Washington Goode. Then, unlike today, the jury considered evidence and facts relative to the case, and not the propriety of commutation or alteration to the laws, although news that Massachusetts is at present considering the re-establishment of the death penalty, cannot hold in this Tsarnaev case because the law cannot be made retrospective. In 1849, defence attorneys, William Aspinall and Edward Hodges, (to Washington Goode) addressed the jury over the course of two days and spoke of the terrible burden of conscience the jury would feel for consigning Washington Goode to a disgraceful and untimely death. Edward Hodges condemned the source of the testimony against Washington Goode as unworthy of consideration in a case of life and death. He said that the testimony of the residents in the neighbourhood was contradictory, inconsistent and hopelessly false and that in this region it was impossible for the fair image of truth to emanate.

Goode, he said, was in the area of the murder, but so were others and Goode's clothing matched that of someone seen walking away from the area, a thin connection on which to convict a man of murder and the death penalty. Edward Hodges concluded his mitigation by leaving the defendant in the hands of the jury and the hand of his God. The Prosecution argued that a man can be identified even without showing his face. Goode's case served as a

rallying point for anti-gallows activists in Massachusetts. No one has been hanged in Boston since 1836 and jurors were determined not to become accessories to the destruction of human life.

In 1972, the court held in *Furman v. Georgia* that 'the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eight and Fourteenth Amendments'. (see Appendix 2). However, this changed in *Gregg v. Georgia* in 1976 and in those states that still maintain the death penalty, technological and medical palliatives used are a facade of humane punishment. (See Masur, L.P. (1989), *Rites of Execution: Capital punishment and the transformation of American culture, 1776-1865*, New York: Oxford University Press).

However, mitigation has a very important part to play in establishing levels of culpability or blame-worthiness by explaining why an offender acted in the way he or she did in committing the offence alleged and 'proven'. Ultimately evidence in mitigation is admitted to enable the court to take a more lenient view of the wrongdoing than might otherwise be the case, but it does not constitute a plea for mercy, which some argue, should become institutionalised as exemplified by the late Nelson Mandela.

## Introduction

It was the day of the Boston marathon. There were hundreds<sup>2</sup> looking forward to this day including those who took part and Boston had planned an exciting few days: *Red Sox* tickets had planned their first home game at Fenway Park.<sup>3</sup> Fenway Park was 100 years old this year and Bostonians were encouraged to go to the marathon and cheer the runners. There were plans for Bostonians to celebrate *Patriots' Day*<sup>4</sup> the start of the American Revolution,<sup>5</sup> and to ride on the Swan Boats in the Public Garden. In addition was the international film festival showing the best 'Indie films'<sup>6</sup> from around the world, and Boston concert and theatre venues advertised and showcased violinist Joshua Bell and the Boston Ballet.<sup>7</sup> After the two bombs

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<sup>2</sup> Note that in the FBI Special Agent's sworn statement on 21 April, (see *Appendix One* to this article), he swore that there were thousands- not hundreds of people.

<sup>3</sup> Every spring, *Fenway Park* opens its gates to welcome visitors to Boston's iconic ball park (known as America's most beloved ball-park). There is a museum in the park. See <http://www.boston-discovery-guide.com/red-sox-annual-open-house-at-fenway-park-in-boston.html#ixzz2RayHFPx7>

<sup>4</sup> *Patriots' Day* is a legal holiday (Rule 45 (4) (b) Federal Rules of Criminal Procedure) observed on the third Monday in April in Massachusetts. Observances and re-enactments of these first battles of the American Revolution occur annually at Lexington Green in Lexington, Massachusetts, (around 6:00 am) and The Old North Bridge in Concord, Massachusetts, (around 9:00 am). In the morning, mounted re-enactors with state police escorts retrace the rides of Paul Revere and William Dawes, calling out warnings the whole way. Since 1969, the holiday has been observed on the third Monday in April, providing a three-day long weekend, as well as being the first day of public school vacation week in Maine and Massachusetts. Previously, it had been designated as April 19, the actual anniversary of the battles. *Patriots' Day* is also a school holiday for many local colleges and universities, both public and private. *Patriots' Day* is considered a holiday in Maine and Massachusetts, when it falls on a day where United States federal income tax returns would otherwise be due for the remainder of the country, and so residents of those states are given until midnight of the next day (Tuesday) to submit their tax returns.

<sup>5</sup> Celebrated as *Patriots' Day*, the American Revolution was a political upheaval during the last half of the 18th century in which thirteen colonies in North America joined together to break from the British Empire, combining to become the United States of America. They first rejected the authority of the Parliament of Great Britain to govern them from overseas without representation, and then expelled all royal officials. By 1774 each colony had established a Provincial Congress or an equivalent governmental institution to govern itself.

<sup>6</sup> 'Indie' films are independent films, by professional film productions resulting in a feature films that are produced mostly or completely outside of the major film studio system. In addition to being produced and distributed by independent entertainment companies, independent films are also produced and/or distributed by subsidiaries of major film studios. Independent films are sometimes distinguishable by their content and style and the way in which the filmmakers' personal artistic vision is realised.

<sup>7</sup> *Boston Discovery* on social media website *Twitter*. See also *Boston Discovery Guide* on social media website *Facebook*. *Boston Ballet* was unaffected by the bombs and are performing in London, UK.

exploded, *Red Sox*<sup>8</sup> spokesman Kevin Gregg said the *Royals*, who had already arrived in Boston spent their day off, Thursday 18 April 2013, in the city.

### **Privately owned pictures and photos used by FBI**

FBI collated CCTV from shops and mobile phone photos from private citizens, thereby possessing video stills of at least one suspect and other ‘persons of interest’ in the Boston marathon bombing incident on Wednesday, 17 April 2013. The FBI had asked for all videos, CCTV footage from local authorities and stores nearby, and mobiles used by members of the public to capture the Boston marathon, in case anyone had captured any allegedly incriminating evidence of use to the police.

*Note that there is no way that the metadata behind these captured smart-phone videos and photographs can be verified as not since been edited because the FBI did not release all these alleged true records in criminal procedure disclosure to defendant’s criminal defence legal team, and therefore these cannot be verified as not ‘doctored’ so should not be allowed in evidence in Tsarnaev’s trial in Boston, Massachusetts.*<sup>9</sup>

### **Metadata in prosecution electronic documents relied on at trial**

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<sup>8</sup> *Red Sox* is a professional baseball team based in Boston, Massachusetts, and a member of Major League Baseball’s American League Eastern Division.

<sup>9</sup> Metadata has been defined as being ‘information within programs (e.g., Microsoft Word/Excel/Power Point, Corel Word Perfect/Quattro Pro, Adobe Acrobat, etc.) which is not readily visible but which is accessible and which may include data such as author, dates of creation/printing, number of revisions, content of those revisions/previous versions, editing time, etc.’ See Editor, (2007) ‘Ethics of viewing and/or using metadata’, *Maryland State Bar Association, Inc., Committee on Ethics*, Ethics Docket No 2007-09.

The questions to be raised in the forthcoming Tsarnaev criminal trial in 2015 are these: Is it ethical for the prosecutor attorney recipient to view or use metadata in documents produced by another party? Does this prosecutor attorney have any duty to remove metadata from the files prior to sending them in disclosure to the legal defence attorneys?

Metadata is a critical component of electronically stored documents.<sup>10</sup> Does the prosecutor attorney recipient of these pieces of videos and photographs in the public's cell-phones have an ethical duty not to view or otherwise use the metadata without first ascertaining whether the sender intended to include such metadata in the produced documents in a court of law?<sup>11</sup>

When email is a vehicle for transmitting other documents, such as word processing documents, videos or photos, etc, links to those attachments are part of the email's metadata. Preserving these links means that a reviewer can tell what document and which version of it was attached to a particular email. Therefore, metadata can be a valuable resource in the document reviewer process because it reveals a document's history. The crucial difference between electronic and printed documents is that all the information in a paper document is displayed on its face, whereas electronic documents carry their history with them. So defence lawyers for Tsarnaev can by court order, demand that the FBI produce the metadata to any photos they intend to display at trial in Boston, because, significantly, metadata is NOT a separate document but is an integral part of the document it displays and metadata connects attachments to emails.

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<sup>10</sup> Editor, (2004) 'Embedded information in electronic documents', *Applied Discovery –LexisNexis*. See [www.lexisnexis.com/applieddiscovery/](http://www.lexisnexis.com/applieddiscovery/), accessed 30.4.2013.

<sup>11</sup> In Formal Opinion 05-437, the American Bar Association's Standing Committee on Ethics and Professional Responsibility pointed out that while Rule 4.4(b) obligated the receiving lawyer to notify the sender of the inadvertent transmission promptly, the Rule did '*not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.*' Comment 2 to Model Rule 4.4 explains that '*whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.*'

### **‘Caucasian looking’ man alleged reported prime suspect**

The images that appeared helpful to the FBI were from a store camera and cell phone footage from bystanders near the finish line where the explosions took place. In one instance, newspapers reported, an individual is alleged to appear planting a bag close to where the explosions took place and then leaving the scene. To the relief of many American immigrant communities, it appears that the FBI have reason to believe that the prime suspect may be a white male, or at least not a coloured person, news reports indicated.<sup>12</sup>

### **Two cheap, home-made ‘pipe’ bombs**

The bombers apparently used two pressure-cookers to make to home-made bombs. A Spanish company named *Fagor*, and not one of the more popular ones from the subcontinent apparently manufactures this pressure –cooker, newspapers reported that the FBI unofficially told them. A company spokesperson for *Fagor* reportedly said that American police had approached them and that the company was assisting the police in whatever way it could.

### **Presidential visit to Boston**

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<sup>12</sup> Chidanand Rajghatta, ‘FBI hunt for men isolated in video grab; no arrests yet’, *Times of India*, 18 April 2013.  
<sup>2</sup> UNSCR 1373 is a counter-terrorism measure passed following the 11 September terrorist attacks on the United States in 2001. The resolution was adopted under Chapter VII of the United Nations Charter, and is therefore binding on all UN member states. Article 2 (e) ‘ensures that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensures that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts’.

United States ('US') President Obama arrived in Boston to commiserate with Bostonians and made a speech at an *interfaith* memorial service.<sup>13</sup> He pledged that his government would find the terrorists and hold them responsible and he described individuals as those who would rather destroy than build, thinking that the devastation they caused will make them important. President Obama continued his speech by saying that America's fidelity to a free and open society will grow stronger, despite this outrage.

### **Media overstep**

The media were reprimanded for getting ahead of the story and reporting the arrest of a suspect when competitive pressure seemed to cause some reporters to overreach and over-interpret 'leaks'. While authorities said they were making rapid progress and zeroing in on persons of interest based on video footage, there was then no arrest or detention of any suspect. This is interesting since the leaks to US newspapers are from anonymous government officials. Yet the FBI was reported (during the UK's Leveson Inquiry) to have launched a probe on 14 July 2011 to determine whether Murdoch's News Corporation had accessed voicemails of victims of the 9/11 attacks. On 15 July, 2011, the then US Attorney General Eric Holder had announced an additional investigation by the Department of Justice, which was to examine whether News International had violated the Foreign Corrupt Practices Act, this examination discontinued in 2015<sup>14</sup> as notified by the Securities Exchange Commission as per section 13 or 15(d) of the US Securities Exchange Act 1934, notified to News Corporation and also to Twenty-First Century Fox on 28 January 2015.<sup>15</sup>

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<sup>13</sup> Of people of different religious traditions.

