No. 20-443

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

DZHOKHAR A. TSARNAEV,

*Respondent.*

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether, in this case involving pretrial publicity "unrivaled in American legal history," Pet. App. 19a, the court of appeals reasonably applied its decades-old supervisory rule that requires asking prospective jurors in a small subset of high-profile cases about the content of the information to which they have been exposed.

2. Whether the court of appeals correctly held that the district court committed reversible error in excluding mitigating evidence that respondent's older brother had previously committed three brutal murders in the name of jihad, where the defense's central mitigating theory was that respondent had acted under his brother's influence and had a lesser role in the offense.

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## INTRODUCTION

The government all but concedes that this case does not come close to satisfying this Court's ordinary criteria for review. The government seeks error correction of the First Circuit's admittedly "case-specific" rulings on two independent grounds for vacating respondent's death sentences. Error correction is warranted, the government urges, because of the gravity of the underlying offense. Pet. 15. Although there is no doubt that the Boston Marathon bombing was a grievous act of terrorism that has had a severe impact on its victims, this Court does not exercise its certiorari jurisdiction based on the nature of the underlying crime. And even if the Court were inclined to engage in error correction here, intractable vehicle problems would prevent the government from benefiting from review. The government has failed to challenge a third ground on which the court of appeals vacated respondent's death sentences. And the First Circuit has strongly signaled that in the event of a remand, it will again vacate respondent's death sentences based on yet another error—a juror-misconduct issue not definitively adjudicated below.

Neither of the questions presented in the petition is a plausible candidate for review—yet because each concerns a ruling that is sufficient to support the judgment, this Court would have to review both. The first question presented challenges a long-established First Circuit supervisory rule, reviewable only for reasonableness, that governs a narrow aspect of voir dire questioning in rare cases. The second question presented seeks error correction of the First Circuit's application of well-established evidentiary standards to the idiosyncratic facts of this case. That question suffers from an insurmountable vehicle problem, as it is inter-

twined with the third ground on which the First Circuit vacated respondent's death sentences—a violation of *Brady* v. *Maryland*—that the government does not challenge here. Because this Court would have to take the First Circuit's *Brady* ruling as given, the government cannot prevail on the related evidentiary question on which it seeks review. Certiorari is therefore unwarranted.

Even if the Court were to grant review and reverse—notwithstanding the unchallenged *Brady* ruling—the government almost certainly would not benefit. On remand, the First Circuit would address an issue on which it has not yet ruled: the district court's refusal to investigate uncontroverted documentary evidence that two jurors, both ultimately seated, lied during voir dire about their social media activities. Those activities included a Twitter post calling respondent a "piece of garbage," and a Facebook conversation in which a juror was exhorted to "get on the jury" to ensure that respondent would be "taken care of." Pet. App. 37a, 39a, 61a. The court of appeals signaled that it was all but certain to vacate respondent's death sentences on that ground as well. *Id*. at 39a. Granting review would therefore simply delay the inevitable—vacatur of respondent's death sentences.

On the merits, the government has identified no error. The First Circuit first held that the district court had not followed a decades-old supervisory rule requiring that prospective jurors in highly publicized cases be asked about the content of the information to which they have been exposed. That rule falls well within the broad bounds this Court has drawn for circuit supervisory rules, as content-specific questioning elicits information critical to assessing jurors' impartiality in high-profile cases. The First Circuit next held that the district court erred in excluding mitigating evidence

that respondent's older brother, Tamerlan, had previously murdered three men in the name of jihad and recruited an accomplice to help. That evidence went to the heart of respondent's mitigation case because it showed Tamerlan's planning of extreme violence and his ability to influence others to join him in those acts. Finally, the court held that the failure to disclose certain information about the murders violated *Brady* and prevented respondent from developing additional mitigating evidence. The government does not challenge that holding, and it must be taken as given.

Taken together, these considerations leave no doubt that the petition should be denied.

## STATEMENT OF THE CASE

1. On Patriots' Day 2013, respondent and his older brother Tamerlan detonated two bombs at the Boston Marathon's finish line, killing Krystle Campbell, Lingzi Lu, and eight-year-old Martin Richard, and inflicting "horrific, life-altering injuries" on hundreds of others. Pet. App. 1a, 4a-5a. The brothers remained at large for several days, while "[r]eports and images" of the attack and its aftermath "flashed across the TV, computer, and smartphone screens of a terrified public—around the clock, often in real time." *Id*. at 2a.

Three days after the bombing, the FBI released images of the brothers and sought the public's help in identifying them, triggering "the most crowdsourced terror investigation in American history." Resp. C.A. Br. 51. That night, the brothers shot and killed Sean Collier, an MIT police officer. After carjacking an SUV, they engaged in a firefight with police, which ended when respondent, fleeing in the SUV, struck and killed Tamerlan. Pet. App. 7a-9a.

During the ensuing manhunt, Governor Deval Patrick ordered residents of Boston and five neighboring

communities to "'shelter in place'"—"to remain behind closed doors and 'not to open the door for anyone other than a properly identified law enforcement officer.'" Pet. App. 10a. That night, police discovered respondent hiding in a boat. There, respondent had written "a manifesto justifying his actions," accusing "[t]he U.S. Government [of] killing our innocent civilians," and stating that he could not "stand to see such evil go unpunished." *Id*. at 9a-10a. When news of respondent's arrest broke, Bostonians celebrated. Resp. C.A. Br. 52. The city "adopted the 'Boston Strong' slogan"—which quickly became ubiquitous—"to convey a message of courage and resilience." Pet. App. 12a.

2. a. "[T]he reporting of the events here—in the traditional press and on different social-media platforms—stands unrivaled in American legal history." Pet. App. 19a. The publicity included videos of respondent placing a bomb, of "the carnage-filled terror scene—with the sights and sounds of the wounded and the dying in full display," and of respondent's arrest. *Id.* at 19a-20a.

The publicity also included information that could not have been admitted at trial: respondent's inadmissible and involuntary confession, made from his hospital bed after his requests for counsel were ignored; and statements from the victims' family members, elected officials, and civic leaders that respondent should receive the death penalty. Pet. App. 11a, 20a-21a, 165a-170a; see *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (*per curiam*). Despite his past opposition to capital punishment, Boston Mayor Thomas Menino opined: "this individual" should "get[] the death penalty." Resp. C.A. App. 23.A.10843. So too Patricia Campbell, Krystle's mother, a "longtime opponent of the death penalty" who thought that in this case, "an eye for an eye feels appropriate." Resp. C.A. App. 24.A.10977a-10978.

Mark Fucarile, who lost a leg, said that seeking the death penalty was "the right thing to do." *Id.* at 11048. More generally, conventional and social media described respondent as "evil," a "monster," "callous," "depraved," "vile," a "scumbag," and the "devil." Pet. App. 21a, 167a.

b. A grand jury charged respondent with 30 offenses, and the government sought the death penalty. Pet. App. 12a-14a n.9, 15a. In light of the extraordinary pretrial publicity, respondent asked the district court to question prospective jurors about the contents of the coverage they had seen. *Id*. at 16a.

Although the government now disputes the wisdom of those inquiries, it fails to acknowledge having at first supported content-specific questioning. The parties submitted a joint proposed juror questionnaire that asked: "What did you know about the facts of this case before coming to court today (if anything)?" Pet. App. 24a. The government later suggested that jurors could be asked the "three or four most memorable things" they had heard. Resp. C.A. Add. 304. And the parties submitted agreed-upon preliminary jury instructions that told jurors to explain what they had "read, seen, heard, or experienced in relation to the case." D. Ct. Doc. 688-1, at 4.

After the government changed position and began opposing content-specific questions, the court refused to pose them. The court explained that it would suffice to ask jurors whether, as result of pretrial publicity, they had formed an opinion as to guilt or penalty, and if so, whether they could set that opinion aside. Pet. App. 26a. Respondent objected that this approach would "make[] the juror the judge of [his or her] own impartiality." *Id.* at 26a-27a. The court acknowledged: "To a large extent that's true." *Id.* at 27a.

The court largely rejected further attempts to ask content-specific questions. Resp. C.A. Br. 193-196; Pet. App. 30a-31a. Contrary to the government's assertion that defense counsel had "considerable latitude" to pose such questions (Pet. 8), the court sustained the government's objections to some content-specific follow-ups, including as to seated jurors. *E.g.*, Resp. C.A. Add. 177, 191. The court qualified many prospective jurors—including nine seated jurors—without learning anything about the publicity each had seen, deferring instead to their untested assurances of impartiality. Pet. App. 41a; Resp. C.A. Br. 194-196. The government is also incorrect in asserting (Pet. 8) that "all" seated jurors had "not paid close attention to the media coverage." Two had seen "a lot" of coverage, a third had seen "somewhere in between" "a lot" and "a moderate amount," and six believed, based on the coverage, that respondent was guilty. Resp. C.A. App. 26.A.12132; Resp. C.A. Br. 83-84.

3. During jury selection, respondent discovered that two venirepersons had lied during voir dire.

a. Juror 286, the foreperson, had posted on social media 22 times about the case, including retweeting that respondent was a "piece of garbage," but falsely claimed that she had not. Pet. App. 29a, 37a-39a. Among other posts, Juror 286 grieved the "[l]ittle 8yr old boy that was killed at marathon," described being "locked down at home" with her family during the shelter-in-place order, and, after petitioner's arrest, retweeted: "Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage." *Id.* at 38a. During jury selection, however, Juror 286 asserted that she had not "commented on this case * * * in an online comment or post," that she used Twitter "just [for] social" purposes, and that neither she nor

her family had been "asked to 'shelter in place.'" *Id.* at 29a, 33a.

b. Juror 138 disobeyed the district court's instructions and then lied about having done so. Pet. App. 28a-29a, 31a, 36a-37a. All jurors were admonished "not to discuss this case," including on Facebook. *Id.* at 28a. Nonetheless, Juror 138 described jury selection on a public Facebook thread. Several friends commented. One urged: "Play the part so u get on the jury then send him to jail where he will be taken care of." *Id.* at 37a. During voir dire, however, Juror 138 said that he had not discussed the case, including on Facebook, and told the court that none of his Facebook friends was "commenting about this trial." *Id*. at 31a.

c. During jury selection, respondent discovered those social-media posts and moved to strike both jurors for cause, or in the alternative, for further voir dire. Pet. App. 35a-36a & n.21. The government opposed both motions, and the district court denied them. *Id.* at 39a-40a. Both jurors were seated.

4. At trial, respondent conceded guilt and the jury convicted him on all counts. At the sentencing stage, respondent, who was 19 years old at the time of the offenses, urged the jury to sentence him to life imprisonment, arguing "that Tamerlan was the radicalizing catalyst." Pet. App. 2a. Pursuant to 18 U.S.C. 3592(a), respondent submitted several mitigating factors reflecting the brothers' relative culpability, including that respondent "acted under the influence of his older brother" and was susceptible to following his lead, and that Tamerlan planned and directed the bombings. Pet. App. 70a, 82a-83a n.48.

a. The district court recognized that evidence of Tamerlan's aggressive behavior was probative of these mitigating factors. The court thus admitted evidence

that Tamerlan "sometimes got argumentative" during religious services, and "yelled at a store owner for selling halal turkey." Pet. App. 70a-71a.

b. To adduce more meaningful proof, respondent sought to show that Tamerlan had a history of recruiting others into his homicidal plots. On September 11, 2011, Tamerlan had robbed and murdered three marijuana dealers in Waltham, Massachusetts, binding and beating them before slitting their throats, and had recruited a friend, Ibragim Todashev, to help. Pet. App. 64a-66a. Respondent "learned * * * months after the fact * * * that Tamerlan had butchered the men, one of whom was a close friend—actions motivated by Tamerlan's vision of jihad." *Id.* at 76a.

Soon after the bombings, law enforcement officers elicited from Todashev a confession that he and Tamerlan had committed the murders. Pet. App. 64a-65a. After confessing, Todashev attacked the officers and was killed. The government advised respondent of "the fact and general substance of Todashev's statements," but refused to disclose recordings and reports of the confession. *Id.* at 66a-67a. The district court refused to compel production. Supp. App., *infra*, at 2a-3a, 5a.[1]

The government moved *in limine* to exclude any evidence concerning the Waltham murders from the penalty phase. Pet. App. 68a. The government called Todashev's confession "unreliable," but did not tell the district court (and does not mention here) that it had credited Todashev's confession in applying for a warrant to search Tamerlan's car for evidence of the murders. *Id.* at 67a-68a, 80a-82a & n.47. In a supporting

[1] Respondent's supplemental appendix contains lower-court rulings relevant to the petition, but omitted from the petition appendix.

affidavit, an FBI agent embraced Todashev's statements that:

- "[H]e and Tamerlan had agreed initially just to rob the victims, whom they knew to be drug dealers."
- "Tamerlan had a gun, which he brandished to enter the residence."
- "Tamerlan decided that they should eliminate any witnesses to the crime, and then Todashev and Tamerlan bound the victims, who were ultimately murdered."

Pet. App. 81a n.47.

Unaware of that affidavit, the district court granted the government's motion *in limine*, ruling that "'there simply is insufficient evidence to describe what participation Tamerlan may have had' in the Waltham murders." Supp. App., *infra*, at 7a. In the court's view, any evidence of the murder "'would be confusing to the jury and a waste of time, * * * without any probative value.'" *Ibid.*[2]

c. In the absence of any evidence showing Tamerlan's dominant role in the Waltham murders, the government belittled respondent's mitigation theory. Prosecutors told the jury that Tamerlan was merely "bossy," and "sometimes lost his temper," but that "no evidence supported the notion that Tamerlan had 'co-

[2] Per order of the court of appeals, respondent's appellate counsel obtained the recordings and reports of Todashev's confession. Pet. App. 68a n.38. Those materials contained "key details" of Tamerlan's role: Tamerlan brought the "tools" used to commit the murders; Tamerlan decided to kill the men; Todashev felt compelled to participate because "he 'did not have a way out'"; and Tamerlan "slashed each man's throat." *Id.* at 67a-69a.

erced or controlled'" respondent. *Id.* at 71a. Nonetheless, several jurors found respondent's relative-culpability mitigating factors proved, and the jury returned life sentences for the 11 death-eligible offenses where Tamerlan was present (*i.e.*, every offense except respondent's placement of a bomb near the finish line). Resp. C.A. Reply Br. 114-115; Pet. App. 75a, 83a n.49.

5. The court of appeals affirmed 27 of respondent's 30 counts of conviction and the associated life sentences.[3] Pet. App. 1a-188a. The court vacated respondent's death sentences and remanded for new penalty-phase proceedings, on three independent grounds.

a. First, the court held that the district court had failed to screen venirepersons properly for exposure to prejudicial pretrial publicity. Pet. App. 49a-60a. The court reaffirmed its long-established supervisory rule that in cases where the trial judge finds "'a significant possibility that jurors have been exposed to potentially prejudicial material,'" the judge, "'on request of counsel,'" should examine each venireperson "'to elicit[] the kind and degree of his exposure to the case or the parties.'" *Id.* at 50a-51a (quoting *Patriarca* v. *United States*, 402 F.2d 314, 318 (1st Cir. 1968)); see *id.* at 56a-59a. By refusing to do so here—particularly in the unprecedented circumstances of this case—the district court had impermissibly "delegate[d] to potential jurors the work of judging their own impartiality." *Id.* at 60a.

b. Second, the court held that the district court erred in excluding the Waltham evidence. Pet. App. 73a-84a. The court saw "obvious" "probative value" in

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[3] The court reversed three 18 U.S.C. 924(c) counts in light of *United States* v. *Davis*, 139 S. Ct. 2319 (2019). Pet. App. 134a-152a.