<sup>14</sup> Editor, 'News Corp won't be prosecuted I US in relation to phone hacking', *The Guardian Newspaper*, Monday, 2 February 2015. It was revealed that News Corporation has been notified that the company will not face charges in the United States ('US') in relation to phone hacking and payments to public officials by the US authorities. See also US SEC Form 8-K, News Corporation at [www.investors.newscorp.com/secfiling.cfm?filingID=1299933-15-161&CIK=1564708](http://www.investors.newscorp.com/secfiling.cfm?filingID=1299933-15-161&CIK=1564708), accessed 23-2-2015.

<sup>15</sup> Richard L. Cassin, 'DOJ declinations for News Corp and 21<sup>st</sup> Century Fox', *FCPA Blog*, 3 February 2015. See [www.fcablog.com/2015/2/3/doj-declinations-for-news-corp-and-21st-century-fox.html](http://www.fcablog.com/2015/2/3/doj-declinations-for-news-corp-and-21st-century-fox.html), accessed on 23-2-15. According to *Wall Street Journal*, a publication owned by *News Corp* and *21<sup>st</sup> Century Fox*, an amount of

### **Mayor of Massachusetts gave FBI progress report**

Governor Deval Patrick is the Mayor of Massachusetts. He said, at the time, in 2013, that ‘*Every hour, we are getting closer*’ describing the progress of the FBI murder investigation of two people. Such was the heightened expectation of an arrest that a media scrum converged in front of the Federal Courthouse in Boston expecting the suspect to be produced.

Federal Courthouse in Boston, Massachusetts, US.

### **Abuse of process complaint should be made by defendant’s attorney**

The media crowd dispersed after authorities said there was no suspect in custody, but not before the FBI’s stinging rebuke of the media, which was undoubtedly with justification. The media’s reckless publications could hamper any prosecution of the persons who did this terrible act if defence counsel were to make a complaint of ‘abuse of process’ in the face of media comment. An FBI spokesperson said:

*‘Contrary to widespread reporting, no arrest has been made in connection with the Boston Marathon attack. Over the past day, there have been a number of press reports based on information from unofficial sources that has been inaccurate. Since these stories often have unintended consequences, we ask the media to exercise caution and attempt to verify information before reporting.’*

### **Boston Marathon home-made bomb was 12 years after 9/11**

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\$551 million had been spent to June 2013<sup>4</sup> in settlement and legal fees connected to the UK phone hacking scandal.

This Boston attack at the Marathon race in Boston is still of unknown affiliation. Not a single organisation has claimed responsibility and it is now apparent that this was a single criminal outrage by persons holding a grudge.<sup>16</sup> This Boston Marathon bomb had occurred twelve years after the World Trade Centre in New York was attacked by aeroplanes driven into the World Trade Centre buildings on 11 September 2001.

### **Several former college friends of Tsarnaev convicted of ‘lying to the FBI’**

Since the Boston bombing, several of Mr Dzhokhar Tsarnaev’s college friend<sup>17</sup>s have faced criminal charges and court cases. Today, it has been alleged that his many supporters have turned against Dzhokhar Tsarnaev as his criminal trial begins, afraid of being connected to the alleged bomber.<sup>18</sup> Several other former friends of Dzhokhar Tsarnaev have undergone court trials<sup>19</sup> and it is possible that some of his former friends will be called as prosecution witnesses in his court trial on many charges, aiding a death sentence conviction for Dzhokhar Tsarnaev.<sup>20</sup> Tsarnaev was deemed well enough to attend court on 5 January 2015, before US District Judge George O’Toole (Jnr).

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<sup>16</sup> The obligation to bring terrorists to justice is specified by article 2 (e) of the United Nations Security Council Resolution (‘UNSCR’) 1373.

<sup>17</sup> Editor, ‘Trial of Boston Bomber's friend’, *Associated Press*, 24 October 2014. Robel Phillipos was a college friend of the alleged Boston Marathon bomber Dzhokhar Tsarnaev, and he was charged because he lied to the FBI about his whereabouts. He was represented at his trial in Boston on 27 October 2014 by defence attorney Derege Demissie. He faces a potential 16-year-prison sentence for lying to the FBI about his whereabouts on the night when Dzhokhar Tsarnaev was allegedly escaping from police.

<sup>18</sup> Editor, ‘Fury of former friends of “gentle” Boston bomber Dzhokhar Tsarnaev as they turn from defending him to lashing out at horror of attack that killed four’, *Daily Mail*, 23 February 2015. See [www.dailymail.co.uk/news/article=2964010/](http://www.dailymail.co.uk/news/article=2964010/), accessed 23-2-15.

<sup>19</sup> Denise Lavoie, ‘Robel Phillipos, Boston bombing suspect’s friend, convicted of lying to FBI’, *Huff Post*, 28 October, 2014. See [www.huffingtonpost.com/2014/10/28/bombing-suspects-friend-convicted-n-6061096.html](http://www.huffingtonpost.com/2014/10/28/bombing-suspects-friend-convicted-n-6061096.html), accessed on 1-11-14. Two other friends of Tsarnaev were charged, tried and convicted of the criminal offences of ‘conspiracy’ and ‘obstruction of justice’.

<sup>20</sup> Tsarnaev is being legally represented by attorneys Judy Clarke, William Fink and Timothy Watkins.

## **2001 US PATRIOT Act**

Three persons died and many were injured by debris after the makeshift pipe bombs exploded. The applicable law to the charges brought against Dzhokhar Tsarnaev is the US PATRIOT Act 2001 which allows for the executive response of detention for up to six months at a time, of non-citizens who are *certified* as suspected *terrorists*. The PATRIOT Act was as a result of the use of emergency powers exercised to enable the Act to be proposed, enacted and signed into law some 45 days after the ‘9/11’ terrorist attacks on New York ‘s World Trade Centre buildings in 2001. To date, this power has not been invoked but was amended in 2011.

## **1996 US Anti-terrorism and Effective Death Penalty Act**

Even before the enforcement of the PATRIOT Act 2001, there was the Anti-terrorism and Effective Death Penalty Act of 1996 which modified a federal habeas court’s role in reviewing state prisoner’s applications in order to prevent federal *habeas* ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.<sup>21</sup> An application for a writ of *habeas corpus*<sup>22</sup> on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a

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<sup>21</sup> See *Williams v Taylor*, 529 U.S. 362 (2000).

<sup>22</sup> A *habeas corpus* is a legal writ, a feature of UK and US law that protects an individual against arbitrary imprisonment by requiring that any person arrested be brought before a court for formal charge. When the writ is executed, the court hears the complaint under which the person has been detained and rules on the validity of the arrest. If the charge is considered valid, the person must submit to trial; if not, the person goes free. So, when a lawyer threatens, "I'll slap a habeas corpus on you so fast, it'll make your head swim", full protection of the law is being sought for the accused. See Ehrlich, E. (1999), *Nil desperandum*, (7th edn.), London: BCA Publishers.

decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the US Supreme Court.<sup>23</sup>

### **Defence attorney's request for trial delay refused**

Dzhokhar Tsarnaev's legal defence team had requested a delay of his trial until September 2015, on the grounds that the January 2015 European *Charlie Hebdo* shootings in Paris bore similarities with the Boston bombings and therefore the similarities and psychological effects on the jury will not be lost, but this request has been denied.<sup>24</sup> Unfortunately, judges do not need to make citations to support their decisions at this stage, an unfair lack of criminal procedure, especially in such an important case in which the US criminal justice system should not be seen by the watching world to be a law unto themselves or above the law with no validity to their decisions.<sup>25</sup>

### **Defence attorney's request for change of trial jurisdiction refused**

For a long time, Tsarnaev's attorney Judy Clarke had been pleading for his case to be heard in another jurisdiction because she claimed that he will not get a fair trial in Boston. It now appears that the trial judge will now have a hearing with Tsarnaev's legal team on the matter of changing the venue for Tsarnaev's trial<sup>26</sup> on the basis of 'saturation publicity' about the case, in which Tsarnaev faces 30 criminal charges.<sup>27</sup> Attorney Judith Mizner represented

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<sup>23</sup> Section 2254 (d (1)).

<sup>24</sup> Editor, 'Judge denies Tsarnaev lawyers' motion to delay trial in wake of Charlie Hebdo attack', *UK Guardian*, 14 January 2015.

<sup>25</sup> Wrightsman, L.S. (1999) *Judicial decision making*, New York: Kluwer Academic/Plenum Publishers, Chpt 6.

<sup>26</sup> Joan Vennochi, 'The judge who wants to move the Tsarnaev trial', *Boston Globe*, 24 February 2015. See [www.bostonglobe.com/opinion/2015/02/23](http://www.bostonglobe.com/opinion/2015/02/23), accessed on 24-2-15.

<sup>27</sup> Denise Lavoie, 'Tsarnaev lawyers ask US Appeals Court to move bombing trial', *Associated Press*, 19 February, 2015. See [www.wbur.org/2015/02/19/tsarnaev-asks-appeals-court-move-trial](http://www.wbur.org/2015/02/19/tsarnaev-asks-appeals-court-move-trial) accessed on 19-2-15.

Tsarnaev and argued that even today press reports about Tsarnaev ‘continues unabated’. His attorney argued also that many of the chosen jury have close personal ties to the case.<sup>28</sup>

### **Withdrawal of citizenship left defendants as stateless refugees**

There still remains the alternative U.S. system of military detentions and commissions for foreigners at Guantanamo. There have been two cases of U.S. citizens who were detained without trial and held in military custody in the US but eventually, one case was resolved in a criminal prosecution, conviction and imprisonment and the second case led to expulsion from the US and withdrawal of citizenship. (See case law *Hamdi v Rumsfeld, Secretary of Defence, et al*<sup>29</sup>; *Rumsfeld v Padilla*<sup>30</sup>; and *US v Hassoun*<sup>31</sup>). This is pertinent to the Tsarnaev case.

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<sup>28</sup> It was reported that in one example, a male juror had admitted to the judge that his wife is a nurse And she had treated victims in an intensive care unit on the day of the bombings. It is to be noted that this jury selection has not yet been completed and that there is a final stage of the selection process of this *voir dire* to be completed. Initially the number of potential jurors was 1, 373, reaching a total of 61 prior to the final stage of choosing the jury.