"showing that the bombings were not the first time Tamerlan committed acts of brutality and persuaded others to help him." *Id.* at 75a. The Waltham evidence was "highly probative of Tamerlan's ability to influence [respondent]." *Id.* at 76a. "[A]t least one juror could reasonably have found that because of what had happened in Waltham, Tamerlan was not just 'bossy' * * * but a stone-cold killer who got a friend to support his fiendish work." *Ibid.* The court further held that the government had not demonstrated that the error was harmless beyond a reasonable doubt, because it could not show that the excluded evidence would not have convinced "even one juror" that respondent "did not 'bear the same moral culpability' as Tamerlan." *Id.* at 84a.

c. Third, the court of appeals held that the district court's refusal to order disclosure of the reports and the recordings of Todashev's confession violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Pet. App. 85a-87a. That refusal deprived the defense of critical details about the murders that would have enabled the defense to "investigate[] further and develop[] additional mitigating evidence." *Id.* at 86a. Thus, there was "a reasonable probability that the material's disclosure would have produced a different penalty-phase result." *Ibid*.

d. Because the court of appeals vacated the death sentences on other grounds, it did not rule on respondent's contention that the district court's refusal to investigate Jurors 138 and 286 before seating them violated the Fifth, Sixth, and Eighth Amendments. The court observed, however:

> [W]e repeat a point made in our caselaw again and again (and again) because it is so very important to our system of justice: If a defendant "com[es] forward" at any point in the litigation process "with a

> colorable or plausible" juror-misconduct claim, "an unflagging duty falls to the district court to investigate the claim."

Pet. App. 61a (quoting *United States* v. *French*, 904 F.3d 111, 117 (1st Cir. 2018)); *ibid.* ("stressing that '[j]urors who do not take their oaths seriously threaten the very integrity of the judicial process'" (quoting *Sampson* v. *United States*, 724 F.3d 150, 169 (1st Cir. 2013))).

## ARGUMENT

### I. This Court should deny certiorari.

The decision below does not warrant review. The questions presented have no significance beyond this case. Vehicle problems would prevent this Court from effectively reviewing the questions. And the government would not benefit from reversal.

A. Because each question presented addresses an independently sufficient ground on which the First Circuit vacated respondent's death sentences, this Court would have to conclude that *both* questions warrant review—and to disturb the decision below, it would have to reverse both holdings. Neither question warrants review. The government's challenge to the court of appeals' evidentiary ruling seeks error correction of the application of well-established evidentiary standards to the extraordinary facts of this case. See Part II.A, *infra*. And the government's challenge to the voir dire ruling concerns a circuit supervisory rule that by definition affects a vanishingly small number of cases within the First Circuit, and that is reviewable only for reasonableness. See Part III.A, *infra*. A petition that presented either question alone would warrant denial. A petition that must present both is not a close question.

In addition, the government's failure to challenge the *Brady* ruling presents an insurmountable obstacle to reviewing the Waltham question. In considering whether the exclusion was harmless, the Court would have to take as given that, as the court below concluded, respondent would have been able to develop additional mitigating evidence had much of the Waltham evidence not been withheld. That assumption would prevent the Court from reversing on this record. See Part II.A, *infra*.

B. Certiorari should be denied for the additional reason that the government is exceedingly unlikely to benefit from any reversal. On remand, the First Circuit would rule on respondent's claim that the district court's qualification of Jurors 138 and 286 deprived him of an impartial jury. The First Circuit strongly signaled that the district court had failed to discharge its "unflagging duty" to investigate, warranting vacatur. Pet. App. 39a, 61a. In the event of a remand, the First Circuit is all but certain to vacate respondent's death sentences again.

C. The government does not contend that either issue on which it seeks review meets the Court's ordinary criteria for certiorari. Instead, the government argues (Pet. 15) that the gravity of the offense justifies review. But this Court has often declined to review cases arising out of similarly grave acts of terrorism. *E.g.*, *Moussaoui* v. *United States*, 544 U.S. 931 (2005) (9/11 attacks); *Salameh* v. *United States*, 526 U.S. 1028 (1999) (1993 World Trade Center bombing); *McVeigh* v. *United States*, 526 U.S. 1007 (1999) (Oklahoma City bombing). That history demonstrates that the Court grants review based on the need to resolve legal questions with broad import, not based on the nature of the offense. And even if the Court were inclined

to review the decision below, the vehicle issues identified above weigh heavily against certiorari.

The government's interest in avoiding a new penalty trial also does not justify review. Voir dire is unlikely to be "more onerous" on remand (Pet. 15); potential jurors are now less likely to have extensive memories of pretrial publicity. See also note 8, *infra*. And because of the likelihood of another reversal on remand, granting review would frustrate, not further, the government's stated interest in expeditious resolution of this case.

## II. The First Circuit's fact-bound holding that the jury was deprived of relevant mitigating evidence does not warrant review.

The First Circuit correctly held that the district court's exclusion of evidence that Tamerlan committed the Waltham murders was reversible error. Pet. App. 75a-77a. That evidence went to the heart of the defense's mitigation case because it showed—much more persuasively than similar, admitted evidence—Tamerlan's capacity to lead acts of violence and influence others to help. The court of appeals' decision is a straightforward application of well-established evidentiary rules. And even if that fact-bound question otherwise warranted review, the government's failure to challenge the First Circuit's *Brady* ruling would prevent this Court from ruling for the government on the question presented.

### A. The First Circuit's decision does not warrant review.

1. It is difficult to think of a more fact-bound, case-specific ruling than the decision below. The First Circuit reviewed the district court's weighing of the Waltham evidence's probative value against its potential for confusion; found that excluding the evidence was error; and determined that the error was not harmless beyond a reasonable doubt after reviewing the entire record. The government does not contend that the First Circuit's decision deviates from any controlling legal principle, or that it conflicts with the decision of any other court of appeals.[4]

The government also does not argue that the First Circuit's evidentiary decision has implications beyond this case. With good reason: the circumstances here are exceedingly unlikely to recur. The court of appeals emphasized that the district court excluded the Waltham evidence while unaware of information that bore directly on its probative value and ease of presentation—the search warrant affidavit. See Pet. App. 68a, 81a-82a; pp. 17-18, *infra*. And the harmlessness inquiry was unusually straightforward, because the jury found mitigating far less compelling evidence of Tamerlan's aggressiveness, making it impossible to conclude beyond a reasonable doubt that evidence of Tamerlan's murders would not have moved at least *one* juror to reject a death sentence. See *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003).

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[4] The sole case that the government cites (Pet. 27) is inapposite. There the district court admitted *some* prior-crimes evidence and excluded other evidence. *United States* v. *Umaña*, 750 F.3d 320, 350-351 (4th Cir. 2014). Here, the jury heard no evidence of the Waltham murders.

The government invites this Court to wade into the voluminous record and redo the court of appeals' evidentiary analysis—simply because the government hopes for a different result. This Court should decline.

2. Even if this Court were otherwise inclined to review the evidentiary ruling, the government's failure to challenge the First Circuit's *Brady* ruling would prevent effective review. Pet. App. 85a-86a. The court held that the reports and recordings of Todashev's confession, if disclosed, would have enabled the defense to "develop[] additional mitigating evidence" about Tamerlan's actions at Waltham, creating a "reasonable probability" of "a different penalty-phase result." *Id.* at 86a. This Court must take that unchallenged conclusion as given and assume that the record below was incomplete. But the Court cannot evaluate the government's arguments concerning how the Waltham evidence would have been presented or why its exclusion was harmless—let alone reverse—based on an incomplete subset of the available evidence.

### B. The First Circuit correctly determined that excluding the Waltham evidence was prejudicial error.

1. The defense's central mitigation theory was that the older, previously radicalized Tamerlan had planned the bombings and influenced respondent to participate. The district court accordingly instructed the jury to consider several mitigating factors relating to Tamerlan's conduct and his influence over respondent: whether, because of Tamerlan's "aggressiveness," respondent was susceptible to his older brother's influence; whether Tamerlan planned and directed the bombing; and whether respondent had acted under Tamerlan's influence. Supp. App., *infra*, at 30a.

The Eighth Amendment and the Federal Death Penalty Act require that capital defendants be permitted to introduce evidence relevant to any mitigating factor. See *Tennard* v. *Dretke,* 542 U.S. 274 (2004); *Gregg* v. *Georgia,* 428 U.S. 153, 203-204 (1976). In this context, the "low threshold" for relevance requires only that the evidence "tend[] logically to prove or disprove" a fact that a "fact-finder could reasonably deem to have mitigating value." *Tennard*, 542 U.S. at 285. Section 3593(c) of Title 18 provides that a capital defendant "may present any information relevant to a mitigating factor" "regardless of its admissibility." Although the district judge retains discretion to exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury," the Eighth Amendment circumscribes that discretion. 18 U.S.C. 3593(c).

2. The district court excluded the Waltham evidence as lacking "any" probative value and requiring a confusing minitrial. Pet. App. 69a. That ruling was based on incomplete information; disregarded the thrust of defense's mitigation case; and is irreconcilable with the court's admission of other evidence of Tamerlan's aggressiveness.

a. The district court's conclusion that the Waltham evidence lacked "any" probative value was based largely on the government's assertion that Todashev's confession was unreliable. Pet. App. 68a-69a. But the district court did not know that the government itself had concluded that Todashev's statement that Tamerlan had led the commission of the triple murder was sufficiently reliable to support a sworn search warrant affidavit. Pet. App. 67a-68a, 80a-82a & n.47; *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978) (information in warrant affidavit must be "believed or appropriately accepted by the affiant as true"). The government had

represented to a magistrate judge that, among other things, "Tamerlan decided that they should eliminate any witnesses to the crime" and, with Todashev, murdered the victims. Pet. App. 81a n.47. The First Circuit therefore correctly concluded that the district court erred in ruling that the evidence was unreliable. *Id*. at 82a.

b. The district court's conclusion that the evidence lacked any probative value also was irreconcilable with the court's own understanding of the defense's mitigation case and its other evidentiary rulings.

The defense's central mitigation theory was that because Tamerlan was aggressive and already radicalized, respondent was susceptible to, and acted under, Tamerlan's influence. The district court therefore admitted, without objection, evidence of Tamerlan's aggressiveness in situations unrelated to the bombing—including that Tamerlan yelled at a butcher for selling halal turkey, poked a man in the chest at a pizzeria, and "might have" abused his girlfriend. Pet. App. 70a-71a, 77a; Resp. C.A. Reply at 100-101. That evidence—though hardly of compelling *weight*—was unquestionably *probative* of the defense's mitigating factors, as it tended to establish that Tamerlan was an aggressive person who attempted to control other people. Pet. App. 77a. A juror could reasonably infer from that evidence that Tamerlan influenced respondent (as three jurors in fact did, Supp. App., *infra*, at 30a), making respondent relatively less culpable for the bombings. *Id*. at 78a.

The Waltham evidence was in the same vein—but it was far more convincing. Indeed, without the Waltham evidence, the jury received a *misleading* portrait of Tamerlan—a portrait that the government belittled in its closing argument as merely that of a "bossy" older brother. Pet. App. 71a. Unbeknownst to the

jury, Tamerlan was not just someone who would interrupt an imam or yell at a butcher. He was a violent criminal who recruited an accomplice to help him murder three men, one a close friend, in the name of jihad.

The First Circuit therefore correctly concluded that the Waltham evidence was highly probative of at least two mitigating factors: respondent's susceptibility to Tamerlan's influence and the likelihood he acted under that influence. Pet. App. 76a-77a. Respondent learned, months after the fact, that Tamerlan had murdered his friend in furtherance of "jihad"—and respondent became radicalized shortly thereafter. *Id*. at 76a-78a. The evidence thus would have shown that respondent's radicalization reflected Tamerlan's influence. It also showed Tamerlan's ability to induce others to participate in horrific violence: "if Tamerlan could influence" Todashev, an adult, "Tamerlan's influence over [respondent] (his younger brother with no prior history of violence) could be even stronger." *Id*. at 76a-77a. In sum, the Waltham evidence "would have helped the defense show that Tamerlan inspired his younger brother not only to believe in jihad but also to act on those beliefs." *Id*. at 79a.

The government contends (Pet. 28) that the Waltham evidence lacks "significant probative value" because it involved a "separate crime" with a "separate accomplice." But the two mitigating factors relating to influence did not require identity between the Waltham murders and the bombings. Rather, they invited the jury to consider Tamerlan's aggressiveness and influence over others—and how those characteristics shaped his relationship with his younger brother. Pet. App. 71a. That is why the district court admitted other, weaker, evidence of Tamerlan's unrelated ag-

gressive conduct: because it was probative of Tamerlan's ability to influence respondent. The Waltham evidence is probative for the same reason.

The Waltham evidence was also probative of a third mitigating factor—the brothers' relative roles in the bombing. As the government acknowledged below, evidence of a co-conspirator's prior violent conduct can bear on a co-conspirator's relative culpability. Gov't C.A. Br. 198, 205 n.46, 207 (citing cases). Tamerlan took the "lead role in the Waltham killings." Pet. App. 75a-76a. And the Waltham murders shared several salient characteristics with the bombing: in both, Tamerlan committed the offense "with help from someone who gave no prior sign of a willingness to commit such acts," and "used his interpretations of Islam to justify his actions." *Id*. 80a. Tamerlan's lead role in Waltham therefore made it "reasonably more likely that he played a greater role" in the bombings. *Id*. at 75a-76a. The government counters (Pet. 29) that the offenses varied, and that respondent willingly participated in the bombings. But as the First Circuit correctly held, those points go to weight, not admissibility. *Id*. at 79a.

c. Because the Waltham evidence was highly probative, the only conceivable basis for excluding it was that, as the district court held and the government now argues (Pet. 27-28), the evidence would have required a "minitrial." But one solution to that concern —which the district court did not consider—would have been to permit the defense to present evidence of Tamerlan's murders through the search warrant affidavit, which was signed by an FBI agent.[5] The affidavit would have cabined the scope of the presentation,

[5] Another solution would have been to present the evidence through a law-enforcement witness.

as the government could not have contested its own agent's sworn statements. Pet. App. 80a-82a. The district court's "minitrial" concern was based on incomplete information and therefore should be disregarded.

Moreover, the district court's erroneous conclusion that the Waltham evidence lacked "any" probative value prevented it from properly weighing the evidence's probative value against the court's (ill-founded) concerns about the scope of presentation. For that reason as well, the district court's balancing of interests is not entitled to deference.

### C. The First Circuit correctly held that the government failed to prove that the error was harmless beyond a reasonable doubt.

The government's contention that the exclusion of the Waltham evidence was harmless beyond a reasonable doubt is equally fact-bound—and equally meritless. The First Circuit correctly concluded that the evidence might have convinced at least one juror to vote against death, Pet. App. 84a, and that the government failed to demonstrate otherwise to a "near certitude." *Victor* v. *Nebraska*, 511 U.S. 1, 15 (1994).

1. This Court has never held the exclusion of relevant mitigating evidence to be harmless beyond a reasonable doubt, including in cases involving evidence of the participants' relative culpability in the offense. See, *e.g., Skipper* v. *South Carolina,* 476 U.S. 1, 8 (1986); *Green* v. *Georgia*, 442 U.S. 95, 97 (1979); *Lockett* v. *Ohio*, 438 U.S. 586, 608-609 (1978). That no doubt reflects the Court's recognition of the importance of permitting jurors to consider any evidence that could lead to a sentence other than death—as well as the difficulty of "confidently conclud[ing]" that particular evidence would not have affected at least one juror's consideration. *Skipper*, 476 U.S. at 8.