<sup>29</sup> (2004) 542 US 507. Hamdi was an American citizen whom the Government had classified as an ‘enemy combatant’ for allegedly taking up arms with the Taliban in Afghanistan. He was captured in Afghanistan and was detained at a naval brig in Charleston. Hamdi’s father filed *Habeas Corpus* but it was decided that, because it was undisputed that H was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing H to be heard or to rebut the Government’s assertions was necessary or proper.

<sup>30</sup> (2004) 542 U.S. 426. The facts in this case were that Padilla, a U.S. citizen, was detained under warrant in federal criminal custody. He filed a motion to vacate the warrant but in the meantime, the President issued an order to Secretary of Defence Rumsfeld designating Padilla an ‘enemy combatant’ and directing that he be detained in military custody. Later he was moved to a navy brig, at which point his defence lawyer filed a habeas corpus in the Southern District. The court accepted the Government’s contention that the President has authority as Commander in Chief to detain as ‘enemy combatants’ citizens captured on American soil during a time of war. The Second Circuit agreed that the Secretary was a proper respondent and that the Southern District had jurisdiction over the Secretary under New York’s long-arm statute. The Court of Appeal reversed on the merits, holding that the President lacked authority to detain Padilla militarily.

<sup>31</sup> (2007) US Dist Lexis 85720. Padilla and other defendants were charged with various crimes arising from their alleged participation in a ‘support cell’ with the aim to ‘promote violent jihad’ as espoused by a ‘radical Islamic fundamentalist movement.’ Padilla et al, appealed the conviction and the appeal was dismissed in light of the distinct elements of each count, the *Blockburger test* is satisfied and none of the contested counts is multiplicities of the others.

As Professor Stephen Vladeck stated, ‘*while the debate over the availability of habeas corpus to non-citizens detained outside the territorial United States-including those held as ‘enemy combatants’ at Guantánamo Bay, ventured into complicated gray areas, cases involving US citizens should be black and white*’.<sup>32</sup> Tsarnaev is a US citizen. The issue that rankles concerning withdrawal of citizenship reminds one that the Nazi regime in Germany did just that to German Jews before killing 12 million Jews.

### **The Danzig Decree and Nazi removal of German Jews’ citizenship**

We are reminded of the German Nazis and their removal of German citizenship from German Jews, making them essentially stateless refugees.<sup>33</sup> In their 25-point Party Program, published in 1920, Nazi party members publicly declared their intention to segregate Jews from ‘Aryan’ society and to abrogate Jews’ political, legal, and civil rights. Nazi leaders began to make good on their pledge to persecute German Jews soon after their assumption of power. During the first six years of Hitler’s dictatorship, from 1933 until the outbreak of war in 1939, Jews felt the effects of more than 400 decrees and regulations that restricted all aspects of their public and private lives.<sup>34</sup>

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<sup>32</sup> Vladeck, S., ‘Habeas Corpus, US citizens and Iraq: why *Omar* and *Munaf* matter’, *American University Washington College of Law*, 4 October 2008. It has long been settled that US citizens have a constitutional right to the writ of *habeas corpus* in order to access the federal courts to challenge executive detention.

<sup>33</sup> Anti-Semitism and the persecution of Jews represented a central tenet of Nazi ideology.

<sup>34</sup> Many of those laws were national ones that had been issued by the German administration and affected all Jews. But state, regional, and municipal officials, on their own initiative, also promulgated a barrage of exclusionary decrees in their own communities. Thus, hundreds of individuals in all levels of government throughout the country were involved in the persecution of Jews as they conceived, discussed, drafted, adopted, enforced, and supported anti-Jewish legislation. Then at their annual party rally held in Nuremberg in September 1935, the Nazi leaders announced new laws which institutionalized many of the racial theories prevalent in Nazi ideology. *These ‘Nuremberg Laws’ excluded German Jews from Reich citizenship and prohibited them from marrying or having sexual relations with persons of ‘German or German-related blood.’*

## **Mayor of Boston, Massachusetts**

This bombing of the marathon race in Boston, Massachusetts caused the Mayor of Boston to release this response on learning about the explosion. He said:

*'Tonight, City of Boston officials coordinated with state and local partners in an ongoing response to today's tragic events. Patriots Day and Marathon Monday are usually celebrated all across Boston, but today our cheers were turned to prayers. But Boston is strong and resilient, and we come together in times of need. We will get through this, and we will find those responsible. Two explosions occurred within moments of each other at about 2:50 p.m. yesterday, near the Boston Marathon Finish Line and at Boylston and Fairfield streets. Boston EMS transported 90 of the patients to Boston hospitals. The Castle at Park Plaza, at the intersection of Columbus Avenue and Arlington Street, will be open until 11 p.m. tonight as a resource and information centre, and it will re-open at 9 a.m. Tuesday. Members of the public can come in for information on counselling services. Displaced residents can receive information on sheltering services. Runners can pick up their belongings that were left this morning on the marathon's shuttle buses. Runners can re-connect with friends and family. Shelter services will be offered at the Castle overnight for displaced residents...'*

## **FBI, police, Armed Guards and other armed government officers arrived in Boston**

For several days after the home-made pipe bomb exploded at the Boston Marathon, Boylston Street was closed to traffic and to pedestrians from Berkley Street to Massachusetts Avenue. All side streets along Boylston Street were closed from Huntington Avenue to Newbury Street. Buildings were inaccessible whilst the crime scene was active. The city of Boston provided shelter services to some displaced residents. For a few days thereafter, there was a police and National Guard, the FBI, and other armed officers present in the city. The FBI had also set-up 1-800-CALL-FBI (1-800-225-5324), prompt #3, for anyone who had information, visual images, and/or details regarding the explosions along the Boston Marathon route and

elsewhere. Mayor Menino reminded those with concerns about their family members or friends who were at the race to call the Mayor's 24-Hour Hotline at 617-635-4500. Boston Public Schools were already closed for April recess.<sup>35</sup>

### **Police shot one suspect dead after the bombing**

Rapid developments brought the death of one of the two terrorist suspects.<sup>36</sup> This followed an incident at the Massachusetts Institute of Technology at which one police officer was shot dead. Police released images of the two suspects. CCTV showed these two men moving towards the finishing line of the marathon race, both men carrying backpacks. When police tried to arrest them, there were gunshots and one suspect was killed. The second suspect, also shot by police in his legs, head and arms, ran away and police could not see him. The wounded suspect has run down a street and spotted a boat in a householder's back garden, where he headed and hid there for one day. The boat owner saw blood on the boat and suspected that this was from the man police were searching for. Police arrived and arrested him, having 'thrown a grenade into the boat to stun him first'. Police had warned local citizens not to approach the second suspect if they saw him.<sup>37</sup>

### **Young brothers turned vengeful and disruptive against fellow citizens?**

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<sup>35</sup> Counselling help at website [http://www.nasponline.org/resources/crisis\\_safety/helpingchildrencope.aspx](http://www.nasponline.org/resources/crisis_safety/helpingchildrencope.aspx).

<sup>36</sup> Chris Parsons, 'Boston Marathon suspect SHOT DEAD as police hunt second terrorist after fatal shooting of police officer', *Yahoo News*, 19 April 2013, accessed on 19.04.2013. See <http://uk.news.yahoo.com/boston-shooting--one-man-dead-but-marathon-bombing-suspect-still-at-large-083644140.html#h5tTDf1>.

<sup>37</sup> Dominic Waghorn, 'Boston marathon bombings: suspects on CCTV', *Sky News Online*, 19 April 2013.

It must be remembered that terrorism does not mean Islamic extremism. The two are to a certain extent, mutually exclusive, even though Islamic terrorism is militant in tone and tenor and is an ideology, as indeed the *Klu Klux Klan* is. However the scope of insider threat is virtually unprecedented.<sup>38</sup> Lederman, as spokesperson for the United States Senate Homeland Security and Governmental Affairs Committee, stated that the existence of the Internet enables radical and violent extremism, which, with the help of modern technology, can enable extremists to kill millions of people ‘*or to hobble critical infrastructure*’.<sup>39</sup>

There have been at least two reported cases of US citizens who were detained without trial and held in military custody in the US.

Jerome P. Bjelopera is a specialist in organised crime and terrorism and his comment was this:

*‘Since May 2009, the U.S. has seen 32 cases of home-grown violent Islamic extremism by American citizens, legal permanent residents, or visitors radicalised in the US.’*<sup>40</sup>

### **However, 1 second-hand gun does not constitute not an ‘arsenal’**

The two men suspected in the Boston Marathon bombings were armed with one gun, it eventually transpired, rather than the earlier newspaper reports of ‘an arsenal of ammunition’.

They had no money whatever. They had no food. Newspapers speculated that they were planning more bombings, according to what reporters stated that American police told them.

The facts are that the two young men were brothers of Russian origin, now with American

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<sup>38</sup> According to Gordon Lederman, September 11 Commission Intelligence Reform staff member. Lederman was Majority Staff Counsel on the Senate Homeland Security and Governmental Affairs Committee. He is Former Director of Legal Affairs for the Project on National Security Reform in Washington, DC. The Project is a non-partisan, non-profit initiative funded by Congress and the Executive Branch to recommend reorganization of the U.S. Government to enable it to meet 21st Century national security threats. Gordon supervised a team of four full-time attorneys. Today he is associate chief director and chief counsel at the United States Senate in Washington DC, in the District of Columbia, U.S.

<sup>39</sup> Richard Brust, ‘Insider threats’, *American Bar Association Journal*, July 2012, pgs 42-49.

<sup>40</sup> Ibid 10.

citizenship, having moved to the US when they were children and living with their parents and two sisters in the US until a few years ago when their parents felt that they had to return to live in Russia.

### **Suspects were poor and unemployed**

They have both been unemployed and the older brother Tamerlan Tsarnaev was trying to make a career out of his boxing skills but he did not succeed in becoming as good as to earn a living from it. Three years ago he met and married a young American girl whom he met at university where he was a student until he dropped out, as did she when she found herself pregnant with child. Tamerlan Tsarnaev married his girlfriend and his wife gave birth to a baby girl, born in the U.S.

### **Tamerlan Tsarnaev a 'house-husband' and the 'carer' of his daughter**

For two full years he was a 'house-husband' and the main 'carer' for the couple's baby for sixty hours a week whilst his wife worked in a private auxiliary nursing role for minimum wages. His wife, Katherine Russell, is the daughter of a medical doctor and a nurse and she was brought up in a 'leafy suburb in the usual middle-class manner'. Katherine Russell had decided to become a Muslim and dressed demurely accordingly. They lived in a tiny apartment several floors up which must have been very difficult for a young couple with a pram and shopping to manoeuvre up those stairs.

### **Second suspect, Tamerlan's brother, also poor**

Tamerlan Tsarnaev's younger brother was also very poor and he also worked hard at his studies, in order to gain scholarship entrance to university, despite having very little to live on. Neither men neither smoked cigarettes nor drank alcohol; indeed they would never have been able to afford to smoke and drink like most American youths do. Tamerlan Tsarnaev's younger brother applied for and was awarded a scholarship to study at Massachusetts Institute of Technology ('MIT'), one of the top universities in the US and this was no mean feat for a boy who hardly had enough to eat. Nor did it appear that he was dysfunctional because he was described by his pals as being easy-going and friendly. Until the state prosecuted some of his friends, no one had come forward to say anything bad about his character.