2. Even on the existing record (putting aside the additional mitigating evidence that respondent could have developed absent the *Brady* violation, see p. 16, *supra*), the government cannot demonstrate harmlessness beyond a reasonable doubt. The government's primary argument (Pet. 30) is that the jurors would have voted for death anyway because they heard evidence that respondent was a willing participant who believed that the bombings were justified. But that assumes the conclusion. The defense's mitigation theory was that respondent's conduct had to be viewed in light of Tamerlan's influence. The jurors could not properly evaluate respondent's conduct without considering Tamerlan's commission of murder with an accomplice, and respondent's knowledge thereof.

Indeed, the jury was receptive to the argument that Tamerlan influenced respondent. Even with the limited evidence admitted on Tamerlan's behavior, the jurors rejected a death sentence for all counts based on acts for which Tamerlan was present—including the conspiracy counts (which, by definition, focused on the brothers' joint responsibility for the bombings), and counts based on the shooting of Officer Collier. Pet. App. 83a. And three jurors found all mitigating factors regarding Tamerlan's violence, radicalization, and domination proven. Supp. App., *infra*, at 30a.

In view of the jury's acceptance of the far weaker admitted evidence of influence, the government cannot show to a "near certitude" that the more powerful Waltham evidence would have made no difference. Jurors who already believed that respondent was susceptible to Tamerlan's influence (as these jurors evidently did), and who knew that Tamerlan "was predisposed to religiously-inspired brutality," Pet. App. 78a, could well have viewed the aggravating evidence on which the government now relies (Pet. 31)—respondent's own

radicalization and his return to Boston after the bombing—as products of Tamerlan's violent influence. Certainly it is impossible to conclude beyond a reasonable doubt that no juror would have so believed.

Likewise, exclusion of the Waltham evidence distorted the penalty phase by permitting the government to argue, without real rejoinder, that respondent and Tamerlan were equally culpable. The government capitalized on the defense's inability to present evidence of Tamerlan's prior killings, arguing that Tamerlan was merely "bossy," and that the defense had not shown that there was "anything about Tamerlan" that could explain respondent's participation. Pet. App. 71a, 75a. In the absence of such evidence, the government argued, the brothers should be viewed as equally culpable. *Ibid*.

The Waltham evidence was precisely the evidence that the government repeatedly argued was lacking. Had the jurors known about the murders, the government could not have argued that Tamerlan was merely an ordinary, if bossy, older brother. And by pointing to Tamerlan's predisposition to commit violence in furtherance of jihad, the defense could have "more forcefully rebutted the government's claim that the brothers had a partnership of equals." Pet. App. 78a-79a. Again, the jury—without knowing that before the bombing, Tamerlan was a triple murderer who had enlisted a friend as an accomplice, *id*. at 76a—concluded that respondent should not receive the death penalty for any act for which Tamerlan was present. The government therefore cannot satisfy its heavy burden of demonstrating that the Waltham evidence would not have convinced one juror that respondent should receive a sentence less than death on the other counts.

## III. The First Circuit's application of its long-established voir dire rule does not merit review.

The First Circuit vacated respondent's death sentence on another independent ground: that the district court violated the supervisory rule established in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), by refusing to ask prospective jurors about the content of the publicity to which they had been exposed. Under that rule, if a trial judge, in her discretion and based on her local vantage point, finds a "significant possibility" that prospective jurors "have been exposed to potentially prejudicial material," then she must ask those jurors what they have heard about the case. *Id*. at 318; Pet. App. 50a-51a.

The First Circuit's holding does not warrant review. The decision does not conflict with that of any other court, and it will have little practical effect. The *Patriarca* rule easily satisfies the deferential standard under which this Court reviews the supervisory rules of the lower courts. And content-specific questioning was critical in the extraordinary circumstances of this case, especially because certain seated jurors' assurances of impartiality proved unreliable.

### A. The decision below does not warrant review.

1. The government identifies no circuit conflict on the question whether a federal court of appeals may exercise its supervisory power to require content-specific voir dire questions in cases attended by extraordinary pretrial publicity. The two decisions that the government asserts in passing "diverge[]" from the decision below (Pet. 31-32) held that voir dire inquiries about bias involving police were not constitutionally required; neither addressed supervisory authority.

*United States* v. *Lawes*, 292 F.3d 123, 126 (2d Cir. 2002); *id*. at 132 (Pooler, J., concurring in part and dissenting in part); *United States* v. *Lancaster*, 96 F.3d 734, 736, 741 (4th Cir. 1996) (*en banc*).

By contrast, the only circuit court to have addressed whether to retain a supervisory rule requiring content-specific questioning after *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991), reached the same conclusion as the court below. See *United States* v. *Beckner*, 69 F.3d 1290, 1291-1293 & n.1 (5th Cir. 1995) (reversing conviction). And even if there were disagreement among the circuits, the government correctly concedes (Pet. 32) that "some variation among circuits' supervisory rules is permissible." See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). This Court therefore "do[es] not often review the circuit courts' procedural rules." *Joseph* v. *United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., joined by Ginsburg & Breyer, JJ., respecting denial of certiorari).

2. The decision below also has little practical effect. Contrary to the government's suggestion (Pet. 31) that the decision has implications for high-profile trials generally, the decision applies only to the small number of federal criminal cases that go to trial in the First Circuit, and then only to the subset of those trials where the judge finds "a significant possibility" of exposure to potentially prejudicial publicity. Pet. App. 50a (quoting *Patriarca*, 402 F.2d at 318). In that small subset, trial judges within the First Circuit have been following *Patriarca* for decades. *E.g.*, *United States* v. *Casellas-Toro*, 807 F.3d 380, 384 (1st Cir. 2015); *United States* v. *Quiles-Olivo*, 684 F.3d 177, 183 (1st Cir. 2012); *United States* v. *Angiulo*, 897 F.2d 1169, 1183 (1st Cir. 1990).

### B. The decision below falls well within the courts of appeals' broad leeway to apply supervisory rules.

1. This Court's "review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope." *Ortega-Rodriguez*, 507 U.S. at 244. Thus, although the government nowhere acknowledges the relevant standard, circuit supervisory rules pass muster so long as they do not "conflict[] with constitutional or statutory provisions," *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985), and "represent reasoned exercises of the courts' authority," *Ortega-Rodriguez*, 507 U.S. at 244. That deferential standard reflects the federal appellate courts' leeway to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). Indeed, "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *LaBuy* v. *Howes Leather Co*., 352 U.S. 249, 259-260 (1957). The circuits' supervisory power "rests on the firmest ground when used," as here, "to establish rules of judicial procedure." *Thomas*, 474 U.S. at 147 n.5.

2. *Patriarca*'s requirement of content-specific questioning in high-profile cases is a paradigmatic example of a permissible supervisory rule. The government does not contend that the rule violates the Constitution or federal law. And the government cannot argue that the rule is unreasoned. The government simply takes a different view of the rule's wisdom than the First Circuit. But that disagreement is no basis for overturning the rule. And in any event, the government's arguments lack merit.

a. The *Patriarca* rule is a sound exercise of supervisory power. Although this Court held in *Mu'Min*, 500 U.S. 415, that the Sixth Amendment does not require content-specific questions, the Court expressly acknowledged that federal courts "enjoy more latitude in setting standards for voir dire" under their "supervisory power." *Id*. at 424; *id*. at 447 n.6 (Marshall, J., dissenting) (noting, without contradiction, that *Mu'Min* neither overturned existing supervisory rules nor "prevent[ed] other Federal Circuits from following suit"). All nine Justices in *Mu'Min* agreed that content-specific questions could prove helpful. *Id*. at 425 (majority op.); *id.* at 433 (O'Connor, J., concurring); *id.* at 434 (Marshall, J., dissenting); *id.* at 451 (Kennedy, J., dissenting). *Mu'Min* itself therefore makes clear that a federal court may conclude that requiring content-specific questioning furthers salutary purposes in the mine-run of high-profile cases and is therefore "desirable from the viewpoint of sound judicial practice."[6] *Cupp*, 414 U.S. at 146.