### **Parents fled the US and brothers ad to fend for themselves**

Newspapers reported that the brothers were left to fend for themselves after their parents were forced to return to the predominantly Muslim republic of Chechnya in southern Russia because their mother had allegedly resorted to some shop-lifting and was afraid of being deported because she failed to attend the court hearing on that charge.

### **Other Tsarnaev relatives living in the US**

The Tsarnaevs do have other relatives who live in the US and whose circumstances are more fortunate than the circumstances in which the two brothers found themselves. Living in the

US is an uncle who managed to make a living for his immediate family from a legal career more in line with the *American Dream* which most immigrants aspire to when they travel to the US to make their home there.

### **What led Tamerlan Tsarnaev to allegedly commit a crime?**

From a criminological and political viewpoint, many wonder how this tragedy came about: so deliberate, and causing so many deaths and injuries, grief and sorrow. Moreover, and not to be dismissed, is the total cost of this stupid act of terror to the US government which will have to pay out hundreds of millions of dollars in compensation to the injured and the family of the three people who died from the explosion at the Boston Marathon 2013.

### **Conspiracy just between two brothers or a coerced younger brother?**

Even before the suspects were found, the FBI told the media that this was a single incident unattached to any organisation. There, with one party already deceased, there could be no possible reason for the FBI to hold the younger brother and interrogate him without counsel for a full 16 hours before telling him he had a right to remain silent.

### **Illegal search by police helicopter thermal imaging device**

Furthermore, the younger Tsarnaev was ‘searched’ within the meaning of the Fourth Amendment when police used, without a court warrant, a thermal-imaging device at a private property from a helicopter to detect relative amounts of heat within the backyard boat.<sup>41</sup> In the case of *Olmstead v United States* (1928)<sup>42</sup> the Supreme Court held that the warrantless wiretapping of phone lines did not constitute an unreasonable search under the Fourth Amendment and the court stated that what was required was ‘physical intrusion into a given area (and not a mere voice amplification) is required for an action to constitute a Fourth Amendment search.’<sup>43</sup>

### **Illegal and warrantless search of the Boston private boat**

The *Fourth Amendment to the US Constitution* is the part of the Bill of Rights that prohibits unreasonable searches and seizures and requires a warrant be judicially sanctioned and supported by probable cause. Evidence that US police allege that Tsarnaev has scrawled on paper whilst lying very badly injured in somebody’s boat in their backyard. This ‘evidence’ also may be deemed inadmissible at Tsarnaev’s criminal trial since it is evidence obtained through a Fourth Amendment violation and also discovered as a later result of this breach of the Fourth Amendment. There was no excuse for this illegal search since the police already had captured Tsarnaev and taken him to a hospital. The proper thing to do, knowing that this important criminal trial would result, unless Tsarnaev died from his police wounds, was to

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<sup>41</sup> Contrary to *Kyllo v United States* 533 US 27 (2001). A warrantless search of a ‘home’ or ‘private property’ is unreasonable because it can be argued that a Fourth Amendment search has taken place.

<sup>42</sup> *Olmstead v US*, 277 US 438 (1928).

<sup>43</sup> This is known as the *trespass doctrine* in federal law; in *Katz v US*, 389 US 347 (1967) the court decided that ‘what a person seeks to preserve as private even in an area accessible to the public, may be constitutionally protected’. Tsarnaev was badly injured. He was preserving his physical body in a private boat, not owned by himself, but a private place, nevertheless.

properly seek a court order to search the private boat. The police in the US, unlike the police in the UK, who would often be paid bribes by reporters to tip them off, are nevertheless, not as careful in their dealing with the media. In fact, according to newspaper reports, many government officials spoke ‘anonymously’ to newspaper reporters.

### **US law enforcement fed the media with much unofficial ‘information’**

Mr Edward Davis, Boston’s Police Commissioner, allegedly told the media that the U.S. authorities believe that the captured suspect and his gunned down , twenty-six year old brother, Tamerlan Tsarnaev , had planned more attacks beyond the bombings at the finishing line at the Boston Marathon. It was reported in the newspapers that US law enforcement recovered ‘four guns-an M-4 carbine rifle; two handguns and a BB gun’. Days later, however, newspapers reported that there was only one gun.<sup>44</sup>

### **First opinion of FBI: self-motivated and not in a terrorist organisation**

Early on after the Boston bombings and on several occasions thereafter, US police officials allegedly told news reporters that it was almost certain that the two suspects had acted on their own, but, negating this statement, the US police told the media that in searching for their motive to commit this heinous crime, police are looking for any hints that someone had trained or inspired them, a *non sequitur*, surely.

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<sup>44</sup> It is of note that UK police officers are forbidden from speaking their mind to the press and only a senior officer would be able to give the press a carefully scripted and measured report of the progress of the incident.

### **US police later undertook a ‘global investigation for motive’**

After Tamerlan was gunned down by police and after his brother was also injured by gunfire then arrested and taken to hospital, US police travelled to Russia to discuss the case and to follow up on alleged Russian information to them in 2011 that the elder Tsarnaev brother had been reading extremist material on the Internet. It was reported in newspapers through official leaks that Russian Officials confirmed that he met no extremists in person whilst he spent several months in Russia in 2012. The hearsay evidence in this case is astonishing. The conjectured scientific evidence is awaited.<sup>45</sup>

### **US Government liability for policing their Internet**

If a US citizen or a person with permanent residence in the US was found to have accessed extremist material on the Internet, there would be a case against the US government for allowing that website or website into their jurisdiction. Katherine Russell, Tamerlan Tsarnaev’s wife, could very well have a valid case against the US government for being so slack as to allow those websites in the US by which her depressed husband was influenced. Defence lawyers must attempt to show that metadata cannot be preserved and thus such electronic evidence may be partly unreliable.

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<sup>45</sup> See Harris, D. A. (2012) *Understanding failed evidence: why law enforcement resists science*, New York: New York University Press. Police tend to incentivise testing because it sounds like confession testimony and is often rich in detail, thus convincing, yet police often fail to comply with protocols and best practice. Police have the most leverage in shaping the way that the criminal justice system works.

### **Financing the Boston bombing-less than US \$100**

The financing of ‘a hoard of arms’, *if there were an ounce of truth in it*, is a matter that US police would have had to solve, as the surviving brother, now Defendant to two serious criminal charges, was living on a scholarship fund<sup>46</sup> and the older brother depended on state benefits and latterly on his wife’s minimum-wage income as a low-paid worker. The brothers did not have rich relative and could be classed as very poor indeed. On the subject of finance, it is known that the deceased brother travelled to Russia in 2012 where he stayed mostly with relatives, probable sleeping on the floor. It is possible, as is common, that he booked very cheap flight months ahead of the date of travel and his relatives would not have expected money for his stay with them. It was reported in the newspapers that US police recovered ‘four guns-an M-4 carbine rifle; two handguns and a BB gun’. When days later, police reports stated that there was only one gun, one is led to believe that officers were speaking to the press without authorisation. As it turned out there was no ‘hoard of arms’ as police anonymously told newspapers.

### **Financing a pipe bomb**

The pipe bombs could have cost very little if they used second-hand pressure cooker pots and cheap fireworks, with scraps of nails and metal. It is believed that they used a design for the pressure-cooker bombs they allegedly downloaded from a manual published in the online

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<sup>46</sup> Tamerlan Tsarnaev, 26, was an amateur boxer who was said to have taken a break from his college studies to train for a boxing competition.

***Disruption of general public may have been objective***

Tamerlan Tsarnaev may have read extremist magazines that were published Online on how to create bombs and how to disrupt the general public. Tamerlan Tsarnaev may have read such material at home whilst his younger brother was studying at college.

***Boston attack cannot be compared to 9/11 outrage where 3000 died***

The Boston Marathon attack, although heinous, can never be compared to 9/11 Trade Centre outrage. The 9/11 attacks came to reality with the use of third party commercial airplanes being hijacked, direct costing being few airplane lessons and two airline single passenger tickets; indirect costing being millions of pounds of commercial airplanes. Al Qaeda was responsible for 9/11. Nobody but Tamerlan Tsarnaev was responsible for the Boston bombings, in contrast and this outrage cost Tamerlan Tsarnaev no more than US \$100, in terms of money as time cannot be costed since the older brother, Tamerlan Tsarnaev, had been unemployed.

***High-tech police equipment and thousands of police officers to catch one poverty-stricken American father and his coerced younger brother***

In contrast to the poverty<sup>47</sup> of the two alleged criminals, the Tsarnaev brothers, the government of the US had immediate access to several thousand armed police officers, sent to Boston and as much high-tech equipment as was needed, together with state-of-the-art-helicopters and electronic communications equipment.

Analysts and agents for the FBI used special video technology that allowed them to string together hours and hours of footage and to enhance the quality. They used heat-seeking equipment from a helicopter. There were 1000 armed police and FBI agents and dozens of police road vehicles and helicopters there as police turned to high-technology equipment to help them capture this injured man.

### **FBI negligence record**

Analysts have noted that Tamerlan Tsarnaev was the fifth person since the terrorist attack on the US on 11 September 2001 attacks (the 9/11 outrage) to be suspected of *committing terrorism whilst under investigation by the FBI*. Agents had questioned Tamerlan in 2011 in response to an alleged notification from the Russian government, a year before he travelled to Chechnya<sup>48</sup> and Dagestan in Russia.

### **Russia informed FBI of Internet visits to radical websites in the year 2011**

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<sup>47</sup> Many criminological theorists today consider poverty to be a key predictor of an individual's involvement in crime. In this case, poverty of the defendant in this wealthy city of Boston, means a sort of social exclusion or lack of economic resources or material deprivation, not necessarily meaning 'social isolation'. See chapter 14, Poverty and exclusion, in Coomber, R., Donnermeyer, J.F., McElrath, K., and Scott, J. (2015) *Key concepts in Crime and Society*, London: Sage Publications. Chechnya's infrastructure has been affected by years of war between separatists and Russian forces, banditry and organised crime. Improved security situation has led to increased investment in reconstruction projects. But sporadic attacks by separatists continue. Dagestan, a southern Russian republic is famed for ethnic and linguistic diversity. Dagestan has oil reserves and a manufacturing sector, but it is said that rampant corruption and organised crime is to be found.

The Russian government feared that Tamerlan Tsarnaev could be a risk, and their notification of the US government was *'based on information that he was a follower of radical Islam and a strong believer, and that he had changed drastically since 2010 as he prepared to leave the United States for travel to the country's region to join unspecified underground groups'*, according to an FBI spokesperson. They did not arrest him on his subsequent visit to Russia because he was y then an American citizen.

### **FBI had been in communication with Russian officials**

The FBI told the media that they did respond to the notification from Russian officials about Tamerlan's Internet activities by checking US government databases and other information to look for such things as derogatory telephone communications; possible use of online sites associated with the promotion of radical activity; associations with other persons of interest; travel history and plans; and education history. Furthermore the FBI sent two counter terrorism agents from its Boston field office to interview Tamerlan Tsarnaev and his family members but did not find any domestic or foreign terrorist activity and conveyed to the Russian government those findings in that same summer of 2011.

### **Metadata disclosure not forthcoming to defence legal team**

Who checks whether the metadata of the alleged FBI correspondence to and from Russia is fictitious and non-existing?

What protocols does the FBI use in collecting evidence?

Who monitors the evidence the FBI bring to criminal trials?

Who checks for illegal corrections in evidence statements?

Who checks for forgeries and counterfeiting of documents which are presented as documentary evidence at trial?

### **Why was Tamerlan identified as a threat based on ‘links to radical websites’?**

According to the present US government’s administration law, terrorism suspects arrested inside the United States must be dealt within the US criminal justice system. This meant that Russia had no jurisdiction over the actions of Tamerlan Tsarnaev.

### **Miranda Rights not read in hospital- breach of citizen's human rights to a fair trial**

The younger brother Tsarnaev seriously injured and ill, was not read his Miranda Rights in hospital until after sixteen hours of police ‘chatted’ with him, at which point he realised that this was not casual conversation and he became silent thereafter. This was a trick on the defendant. In *Gideon v Wainwright*<sup>49</sup> it was held that the Sixth Amendment’s guarantee of the right to state-appointed counsel, firmly established in federal court proceedings in *Johnson v Zerbst*<sup>50</sup> applies to state criminal prosecutions through the Fourteenth Amendment. The scope of this right was clarified in *Argersinger*, when it was held that an indigent defender must be offered counsel in any misdemeanour case ‘*that actually leads to imprisonment*’. *Scott* later confirmed *Argersinger*’s delimitation. Uncounselled conviction will lead to imprisonment and that is precisely what the *Sixth Amendment* does *not* allow.

### **Coerced younger brother acting under duress?**

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<sup>49</sup> 372 US 335, 344-345 (1963).

<sup>50</sup> 304 US 458 (1938).

There is no evidence suggesting that Tsarnaev is or was part of Al Qaeda; and furthermore the United States is engaged in an armed conflict with Al Qaeda, not all Muslim extremists, if indeed he is a Muslim extremist and not merely a bullied younger brother who complied with his older brother's wishes. An analogy is the example of millions of people who view illicit child pornography on the Internet. They are not all classified automatically as sex offenders,

### **Investigation of the Tsarnaevs**

FBI agents, in investigating this crime, examined the credit card records and other material seized from Tamerlan's apartment and his motorcar for evidence of bomb components; evidence of the backpacks used; and any other evidence that would tie the Tsarnaevs to the Boston Marathon bombings.

### **Well-being of the defendant/patient**

One very real fear that police must address is the prospect of a suicide attempt by the surviving Defendant especially as he has been reported as making one attempt before arrest and because half the suicides among prisoners are among those on remand.

### **America's established record of over-criminalisation**

William J. Stuntz wrote in 2001 of the phenomenon of over-criminalisation. He said that it was a product of institutional incentives rather than ideologies or politics. He said that federal and state legislators have strong incentives to expand criminal liability<sup>51</sup>. He said:

*'On the one hand, expansion deflects blame for the harm caused by the newly criminalized activities. On the other hand, when blameless defendants are caught in the expanding net of criminal liability, legislators can blame overzealous prosecutors for abusing their discretion. One might suppose that, for just this reason, prosecutors would resist this expansion, but in fact they too argue for it because it eases their task of proving cases and inducing guilty pleas. Few interest groups oppose this united front...'*<sup>52</sup>

### **The 'Beck' Suicide Index**

The Beck Suicide Index is helpful in measuring changes in this risk.<sup>53</sup>

### **Homeland Security examined intelligence failure**

On 24 April 2013, Congress questioned FBI senior officials who were summoned. Congress questioned US security officials on whether they mishandled information about the Boston bomb suspect Tamerlan Tsarnaev. Why has the Senate Intelligence Committee failed to investigate the FBI's failure to act on Russian concerns that Tamerlan Tsarnaev was 'becoming radicalised', apart from a casual, no warning-conversation with his family as FBI alleged. It is alleged that FBI met with the Tsarnaev family and were satisfied that they were not radicals. At this 'closed hearing', Members of Congress interrogated the FBI officials as

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<sup>51</sup> See also, Jennifer Lebitz, 'Citing 'Fish' Case at High Court, Judge Puts Boston Bombing Sentencing On Hold', *Wall Street Journal*, 4 November 2014.

<sup>52</sup> Klarman, M., Skeel, D., and Steiker, C. (2012) *The Political Heart of Criminal Procedure*, New York: Cambridge University Press, pg.11.

<sup>53</sup> Beck, A.T; Brown, G.K.; Steer, R.A. (1997) 'Psychometric characteristics of the Scale for Suicide Ideation with psychiatric outpatients', *Behaviour Therapy*, 35:1039–1046.

to why no further action was taken after Tamerlan Tsarnaev was investigated in 2011 at the request of the Russian government. This was a ‘closed hearing’, yet the media were allegedly told afterwards that among the topics discussed was the suggestion by senators that ‘*steps could be taken to improve information sharing between agencies*’.

### **Homeland Security Committee: FBI were negligent**

As scrutiny increased as to how the brothers had been allegedly radicalised, Representative Michael McCall (a Texas Republican who headed the Homeland Security Committee) and Representative Peter T. King, a New York Republican on the panel, sent a letter to the directors of three of the nation’s leading intelligence gathering agencies in which he allegedly stated that the FBI’s handling of the case was an intelligence failure, newspapers reported.

### **Potential Class-action corporate negligence against the FBI**

This is an important matter as regards the hundreds at the Boston Marathon who may bring a class action for compensation of corporate negligence against the FBI.

### **Miller called for autopsy of boxer Tamerlan Tsarnaev’s brain**

Michael Craig Miller should have approached the President to the United States instead of contributing to a newspaper article. That would have been the correct procedure. Newspapers of the world are not yet, though they think they are, the power of the world because they carry lies, hearsay, emotional disturbance and riotous articles a lot of the time, sometimes fabricating ‘news’. Boston Marathon bombing suspect Tamerlan Tsarnaev probably never

imagined leaving his brain to science, conjectured one newspaper who interviewed a former director of a Boston hospital who believes that his boxing hobby could be the cause of his apparent violent which could have internalised to his making a bomb all by himself out of pure rage and violence due to brain damage from boxing. The newspaper suggested that the idea of examining Tamerlan's brain should be suggested to whoever has custody of his remains and neuroscientists should be given the chance to examine his brain closely.<sup>54</sup> This is not a wildcard idea but a very feasible possibility. Although Tamerlan cannot be compared with Hitler, for example, it is widely known that Hitler was very troubled with illnesses which caused him constipation and stomach problems which may be why he was always irritable.

### **Charles Whitman asked for brain autopsy**

Consider the murders that Charles Whitman committed. In the early hours of 1 August 1966, he killed his mother, and then his wife. Later that morning, he organized himself and proceeded to purchase firearms and ammunition and brought them, along with his sniper's skill, to the top of a tower at the University of Texas in Austin. He began shooting and by the time an Austin policeman's bullets shot him dead, he had killed 17 people and wounded 32 others. In the 24 hours before the end of his siege, Whitman wrote several notes, *including one requesting an autopsy to determine whether or not something was wrong with his brain, said Michael Craig Miller*<sup>55</sup> who called for the testing of the brain of deceased boxer Tamerlan Tsarnaev, albeit via a news article, the incorrect non-procedural path to take for such a request.

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<sup>54</sup> Article by Miller in the *Boston Globe* on 27 April 2013.

<sup>55</sup> Dr Michael Craig Miller is former editor-in-chief of the *Harvard Mental Health Letter* and a psychiatrist at Beth Israel Deaconess Medical Centre.

Autopsy of Charles Miller's brain resulted in finding a tumor in the brain of this killer. In this case the medical examiner found *a small tumor pressing on a brain region, the amygdala, known to regulate emotion* and since then, there have been newspaper reports of his anger and intensity.

### **Tamerlan Tsarnaev suffered bouts of anger - frustrated violence**

A local Imam<sup>56</sup> has described angry disruptions at a Cambridge mosque. In 2009, Tsarnaev faced domestic violence charges that were later dismissed. He had attracted local attention as a boxer and was a martial arts enthusiast. The biology of Tamerlan's violent behaviour has not received any attention and Dr Michael Craig Miller suggested a study of Tamerlan Tsarnaev's brain.

### **Chronic traumatic encephalopathy**

Dr Robert Cantu and Dr Robert Stern of Boston University's Centre for the Study of Chronic Traumatic Encephalopathy had also expressed their interest in examining Tamerlan's brain. Tsarnaev's high-level participation in boxing may have exposed him to multiple head knocks. In other words, he may have endured repetitive head injury and developed the brain disease that brain damage experts have studied in football players and other athletes.<sup>57</sup>

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<sup>56</sup> An Imam is an Islamic community leader. The word Imam is commonly used in the context of a worship leader of a mosque for Sunni Muslims, and Tamerlan was from a Sunni Muslim family in Russia. Imams usually lead Islamic worship services; serve as community leaders; and provide religious guidance.

<sup>57</sup> It is of note however, that the pathologist who discovered Charles Whitman's tumours said it was not related to his violent tear. He called Whitman a psychopath of the worst kind; although it must be noted that a pathologist is *not* a psychiatrist or a psychologist- just a pathologist. There should have been at least two

Dr Cantu and Dr Stern pointed out that, even if Tamerlan Tsarnaev showed evidence of *chronic traumatic encephalopathy* or some other pathology, it might not however, have been the cause of allegedly premeditated, violent behaviour which the FBI have asserted, having *illegally* interviewed his younger brother in his almost-deathbed, under possible drugs or not, we will never know. Examination of the brain is extremely important: where does alleged psychopathy come from, if not the brain?

### **Police brutality**

This case should be thrown out in the first instance because the FBI could be sued for malpractice and breach of legal procedures.

\*The FBI leaked information to the media.

\*The FBI interviewed Mr D Tsarnaev whilst seriously ill in hospital and initially without the presence of an attorney.

\*The FBI was aware of Mr D Tsarnaev's dire financial straits and should have properly appointed a public defender for Mr D Tsarnaev.

\* The FBI should have awaited a psychiatrist report on whether the hospitalised man was fit to make a statement.<sup>58</sup>

\*A court should have certified that Mr Tsarnaev was fit for interview at the time he was questioned as he lay critically ill in a hospital bed with an FBI bullet removed from his throat and under pain killing medication which must have interfered with his soundness to be

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examinations of Miller's brain by two different pathologists to examine whether the tear was caused after death or before death.