*Patriarca* flows from bedrock principles. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950). But merely asking a venireperson whether she can be fair often will not suffice in cases that have attracted extensive and prejudicial publicity. When venirepersons have been inundated with reporting and opinion about the case before ever setting foot in the courtroom, they "'may have an interest in concealing [their] own

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[6] The many decisions directing such questioning, pre- and post-*Mu'Min*, prove the point. *E.g.*, *Beckner*, 69 F.3d at 1292 n.1; *State* v. *Pauline*, 60 P.3d 306, 318 (Haw. 2002); *Bolin* v. *State*, 736 So. 2d 1160, 1164-1166 (Fla. 1999); *People* v. *Tyburski*, 518 N.W.2d 441, 452 (Mich. 1994); see also 500 U.S. at 446-447 (Marshall, J., dissenting) (collecting cases).

bias'"—as Jurors 286 and 138 did here—"or 'may be unaware of it.'" Pet. App. 52a (quoting *Smith* v. *Phillips*, 455 U.S. 209, 221-222 (1982) (O'Connor, J., concurring)); see also *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961). "[T]he juror's assurances" of impartiality in such cases "cannot be dispositive of the accused's rights." *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). By ensuring that the assessment of impartiality is made by the judge, not the juror, *Patriarca* adopts a measured response to problems that this Court has long recognized.

The government is therefore wrong to argue (Pet. 26) that requiring content-specific questioning "does not reflect the critical inquiry"—that is, whether the jurors can be impartial. *Patriarca* focuses on that very inquiry: after learning what a juror has heard about a case, the trial judge must assess "the effect of such exposure" on the juror's ability to be impartial. 402 F.2d at 318. Content-specific questioning facilitates that inquiry by revealing what, and how much, a juror thinks she knows about a case before the evidence has come in, providing vital information about whether she may have biases that she is unaware of or does not want to admit.

b. This case vividly illustrates the soundness of the *Patriarca* rule. The pretrial publicity here "stands unrivaled in American legal history." Pet. App. 19a. The district court found *Patriarca*'s prerequisites met, observing that prospective jurors' exposure to prejudicial pretrial publicity was "the biggest issue in voir dire, obviously, because there are going to be a lot of people with preconceptions," Resp. C.A. Add. 307, and crediting respondent's "legitimate concerns" "about jurors who have fixed opinions * * * or who are vulnerable to improper influence from media coverage," Pet. App. 228a. No doubt for those reasons, the government at

first advocated content-specific questioning. See p. 5, *supra*.

Nonetheless, the district court refused to permit content questions, and when respondent objected, the court candidly admitted that its decision made the jurors "to a large extent" judges of their own impartiality. Pet. App. 26a-27a. But the unprecedented circumstances of this case demanded something other than acquiescence in the very problem *Patriarca* is designed to prevent. This case did not simply involve pervasive pretrial coverage; it included extensive coverage of "inaccurate or inadmissible information—like the details of [respondent's] un-*Miranda*-ized hospital interview and the opinions of public officials," as well as victims and family members, "that [respondent] should die." *Id*. at 53a. If a venireperson's primary recollection of the coverage was that officials and family members alike had called for the death penalty, that information would be central to assessing the venireperson's ability to be impartial.

Indeed, although the government defends the district court's voir dire at great length (Pet. 16-21), and touts the jurors' assurances that they could be impartial, there is every reason to doubt those assurances. The district court seated one prospective juror who dissembled about calling respondent a "piece of garbage" and sheltering in place, and another who hid a friend's suggestion to "play the part," "get on the jury," and send respondent "to jail where he will be taken care of." See pp. 6-7, *supra*; Pet. App. 61a. Both said they could be impartial—but neither told the truth when questioned on matters pertinent to their impartiality. That incident shows the difficulty of ensuring, in an extraordinarily high-profile case, that jurors do not have biases that they are unwilling to admit or preconceptions that they wrongly believe are irrelevant. The

First Circuit reasonably concluded that on the ultimate question of impartiality, the jurors' say-so did not suffice.[7]

3. The government next argues that *Patriarca* is inconsistent with the district judge's discretion over voir dire. Not so. Not only did *Mu'Min* acknowledge federal courts' supervisory powers to require content-specific questioning, but the Court has also used its own supervisory powers to regulate discrete aspects of voir dire by compelling specific inquiries about racial prejudice in certain circumstances. *E.g.*, *Aldridge* v. *United States*, 283 U.S. 308, 315 (1931); *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981) (plurality op.); see also *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976). Indeed, the Court has reversed convictions and death sentences for violation of that supervisory rule. See, *e.g.*, *Aldridge*, 283 U.S. at 315. The Court thus has never understood the trial judge's discretion over voir dire to preclude limited, reasonable supervisory rules.

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[7] The government wrenches from context (Pet. 25) language in *United States* v. *Hasting* to argue that the First Circuit should not have relied on its supervisory rule to vacate the death sentences "in this terrorism case," in light of victim interests and the burden of a retrial. 461 U.S. 499, 507 (1983). But in *Hasting*, the Seventh Circuit had invoked supervisory authority to refuse to review a (concededly inconsequential) constitutional error for harmlessness, instead reversing the conviction "to discipline the prosecutor." *Id.* at 504. This Court held that the Seventh Circuit had disregarded the interests protected by harmless-error review—those on which the government relies here. *Id*. at 507. The Court did not suggest that a non-harmless violation of a supervisory rule would not warrant vacatur. Here, the First Circuit properly reviewed the error for harmlessness. Pet. App. 60a; 18 U.S.C. 3595(c)(2)(C).

The government's contrary argument relies primarily on the Court's discussion of trial-judge discretion over voir dire in *Skilling* v. *United States*, 561 U.S. 358 (2010). But *Skilling*, stated only that voir dire there passed *constitutional* muster. See *id*. at 395; see also *id.* at 378 n.11. *Skilling* therefore does not suggest that an appellate court may never use supervisory authority to mandate particular voir dire questions. And far from "affirmatively repudiat[ing]" such rules (Pet. 25), *Skilling* cited decisions in which this Court mandated particular questioning. 561 U.S. at 386 (citing *Rosales-Lopez*). *Skilling* must be read against the backdrop of those decisions.

The government also argues that the First Circuit erred because it required "*more* extensive procedures" than were approved in *Skilling*. Pet. 20 (emphasis added). Not so. The *Skilling* trial judge *asked content-specific questions* "about exposure to Enron-related news and the content of any stories that stood out in the prospective juror's mind." 561 U.S. at 374; accord Pet. App. 31a n.19 (content-specific questions proposed in this case "paraphrase[d]" those posed in *Skilling*). And this Court relied on the jurors' answers to those questions in concluding that the seated jurors were not biased. *Skilling*, 561 U.S. at 390 & n.26. *Skilling* thus illustrates the value of content questioning in evaluating jurors' preconceptions in high-profile cases—making plain just how inadequate the district court's approach in this case was.

Moreover, the government is wrong to characterize (Pet. 14-15) *Patriarca* as establishing an "inflexible" rule that "denies district courts * * * broad discretion to manage juries." A district judge must exercise discretion to trigger the rule: *Patriarca* applies only "'in cases where there is, *in the opinion of the [judge]*, a significant possibility that jurors have been exposed to

potentially prejudicial material.'" Pet. App. 50a (quoting *Patriarca*, 402 F.2d at 318) (emphasis added). That is, *Patriarca* does place "primary reliance" on the trial court's judgment and "local knowledge" (Pet. 16). Here, the district court found the necessary conditions present. Resp. C.A. Add. 307. *Patriarca* also leaves district judges discretion as to the form and number of questions, and the extent to which follow-up questions are appropriate.[8] See *United States* v. *Medina*, 761 F.2d 12, 20 (1st Cir. 1985) (approving voir dire under *Patriarca* where court "probed further" only for some jurors).

4. Finally, the government criticizes (Pet. 14) the First Circuit's invocation of *Patriarca* as "unexpected." That objection lacks merit.