<sup>58</sup> To this day, Mr D Tsarnaev has not been examined by any psychiatrist as to his fitness to plead.

questioned in his fragile physical and psychological state at the time, a travesty of injustice and an example of police brutality.<sup>59</sup>

### **The brain is the mediator of all thought and behaviour**

The brain is the mediator of all thought and behaviour and the killed-by-police-suspect Tamerlan Tsarnaev's brain might have taught the legal-medical world a small but important bit of information about the biology of violence. So experts should have had the chance to study Tamerlan Tsarnaev's brain. And they should have studied it as closely as forensic experts have studied the area a few blocks along Boylston Street. This was not a terrorist outrage. There was no claim by any listed terrorist organisation. This was not terrorism. This was the act of a brain-injured young man, Tamerlan Tsarnaev who felt cheated because his young wife was forced to work unbelievably long hours in order to bring food to the table as the authorities did not see fit to allow them the benefits of an unemployed couple with a very young baby. They should have been entitled to state support at least with a rent subsidy.

### **US Intelligence Committee questioned FBI**

On 24 April 2013, US security officials faced questions in Congress over whether they mishandled information about deceased Boston bombing suspect Tamerlan Tsarnaev as was

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<sup>59</sup> It is noted here that a psychiatrist cannot now be called as an expert witness to assess the damage to Mr D Tsarnaev. the then hospital patient nor can an expert witness now be called to assess the deviation from the standard of care that Mr D Tsarnaev received in April 2013 when the FBI interrogated him in his hospital bed with a police gunshot bullet removed from his throat because he should have been assessed before any interrogation took place. We do not know what lies are contained in his medical notes made at that hospital or whether or not any medical notes were forged, counterfeited or destroyed since April 2013. We do not know whether Mr D Tsarnaev had been given, without his consent, any medication such as *Amital* or who prescribed any medication (without Tsarnaev's consent) or the true extent of Mr D Tsarnaev's injuries as they remain today.

their very incompetence with the 9/11 tragedy. Indeed, the former director of the FBI learnt of the explosion at the World Trade Centre when his wife telephoned him to tell him she had just seen it on a newsflash.

Indeed after the '9/11' outrage, so to speak, the FBI displayed their vast array of very expensive high technology weaponry and human officer force at their disposal, all too late.

### **'Closed hearing' of US Senate Intelligence Committee reported in newspapers: breach of confidentiality**

The FBI briefed the Senate Intelligence Committee in a closed hearing after some US lawmakers accused the FBI of failing to act on Russian concerns. The Senate posed these questions to the FBI:

1. Why was no further action taken after the 2011 investigation of *Tamerlan Tsarnaev*?
2. Why was *Tamerlan Tsarnaev* not identified as a threat based on links to radical websites?
3. Why were the authorities unaware of Tamerlan Tsarnaev's visit to Russia in 2012?
4. Democratic Senator Dianne Feinstein, Chair of the intelligence committee, had announced that the Intelligence Committee would have resolved these questions at the planned meeting with FBI officials on Tuesday, 24 April 2013, after which they were to brief the full Senate. Why have these questions not been resolved?
5. The facts were that Mr Tamerlan Tsarnaev was questioned in 2011 amid claims that he had adopted radical Islam. Why was he not questioned *under caution*, ie his *Miranda*<sup>60</sup> rights not read to him?
6. Why was the whole of the questioned family had not been told of their *Fifth Amendment*<sup>61</sup> rights not to make any self-incriminating statements?

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<sup>60</sup> *Miranda v Arizona*, 384 US 436 (1966).

<sup>61</sup> See Appendix Two.

*The conclusion is that none of the information thus garnered by the FBI before the Boston Marathon incident must be allowed to be admitted in evidence during the trial of Mr D Tsarnaev in 2015 in Boston, Massachusetts.*

### **FBI's defence to Intelligence Committee- pre-released on 19 April 2013**

The FBI's defence<sup>62</sup> was that FBI officials had run checks on the suspect but found no evidence of terrorist activity. A request to Russia for further information to justify more rigorous checks allegedly went unanswered, they claimed, and an interview by agents with Tamerlan Tsarnaev and his family also revealed nothing suspicious. In a press release after the interview on 24 April, Republican Senator Lindsey Graham, in Committee, allegedly questioned why the FBI was unable to identify Tamerlan Tsarnaev as a threat based on his alleged links to radical websites. Senator Lindsey Graham called for better co-operation with Russia and the amendment of privacy laws to allow closer scrutiny of suspects' Internet activity. Senator Lindsey Graham added that the US authorities did not know that Tamerlan Tsarnaev had travelled to Russia in 2012.<sup>63</sup> Tamerlan Tsarnaev had spent six months in Dagestan, another mainly Muslim Russian republic bordering Chechnya. During Tamerlan Tsarnaev's visit to Russia, where he stayed for six months, he allegedly spent two days in Chechnya itself, newspapers reported.<sup>31</sup>

### **'Leaks' warrant inquiry into bribery of US government officials**

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<sup>62</sup> Pre-released to newspapers in a statement on Friday 19 April, 2013. These breaches of Fifth Amendment Rights of Tsarnaev, as he was in police custody in hospital, are a travesty against his human rights to a fair trial and should be inadmissible in a court of law. He should have been told by police in hospital that this was not a friendly chat; that he was under arrest but because of his severe injuries, he had been taken to a hospital and that he had the right to remain silent; and anything he said can and will be used in a court of law; that he had the right immediately to an attorney; and that one could be appointed for him, seeing that he was severely incapacitated;

<sup>31</sup> Unofficial leaks to newspapers were that Tamerlan Tsarnaev's name was spelt incorrectly on his travel documents. This 'fact' can easily be verified or disputed from airline computers and Tsarnaev's passport.

That the US warrants an inquiry similar to the UK's Leveson Inquiry Report of 2012 is beyond question. Each and every newspaper in the world reported officers of the United States making anonymous statements about police matters and whether they were bribed or not we do not know, nor do we know whether these pieces of alleged information to the press were leaks to verify to the public that the police were doing their job, thus creating unofficial public confidence.

### **After surviving cruel method of capture, normal evidence gathering began**

It was one week after the bombing that police began to take statements from relevant people in Boston, after Tamerlan Tsarnaev was killed by police gunfire and the his younger brother wounded and captured, newspapers worldwide spreading truth mixed with hearsay and then police tactics turned to basic communications with the defendant's friends<sup>64</sup>, neighbours and relatives<sup>65</sup> as they collected statements and other evidence for a criminal trial. The then hospital patient or an expert witness now NOT now be called to assess the deviation from the standard of care that Mr D Tsarnaev received in April 2013 when the FBI interrogated him in his hospital bed with a police gunshot bullet removed from his throat.

This is because he should have been assessed by a qualified and experienced psychiatrist before any interrogation took place.

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<sup>64</sup> His two friends have since been arrested.

<sup>65</sup> Here again, the police had no right to collect statements from anybody to be used in a criminal trial unless they informed them beforehand that their statement was to be used as evidence in a federal criminal case. It may even be a breach of people's right to privacy, the recognition of which is deeply rooted in history. There is recognition of privacy in the Quran and in the sayings of Mohammed. The Bible has numerous references to privacy. Jewish law has long recognised the concept of being free from being watched. In 1890, American attorneys Samuel Warren and Louis Brandeis wrote a seminal piece on the right to privacy as a tort action, describing privacy as 'the right to be left alone'. The International Covenant on Civil and Political Rights, article 17, upholds privacy as does the 1948 Universal Declaration of Human Rights, Article 12.

We do not know what lies are contained in his medical notes made at that hospital or whether or not any medical notes were forged, counterfeited or destroyed since April 2013. We do not know whether Mr D Tsarnaev had been given, without his consent, any medication such as *Amital* or who prescribed any medication or the true extent of Mr D Tsarnaev's injuries as they remain today.

### **Information gathering by US federal police**

A comprehensive assessment of the defendant takes into account the defendant's history; his physical state; mental illnesses that he may suffer; results of psychometric assessments; collateral histories from family members; collateral histories from friends and colleagues; teachers; and others who have known the defendant for a considerable length of time. Police will also collect his medical records; any hospital records; social services records; police criminal records and police intelligence reports; witness statements; housing and hostel records; and employment records.<sup>66</sup> This information thus gathered is evidence that may be presented to a court to prove or rebut this criminal case. Evidence can be used to support or corroborate or contradict a specific piece of evidence; or the status, demeanour or credibility of the witness. The US White House press secretary Jay Carney had said in his press briefing on 22 April 2013, that Dzhokhar Anzorovich Tsarnaev<sup>67</sup> will be tried in the US civilian court system, meaning that they considered him a political terrorist but that he would be tried in the civilian court system because they recognised his US citizenship.<sup>68</sup>

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<sup>66</sup> Rules of evidence govern whether information in a case may be presented, when it is presented, and in what form. The rules of evidence are very tightly drawn within the criminal law.

<sup>67</sup> Then Dzhokhar Anzorovich Tsarnaev, also injured by police bullets, fled on foot, having abandoned the SUV.

<sup>68</sup> Whilst the FBI might have hoped to use the conviction of Tsarnaev's friends conviction as evidence against him, the matter of this strategy may have been somewhat scuppered, at least temporarily. Editor, 'Judge delays

However, shortly after April 2013, the state of Massachusetts decided to reintroduce the capital death sentence.<sup>69</sup>

### **Police say brother killed Tamerlan**

Relevant evidence will go some way to showing whether a fact did or did not exist, but even relevant evidence may be inadmissible because of perceived unfairness in the way it was collected or because it was more prejudicial than probative, ie, it does little to prove one side's case, while tending to make a party look bad or immoral. After Tamerlan Tsarnaev shot *at* police and apparently ran out of bullets, the police chief said, officers tackled him. They were applying handcuffs when the SUV came at them, it being driven by Dzhokhar Anzorovich Tsarnaev. The officers scattered, they said, and left the first suspect in the road and the SUV allegedly ran over Tamerlan Tsarnaev and killed him, police alleged.

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sentencing in Tsarnaev friends' cases', *Boston Globe*, 7 Nov 2014.. See <http://www.bostonglobe.com/metro/2014/11/07/supreme-court-case-could-impact-sentencing-friends-accused-boston-marathon-bomber/JusRpo0F67ahMV5HvHZhcL/story.html>, accessed 1 Dec 2014.

<sup>69</sup> In the US, those awaiting sentence of death are called 'death row inmates', and are incarcerated in maximum security prisons where they have very little, in any, contact with other prisoners. The principle of extreme isolation has its roots in the ethos of Eastern State Penitentiary and violate prisoners human rights (Haney, 2008).