The First Circuit has long understood *Patriarca* to state "the standards of this circuit." *Medina*, 761 F.2d at 20; see Pet. App. 55a. The First Circuit has consistently reviewed voir dire against *Patriarca*'s standards. Pet. App. 52a-53a (discussing *Medina*, 761 F.2d at 20; *United States* v. *Vest*, 842 F.2d 1319, 1332 (1st Cir. 1988); and *United States* v. *Orlando-Figueroa*, 229 F.3d 33, 43 (1st Cir. 2000)). And the court had applied the principle underlying *Patriarca*—that "a judge cannot delegate to potential jurors the work of judging their own impartiality," Pet. App. 60a—to reverse convictions for inadequate investigation of jurors' exposure to prejudicial publicity. *E.g.*, *United States* v. *Rhodes*, 556 F.2d 599, 601 (1st Cir. 1977).

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[8] For that reason, the government's contention that content-specific questioning is unduly burdensome lacks merit. The court need only ask one question about what the juror remembers, subject to discretionary follow-up. The *Skilling* court asked such questions of dozens of prospective jurors and quickly completed voir dire. 561 U.S. at 374.

The government objects (Pet. 12) that the First Circuit "had never before described" *Patriarca* as supervisory. But it is hardly unusual for a court to clarify that an existing rule rests on supervisory grounds; this Court has done the same. See *Ristaino*, 424 U.S. at 598 n.10. The First Circuit has unquestionably followed *Patriarca*, however labeled, since it issued.[9]

Finally, the government relies heavily on the observation of an earlier First Circuit panel, while considering a mid-voir dire mandamus petition seeking a change of venue, that the voir dire was "'thorough and appropriately calibrated to expose bias, ignorance, and prevarication.'" Pet. 8 (quoting Pet. App. 250a). But no question concerning the adequacy of voir dire was before that panel, which held only that respondent had not satisfied the mandamus standard. Pet. App. 230a. Moreover, the mandamus panel did not know that the voir dire had failed to uncover the "bias" and "prevarication" of Jurors 286 and 138. That panel's characterization therefore cannot be treated as dispositive.

[9] Even if that were not the case, a new supervisory rule would apply "to the case in which the determination was made." *Castro* v. *United States*, 540 U.S. 375, 383 (2003).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER 17, 2020

# APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
*Defendant*.

Filed November 25, 2014

**OPINION AND ORDER**

O'TOOLE, D.J.

The defendant's Motion to Compel Discovery (dkt. no. 602) is DENIED.

*Documents from the Russian Government*: The defendant's request for unredacted copies of documents furnished by the Russian government after the Marathon bombings is denied at this time. If the defendant's ability to use disclosed information at trial is hampered by the redactions, the matter can be revisited. In addition, the defendant's request for complete copies of pages with text which appears to have been cut off inadvertently is moot in light of the government's representations that it will try to obtain a copy of the materials with the text restored and will produce the material if successful.

*Pre-2013 Communication from the Russian Government:* The government represents that it has disclosed the substance of the communication. It does not appear that the production of a copy of the

communication would furnish additional information that would be helpful or material to the defense. The defendant's request for a copy of the communication itself, which the government describes as consisting of an unidentified Russian analyst's opinion about the significance of the underlying information, is therefore denied.

*Transcripts/Translations of the Defendant's BOP Calls:* In light of the government's agreement to produce any transcripts in its possession, the defendant's request is moot.

*Reports of Computer Forensic Examinations:* The government has represented that there are no other reports of examination similar to the analysis of the defendant's computer referred to in the defendant's motion. (Mot. to Compel Ex. E (dkt. no. 602-5) (under seal).) In light of the representation, the defendant's request is moot.

*List of Digital Devices:* The defendant's request for the "government's list identifying which among [the digital] devices it actually intends to use at trial," (Mot. to Compel) (dkt. no. 602), is denied in light of the scheduling order establishing a deadline for production of the government's exhibit list.

*Russian Communications Regarding Defense Team Travel Issues:* The defendant's request is denied.

*OIG Report:* The defendant's request is denied.

*FBI Todashev Materials:* The defendant seeks production of certain FBI materials related to Ibragim Todashev's statements about Tamerlan Tsarnaev's participation in the murder of three men in Waltham in 2011. With respect to this issue, the government had submitted to me for in camera review FBI 302 reports of interviews of Todashev, as well as a video

and audio recording of an additional interview. Only one of these materials, an FBI 302 report dated June 7, 2013, is pertinent to the request. The government objects to the request.

The government represents that a state law enforcement investigation of the Waltham murders is ongoing and for that reason invokes the limited investigatory privilege. *See Comm. of Puerto Rico v. United States*, 490 F.3d 50, 62-64 (1st Cir. 2007). It also asserts that it has already conveyed the fact and general substance of Todashev's statements concerning the murders, and principles governing discovery in criminal cases do not require more.

After careful consideration, I agree with the government as to both points. As to the first, disclosure of the report risks revealing facts seemingly innocuous on their face, such as times of day or sequences of events, revelation of which would have a real potential to interfere with the ongoing state investigation. As to the second, I fully understand the mitigation theory the defense thinks the requested discovery may advance. After review, it is my judgment that, contrary to the defense speculation, the report does not materially advance that theory beyond what is already available to the defense from discovery and other sources. It would be a different matter if Todashev were available as a potential witness. Without that possibility, the utility of the report to the defense in building a mitigation case is very low at best. I conclude that the report is not material and helpful in the necessary sense.

The defendant's motion regarding this topic is denied.

*Search Warrant Return for Zubeidat Tsarnaeva's Emails:* The requested materials do not appear to fall

within the scope of Local Rule 116.1(c)(1)(B).[1] The defendant's request is therefore denied.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

[1] Implicit in this ruling is my understanding that the government represents that the search warrant also did not lead to the discovery of evidence that the government intends to use in its case-in-chief. See L.R. 116.1(c)(1)(B)(i).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
*Defendant*.

Filed April 17, 2014

**ORDER**

O'TOOLE, D.J.

The defendant's discovery motions (dkt. nos. 233, 235) are DENIED with the exception that reports of Ibragim Todashev's statements to the FBI are to be submitted to the Court for *in camera* review in a way that indicates: (a) what will be produced to the defendant, and (b) what the government seeks to withhold from production.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
a/k/a "Jahar Tsarni,"
*Defendant*.

BEFORE THE HONORABLE
GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

**SEALED LOBBY CONFERENCE**[*]

* * *

**[3]** PROCEEDINGS

THE CLERK: All rise.

(The Court enters the courtroom at 12:08 p.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a lobby conference in the case of United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record.

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[*] This transcript was unsealed during the appellate proceedings, and publicly filed in the respondent's addendum in the court of appeals.

MR. WEINREB: Good afternoon, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Good afternoon, your Honor. Nadine Pellegrini.

MR. BRUCK: Good afternoon, your Honor. David Bruck, Judy Clarke and Tim Watkins for the defendant.

THE COURT: Okay. Let me begin by resolving some of the issues that were discussed the last occasion. The government's motion in limine to preclude reference to the Waltham triple homicide or other alleged bad acts is granted as to the Waltham events. The reason is that there simply is insufficient evidence to describe what participation Tamerlan may have had in those events. I know that the defense has a theory about what those things were, but I don't believe there's any evidence that would permit a neutral finder of fact **[4]** to conclude that from the evidence.

From my review of the evidence, which includes an in camera review of some Todashev 302s, it is as plausible, which is not very, that Todashev was the bad guy and Tamerlan was the minor actor. There's just no way of telling who played what role, if they played roles. So it simply would be confusing to the jury and a waste of time, I think, without very -- without any probative value.

As to other bad acts, it will depend. I mean, I see on the witness list witnesses who might be able to testify to behavior of Tamerlan that would be relevant to the defense theory of domination. So I'm not going

to, as a blanket matter, exclude all bad acts. We'll deal with those issues as they arise.

With respect to the government's motion to preclude reference to plea negotiations, to the extent the government presses its non-statutory aggravating factor of absence of remorse, I think it's fair that the defendant could respond by showing an offer to plead guilty, but it would then be open to the government to explain the conditions that were attached, including with respect to the sentence and the refusal to participate in a proffer. If that goes forward, let me just suggest that the best way to handle that, if the parties wanted to, would be by stipulation, perhaps.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
a/k/a "Jahar Tsarni,"
*Defendant*.