## **Second hand and third-hand hearsay evidence**

The brothers' uncle Ruslan Tsarni (who lives in Maryland) told newspapers in an interview that he had first noticed a change in the older brother, Tamerlan Tsarnaev, in 2009.<sup>70</sup> After being 'disturbed by his nephew Tamerlan's change in attitude', Tsarni told newspapers that he sought advice from a family friend, who told him that in 2009 Tamerlan Tsarnaev's alleged radicalisation had begun after he met a convert to Islam in Boston. Tsarni said he had later learned from a relative that his nephew Tamerlan had met the convert in 2007.<sup>71</sup> He made no mention whatsoever about his younger nephew Dzhokhar. Being a lawyer, it is beyond belief that he should speak to a newspaper reporter. It has been reported that in 1995, Ruslan Tsarni incorporated in the US a group called the Congress of Chechen International Organizations, from the home of Graham Fuller, the one-time vice chairman of the National Intelligence Council at the CIA under President Reagan. The Congress of Chechen International Organizations helped supply Islamist insurgents in Chechnya with items like mine-resistant combat boots.<sup>72</sup>

## **Hearsay evidence: converting to Islam**

*It is to be noted that to convert to Islam is not a crime anywhere in the world.*

A Human Rights aspect is that the refusal of US authorities to read the Boston Marathon bombing suspect his rights has not gone unnoticed by the world's legal observers.

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<sup>70</sup> This statement was more prejudicial than probative, ie, it does little to prove one side's case, while tending to make a party look bad or immoral.

<sup>71</sup> There are rules relating to facts described by a witness arising not directly from their own experience but from what they have heard from others and hearsay is usually excluded in criminal proceedings because the weight of this evidence cannot be tested for reliability by cross-examination.

<sup>72</sup> Patrick Martin, 'Who is Ruslan Tsarni?', World Socialist Web Site, 29 June 2013. See [www.wsws.org/en/article/2013/06/29/bos2-j2s](http://www.wsws.org/en/article/2013/06/29/bos2-j2s), accessed 1.1.2014.

It is believed that this defendant was interrogated whilst in his hospital bed and that he responded by writing. Whether he was threatened with withdrawing his life support or given drugs to make these actions is not known.

It is noted also noted that interrogators did not read Mr Tsarnaev his *Miranda* rights<sup>73</sup> until they had the statements they wanted from him and this took sixteen hours of questioning. This exception is allowed *on a limited basis* when the public may be in immediate danger. However, it cannot be said that the public are in danger from a gravely wounded man in a hospital bed, unable to speak because of an alleged gunshot wound to the throat, according to US newspapers which stated that they quoted anonymous sources as saying he had been responding to questions in writing.

Boston's Mayor Tom Menino told ABC News, before the charges against D. Tsarnaev were announced, that:

*'We don't know if we'll ever be able to question the individual'.<sup>74</sup>*

Newspaper reports stated that they were anonymously informed that the federal public defender's office in Massachusetts had agreed to represent Mr Tsarnaev *after charges were made*. However, Tsarnaev is now being represented by a different attorney.

## Conclusion

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<sup>73</sup> ...which guarantee the right to remain silent and the right to a lawyer.

<sup>74</sup> Boston's Mayor Menino was careful not to use the word 'suspect' or 'terrorist' and his statement sounds sincere, which causes one to believe that the younger Tsarnaev brother was indeed very seriously wounded by the FBI.

The above illustrates a defence of duress suffered from the older brother (who might have become insane or brain damaged due to boxing injury) and has no potential to succeed, even with the mitigation as per this article.<sup>75</sup>

This is because this trial in Boston was an emotional trail , a method, if continued, will result in anarchy and cowboy law, rather than Rule of Law.

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<sup>75</sup> See also 'Appendix Two' attached.

**Appendix One****Appendix One -page1**

(A complaint was filed against Dzhokhar Anzorovich Tsarnaev during a court hearing held around his hospital bed). *Note that since this date a total of 30 (thirty) offences have been filed against Dzhokhar Tsarnaev.*

**AFFIDAVIT OF FBI SPECIAL AGENT DANIEL R. GENCK**

*"I, Daniel R. Genck, being duly sworn, depose and state:*

*1. I am a Special Agent with the Federal Bureau of Investigation ('FBI') and have been so employed since 2009. I am currently assigned to one of the Boston Field Office's Counter-terrorism Squads. Among other things, I am responsible for conducting national security investigations of potential violations of federal criminal laws as a member of the Joint Terrorism Task Force ('JTTF'). During my tenure as an agent, I have participated in numerous national security investigations. I have received extensive training and experience in the conduct of national security investigations, and those matters involving domestic and international terrorism.*

*2. During my employment with the FBI, I have conducted and participated in many investigations involving violations of United States laws relating to the provision of material support to terrorism. I have participated in the execution of numerous federal search and arrest warrants in such investigations. I have had extensive training in many methods used to commit acts of terrorism contrary to United States law.*

*3. This affidavit is submitted in support of an application for a complaint charging DZHOKHAR ANZOROVICH TSARNAEV of Cambridge, Massachusetts ("DZHOKHAR ANZOROVICH TSARNAEV") with using a weapon of mass destruction against persons and property at the Boston Marathon on April 15, 2013, resulting in death. More specifically, I submit this affidavit in support of an application for a complaint charging DZHOKHAR ANZOROVICH TSARNAEV with*

*(1) unlawfully using and conspiring to use a weapon of mass destruction (namely, an improvised explosive device) against persons and property within the United States used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce, which offence and its results affected interstate and foreign commerce (including, but not limited to, the Boston Marathon, private businesses in Eastern Massachusetts, and the City of Boston itself), resulting in death, in violation of 18 U.S.C. § 2332a; and*

*(2) maliciously damaging and destroying, by means of an explosive, real and personal property used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce, resulting in personal injury and death, in violation of 18 U.S.C. § 844(i).*

*4. This affidavit is based upon my personal involvement in this investigation, my training and experience, my review of relevant evidence, and information supplied to me by other law enforcement officers. It does not include each and every fact known to me about the investigation, but rather only those facts that I believe are sufficient to establish the requisite probable cause.*

#### ***The Boston Marathon Explosions***

##### ***Facts and Circumstances***

*5. The Boston Marathon is an annual race that attracts runners from all over the United States and the world. According to the Boston Athletic Association, which administers the Marathon, over 23,000 runners participated in this year's race. The Marathon has a substantial impact on interstate and foreign commerce. For example, based on publicly available information, I believe that the runners and their families - including those who travel to the Boston area from other states and countries - typically spend tens of millions of dollars each year at local area hotels, restaurants and shops, in the days before, during, and after the Marathon. In addition, a number of the restaurants and stores in the area near the finish line have special events for spectators.*

*6. The final stretch of the Boston Marathon runs eastward along the center of Boylston Street in Boston from Hereford Street to the finish line, which is located between Exeter and Dartmouth Streets. Low metal barriers line both edges of the street and separate the spectators from the runners. Many businesses line the streets of the Marathon route. In the area near the finish line, businesses are located on both sides of Boylston Street, including restaurants, a department store, a hotel and various retail stores.*

*7. On April 15, 2013, at approximately 2:49 p.m., while the Marathon was still underway, two explosions occurred on the north side of Boylston Street along the Marathon's final stretch. The first explosion occurred in front of 671 Boylston Street and the second occurred approximately one block away in front of 755 Boylston Street. The explosive devices were placed near the metal barriers where hundreds of spectators were watching runners approach the finish line. Each explosion killed at least one person, maimed, burned and wounded scores of others, and damaged public and private property, including the streets, sidewalk, barriers, and property owned by people and businesses in the locations where the explosions occurred. In total, three people were killed and over two hundred individuals were injured.*

*8. The explosions had a substantial impact on interstate and foreign commerce. Among other things, they forced a premature end to the Marathon and the evacuation and temporary closure of numerous businesses along Boylston Street for several days.*

#### ***B. Surveillance Evidence***

**9.** *I have reviewed videotape footage taken from a security camera located on Boylston Street near the corner of Boylston and Gloucester Streets. At approximately 2:38 p.m. (based on the video's duration and timing of the explosions) - i.e., approximately 1 minute before the first explosion - two young men can be seen turning left (eastward) onto Boylston from Gloucester Street. Both men are carrying large knapsacks. The first man, whom I refer to in this Affidavit as Bomber One, is a young male, wearing a dark-coloured baseball cap, sunglasses, a white shirt, dark coat, and tan pants. The second man, whom I refer to in this affidavit as Bomber Two, is a young male, wearing a white baseball cap backwards, a grey hooded sweatshirt, a lightweight black jacket, and dark pants. As set forth below, there is probable cause to believe that Bomber One is Tamerlan Tsarnaev and Bomber Two is his brother, DZHOKHAR ANZOROVICH TSAMAEVTSARNAEV.*

**10.** *After turning onto Boylston Street, Bomber One and Bomber Two can be seen walking eastward along the north side of the sidewalk towards the Marathon finish line. Bomber One is in front and Bomber Two is a few feet behind him. Additional security camera video taken from a location farther east on Boylston Street, as well as contemporaneous photographs taken from across the street, show the men continuing to walk together eastward along Boylston Street towards Fairfield Street.*

**11.** *I have also reviewed video footage taken from a security camera affixed above the doorway of the Forum Restaurant located at 755 Boylston Street, which was the site of the second explosion. This camera is located approximately midway between Fairfield and Exeter Streets and points out in the direction of Boylston and is turned slightly towards Fairfield. At approximately 2:41 p.m. (based on the video's duration and the timing of the explosions), Bomber One and Bomber Two can be seen standing together approximately one half-block from the restaurant.*

**12.** *At approximately 2:42 p.m. (i.e., approximately seven minutes before the first explosion), Bomber One can be seen detaching himself from the crowd and walking east on Boylston Street towards the Marathon finish line. Approximately 15 seconds later, he can be seen passing directly in front of the Forum Restaurant and continuing in the direction of the location where the first explosion occurred. His knapsack is still on his back.*

**13.** *At approximately 2:45 p.m., Bomber Two can be seen detaching himself from the crowd and walking east on Boylston Street toward the Marathon finishing line. He appears to have the thumb of his right hand hooked under the strap of his knapsack and a cell phone in his left hand. Approximately 15 seconds later, he can be seen stopping directly in front of the 'Forum Restaurant' and standing near the metal barrier among numerous spectators, with his back to the camera, facing the runners. He then can be seen apparently slipping his knapsack onto the ground. A photograph taken from the opposite side of the street shows the knapsack on the ground at Bomber Two's feet.*

**14.** *The 'Forum Restaurant' video shows that Bomber Two remained in the same spot for approximately four minutes, occasionally looking at his cell phone and once appearing to*

take a picture with it. At some point he appears to look at his phone, which is held at approximately waist level, and may be manipulating the phone. Approximately 30 seconds before the first explosion, he lifts his phone to his ear as if he is speaking on his cell phone, and keeps it there for approximately 18 seconds. A few seconds after he finishes the call, the large crowd of people around him can be seen reacting to the first explosion. Virtually every head turns to the east (towards the finish line) and stares in that direction in apparent bewilderment and alarm. Bomber Two, virtually alone among the individuals in front of the restaurant, appears calm. He glances to the east and then calmly but rapidly begins moving to the west, away from the direction of the finish line. He walks away without his knapsack, having left it on the ground where he had been standing. Approximately 10 seconds later, an explosion occurs in the location where Bomber Two had placed his knapsack.

15. I have observed video and photographic footage of the location where the second explosion occurred from a number of different viewpoints and angles, including from directly across the street. I can discern nothing in that location in the period before the explosion might have caused that explosion, other than Bomber Two's knapsack.

### **Photographic Identifications**

16. I have compared a Massachusetts Registry of Motor Vehicles ('RMV') photograph of DZHOKHAR ANZOROVICH TSARNAEV with photographic and video images of Bomber Two, and I believe, based on their close physical resemblance, there is probable cause that they are one and the same person. Similarly, I have compared an RMV photograph of Tamerlan Tsarnaev with photographic and video images of Bomber One, and I likewise believe that they are one and the same person.

### **The Bombers Emerge**

17. I base the allegations set forth in paragraphs 18 through 27 on information that has been provided to me by fellow law enforcement officers, including members of the JTTF and state and local law enforcement who responded to the crime scenes, as well as on publicly available information that I deem reliable.

18. At approximately 5:00 p.m. on April 18, 2013, the FBI published video and photographic images of Bomber One and Bomber Two on its web site. Those images were widely rebroadcast by media outlets all over the country and the world.

19. Near midnight on April 18, 2013, an individual carjacked a vehicle at gunpoint in Cambridge, Massachusetts. A victim of the carjacking was interviewed by law enforcement and provided the following information. The victim stated that while he was sitting in his car on a road in Cambridge, a man approached and tapped on his passenger-side window. When the victim rolled down the window, the man reached in, opened the door, and entered the victim's vehicle. The man pointed a firearm at the victim and stated, "Did you hear about the Boston explosion?" and "I did that." The man removed the magazine from his gun and showed the victim that it had a bullet in it, and then re-inserted the magazine. The man then stated, 'I am serious.'

20. The man with the gun forced the victim to drive to another location, where they picked up a second man. The two men put something in the trunk of the victim's vehicle. The man with

*the gun took the victim's keys and sat in the driver's seat, while the victim moved to the front passenger seat. The second man entered the victim's vehicle and sat in the rear passenger seat. The man with the gun and the second man spoke to each other in a foreign language.*

**21.** *While they were driving, the man with the gun demanded money from the victim, who gave the man 45 dollars. One of the men compelled the victim to hand over his ATM card and password. They then drove to an ATM machine and attempted to withdraw money from the victim's account. The two men and the victim then drove to a gas station/convenience store in the vicinity of 816 Memorial Drive, Cambridge. The two men got out of the car, at which point the victim managed to escape.*

**22.** *A short time later, the stolen vehicle was located by law enforcement in Watertown, Massachusetts. As the men drove down Dexter Street in Watertown, they threw at least two small-improvised explosive devices ("IEDs") out of the car. A gunfight ensued between the car's occupants and law enforcement officers in which numerous shots were fired. One of the men was severely injured and remained at the scene; the other managed to escape in the car. That car was later found abandoned a short distance away, and an intact low-grade explosive device was discovered inside it. In addition, from the scene of the shootout on Laurel Street in Watertown, the FBI has recovered two unexploded IEDs, as well as the remnants of numerous exploded IEDs.*

### ***Identification of the Carjackers***

**23.** *I have reviewed images of two men taken at approximately 12:17 a.m. by a security camera at the ATM and the gas station/convenience store where the two carjackers drove with the victim in his car. Based on the men's close physical resemblance to RMV photos of Tamerlan and DZHOKHAR ANZOROVICH TSARNAEV, I believe the two men who carjacked, kidnapped, and robbed the victim are Tamerlan and DZHOKHAR ANZOROVICH TSARNAEV. In addition, the carjacker who was severely injured during the shoot-out in Watertown was taken to Beth Israel Hospital, where he was pronounced dead. FBI fingerprint analysis confirms that he is Tamerlan Tsarnaev, and the man's face matches the RMV photograph of Tamerlan Tsarnaev. RMV records indicate that Tamerlan Tsarnaev and DZHOKHAR ANZOROVICH TSARNAEV share the same address on Norfolk Street in Cambridge, Massachusetts. According to Department of Homeland Security immigration records, Tamerlan Tsarnaev and DZHOKHAR ANZOROVICH TSARNAEV are brothers. Tamerlan Tsarnaev was a Lawful Permanent Resident. DZHOKHAR ANZOROVICH TSARNAEV entered the United States on April 12, 2002, and is a naturalized U.S. citizen.*

### ***Preliminary Examination of the Explosives***

**24.** *A preliminary examination of the remains of the explosive devices that were used at the Boston Marathon revealed that they were low-grade explosives that were housed in pressure cookers. Both pressure cookers were of the same brand. The pressure cookers also contained*

*metallic BBs and nails. Many of the BBs were contained within an adhesive material. The explosives contained green-colored hobby fuse.*

*25. A preliminary examination of the explosive devices that were discovered at the scene of the shootout in Watertown and in the abandoned vehicle has revealed similarities to the explosives used at the Boston Marathon. The remnants of at least one of the exploded IEDs at the scene of the shootout indicate that a low-grade explosive had been contained in a pressure cooker. The pressure cooker was of the same brand as the ones used in the Marathon explosions. The explosive also contained metallic BBs contained within an adhesive material as well as green-colored hobby fuse. The intact low-grade explosive device found in the abandoned car was in a plastic container and wrapped with green-colour hobby fuse.*

#### ***DZHOKHAR ANZOROVICH TSARNAEV is Located***

*26. On the evening of April 19, 2013, police investigation revealed that there was an individual in a covered boat located at 67 Franklin Street in Watertown. After a stand-off between the boat's occupant and the police involving gunfire, the individual was removed from the boat and searched. A University of Massachusetts at Dartmouth identification card, credit cards, and other forms of identification were found in his pockets. All of them identified the man as DZHOKHAR ANZOROVICH TSARNAEV. **He had visible injuries, including apparent gunshot wounds to the head, neck, legs, and hand.** DZHOKHAR ANZOROVICH TSARNAEV's wounds were triaged and he was brought to an area hospital, where he remains for medical treatment.*

*27. On April 21, 2013, the FBI searched DZHOKHAR ANZOROVICH TSARNAEV's dormitory room at 7341 Pine Dale Hall at the University of Massachusetts at Dartmouth, pursuant to a search warrant. The FBI seized from his room, among other things, a large pyrotechnic, a black jacket and a white hat of the same general appearance as those worn by Bomber Two at the Boston Marathon on April 15, 2013, and BBs.*

#### **Conclusion**

*28. Based on the foregoing, there is probable cause to believe that on or about April 15, 2013, DZHOKHAR ANZOROVICH TSARNAEV violated 18 U.S.C. §§ 2332a (using and conspiring to use a weapon of mass destruction, resulting in death) and 844(i) (malicious destruction of property by means of an explosive device, resulting in death). Accordingly, I respectfully request that the Court issue a complaint charging DZHOKHAR ANZOROVICH TSARNAEV with those crimes.*

***Special Agent Mel R. Genck  
Federal Bureau of Investigation  
Sworn and signed 21<sup>st</sup> day of April 2013.***

*U.S. District Court - District of Massachusetts  
Place of Offence: City Boston County Suffolk  
Superseding Ind.l Inf. Same Defendant  
Magistrate Judge Case Number  
Search Warrant Case Number R 20/R 40 from District of*

*Defendant Information:**Defendant Name Dzhokhar Anzorovich Tsarnaev**Juvenile: Yes**Is this person an attorney and/or a member of any state/federal bar: D Yes [ZJ]No**Alias Name Jahar Tsarnaev**Address (City & State) Cambridge, MA**Birth date (Yr only): 1993 SSN (last4#): 0491 Sex M Race: Caucasian**Nationality: USA**Defence Counsel if known: None**Address**Bar Number**U.S. Attorney Information: A USA William D. Weinreb**Interpreter: Yes Alope Chakravarty**List language and/or dialect:**Victims: [Duo]**If yes, are there multiple crime victims under 18 USC§377I (d) (2) Yes**Matter to be SEALED: Yes**Warrant Requested D**Regular Process D**In Custody**Location Status:**Arrest Date 04/19/2013**Already in Federal Custody as of 04/19/2013 in FBI-Beth Israel Hospital**D Already in State Custody waiting Trial**D On Pretrial Release:**Ordered by:**On**I hereby certify that the case numbers of any prior proceedings before a Magistrate Judge are accurately set forth above.**Date: 04/21/2013**JS 45 (5/97) (Revised U.S.D.C. MA 12/7/05)**District Court Case Number (To be filled in by deputy clerk):**Name of Defendant Dzhokhar Anzorovich TsarnaevTsarnaev**U.S.C. Citations**Index Key/Code Description of Offence Charged Count Numbers**Use of Weapon of Mass Destruction**Set 1 18 U.S.C 2332a (a)**Malicious Destruction of Property Resulting in Death**Set 2 18 U.S.C 844(i)".*

## Appendix Two

### Relevant amendments to the United States Constitution referred to in this article

#### ***Fourth Amendment***

Under the Fourth Amendment, search and seizure (including arrest) should be limited in scope according to specific information supplied to the issuing court, usually by a law enforcement officer who has sworn by it

Fourth Amendment case law deals with three central questions: what government activities constitute search and seizure; what constitutes probable cause for these actions; and how violations of Fourth Amendment rights should be addressed.

Early court decisions limited the Fourth Amendment's scope to a law enforcement officer's physical intrusion onto private property, but after the decision in *Katz v United States* (1967), the Supreme Court held that its protections, such as the warrant requirement, extend to the privacy of individuals as well as physical locations. Law enforcement officers need a warrant for most search and seizure activities, but the Court has defined a series of exceptions for consent searches, motor vehicle searches, evidence in plain view, exigent circumstances, border searches, and other situations.

The exclusionary rule is one way the amendment is enforced. Established in *Weeks v United States* (1914), this rule holds that evidence obtained through a Fourth Amendment violation is generally inadmissible at criminal trials. Evidence discovered as a later result of an illegal search may also be inadmissible as 'fruit of the poisonous tree' unless it inevitably would have been discovered by legal means.

It states:

*'The right of the people to be secure in their persons, houses, papers, and effects,<sup>[a]</sup> against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'*

[http://en.wikipedia.org/wiki/Fourth\\_Amendment\\_to\\_the\\_United\\_States\\_Constitution\\_-\\_cite\\_note-3](http://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution_-_cite_note-3)

#### ***Sixth Amendment***

The Sixth Amendment (Amendment VI) to the United States Constitution is the part of the United States Bill of Rights that sets forth rights related to criminal prosecutions. The Supreme Court has applied the protections of this amendment to the states through the *Due Process Clause* of the Fourteenth Amendment.

It states:

*'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of*

*counsel for his defense.'*

### ***Fourteenth Amendment***

The amendment addresses citizenship rights and equal protection of the laws, and was proposed in response to issues related to former slaves following the American Civil War.

It states:

#### **Section 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **Section 2**

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

#### **Section 3**

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

#### **Section 4**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

#### **Section 5**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENDS+



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