[Filed May 15, 2015]

**PENALTY PHASE**
**VERDICT**

## SECTION I. AGE OF DEFENDANT

**General directions for Section I:**

- As used in this section, the term "capital counts" refers to:

  Count One (1): Conspiracy to use a weapon of mass destruction resulting in death of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard

  Count Two (2): Use of a weapon of mass destruction (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Three (3): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as in Count Two of this section, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Four (4): Use of a weapon of mass destruction (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

  Count Five (5): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as in Count Four of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

  Count Six (6): Conspiracy to bomb a place of public use, resulting in deaths of Krystle Marie Campbell,

Officer Sean Collier, Lingzi Lu, and Martin Richard

Count Seven (7): Bombing of a place of public use (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street, Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Eight (8): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, the bombing of a place of public use as in Count Seven of this section, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Nine (9): Bombing of a place of public use (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street, Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Ten (10): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, the bombing of a place of public use as in Count Nine of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Twelve (12): Malicious destruction of property by means of an explosive (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Thirteen (13): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, the malicious destruction of property as in Count Twelve of this

section, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Fourteen (14): Malicious destruction of property by means of an explosive (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Fifteen (15): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, malicious destruction of property as in Count Fourteen of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Sixteen (16): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to use a weapon of mass destruction as in Count One of this section, and aiding and abetting, resulting in death of Officer Sean Collier

Count Seventeen (17): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to bomb a place of public use as in Count Six of this section, and aiding and abetting, resulting in death of Officer Sean Collier

Count Eighteen (18): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to maliciously destroy property, and aiding and abetting, resulting in death of Officer Sean Collier

- In this section, please indicate whether you unanimously find the government has established beyond a reasonable doubt that the defendant, Dzhokhar Tsarnaev, was eighteen (18) years of age or older at the time of the offense charged under the particular capital count. You must mark one of the responses.

**1. Dzhokhar Tsarnaev was eighteen (18) years of age or older at the time of the offense charged under the particular capital count.**

__✓__ We unanimously find that this has been proved beyond a reasonable doubt with regard to <u>all</u> of the capital counts.

_____ We do not unanimously find that this has been proved beyond a reasonable doubt with regard to <u>any</u> of the capital counts.

_____ We unanimously find that this has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**<u>Directions:</u>**

- For each capital count, if you do not unanimously find the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the offense charged under the particular capital count, then your deliberations are over as to that count.
- If there is no capital count for which you unanimously find the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the

offense, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.

- If you have found the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the offense charged with regard to one or more capital counts, continue on to Section II.

## SECTION II. GATEWAY FACTORS

**General directions for Section II:**

- As used in this section, the term "capital count(s)" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged under the particular count in Section I. Do not consider gateway factors in this section with regard to any counts for which you have not found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I.
- In this section, please indicate which, if any, of the following gateway factors you unanimously find the government has proven beyond a reasonable doubt. For each of the four gateway factors listed below, you must mark one of the responses.

**1. Dzhokhar Tsarnaev intentionally killed the victim or victims of the particular capital count you are considering.**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number*.

*1, 4, 5, 6, 9, 10, 14, 15*

**2. Dzhokhar Tsarnaev intentionally inflicted serious bodily injury that resulted in the death of the victim or victims of the particular capital count you are considering.**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard ro the following capital counts. *Identify each count by count number.*

<u>1, 4, 5, 6, 9, 10, 14, 15</u>

**3. Dzhokhar Tsarnaev intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and. the victim or victims of the particular capital count you are considering died as a direct result of the act.**

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**4. Dzhokhar Tsarnaev intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim or victims of the particular capital count you are considering died as a direct result of the act.**

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**<u>Directions:</u>**

- For each capital count you are considering in this section, if you do not unanimously find the government has proven beyond a reasonable doubt

at least one of the above gateway factors with respect to that count, then your deliberations are over as to that count.

- If there is no capital count for which you unanimously find a gateway factor has been proved beyond a reasonable doubt, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.
- If you have found at least one gateway factor with regard to one or more capital counts, continue on to Section III.

## SECTION III. STATUTORY AGGRAVATING FACTORS

**General directions for Section III:**

- As used in this section, the term "capital count(s)" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I and at least one gateway factor in Section II. Do not consider statutory aggravating factors in this section with regard to any counts for which you have not found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I and at least one gateway factor in Section II.
- In this section, please indicate which, if any, of the following six (6) statutory aggravating factors you unanimously find the government has proven beyond a reasonable doubt. For each of the six statutory aggravating factors listed below, you must mark one of the responses.

**1. The death, and injury resulting in death, occurred during the commission and attempted commission of, and during the immediate flight from the commission of, an offense under:**

**a. 18 U.S.C. § 2332a (use of a weapon of mass destruction) [Applies to all capital counts]; and/or**

**b. 18 U.S.C. § 844(i) (destruction of property affecting interstate commerce by explosives) [Only applies to capital counts 1-10 and 12-15.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**2. Dzhokhar Tsarnaev knowingly created a grave risk of death to one or more persons in addition to the victim of the offense in the commission of the offense and in escaping apprehension for the violation of the offense. [Applies to all capital counts.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

*<u>1, 4, 5, 6, 9, 10, 14, 15, 16, 17, 18</u>*

_____

**3. Dzhokhar Tsarnaev committed the offense in an especially heinous, cruel and depraved manner in that it involved serious physical abuse to the victim. [Only applies to capital counts 1-10 and 12-15.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

*1, 4, 5, 6, 9, 10, 14, 15*

**4. Dzhokhar Tsarnaev committed the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism. [Only applies to capital counts 1-10 and 12-15.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only

with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**5. Dzhokhar Tsarnaev intentionally killed and attempted to kill more than one person in a single criminal episode. [Only applies to capital counts 1-10 and 12-15.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**6. Dzhokhar Tsarnaev is responsible for the death of a victim, Martin Richard, who was particularly vulnerable due to youth. [Only applies to capital counts 1, 4, 5, 6, 9,10,14, and 15.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt

with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**<u>Directions:</u>**

- For each capital count you are considering in this section, if you do not unanimously find the government has proven beyond a reasonable doubt at least one of the above statutory aggravating factors with respect to that count, then your deliberations are over as to that capital count.
- If there is no capital count for which you unanimously find at least one statutory aggravating factor has been proved beyond a reasonable doubt, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.

  If you have found one or more statutory aggravating factors with regard to one or more capital counts, continue on to Section IV.

## SECTION IV. NON-STATUTORY AGGRAVATING FACTORS

**General directions for Section IV:**

- As used in this section, the term "capital count(s)" refers only to those counts for which you have found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III. Do not consider non-statutory aggravating factors in this section with regard to the counts for which you have not found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- In this section, please indicate which, if any, of the following six (6) non-statutory aggravating factors you unanimously find the government has proven beyond a reasonable doubt. For each of the proposed factors, you must mark one of the responses provided.

**1. In conjunction with committing acts of violence and terrorism, Dzhokhar Tsarnaev made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States. [Applies to all capital counts.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

__✓__ We do not unanimously find that this factor has been proved beyond a reasonable doubt

with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**2. Dzhokhar Tsarnaev caused injury, harm and loss to:**

**a. Krystle Marie Campbell and her family and friends [Only applies to capital counts 1, 2, 3, 6, 7, 8, 12, and 13];**

**b. Martin Richard and his family and friends [Only applies to capital counts 1, 4, 5, 6, 9, 10, 14, and 15];**

**c. Lingzi Lu and her family and friends [Only applies to capital counts 1, 4, 5, 6, 9, 10, 14, and 15]; and/or**

**d. Officer Sean Collier and his family and friends [Only applies to capital counts 1, 6, 16, 17, and 18].**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only

with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**3. Dzhokhar Tsarnaev targeted the Boston Marathon, an iconic event that draws large crowds of men, women and children to its final stretch, making it especially susceptible to the act and effects of terrorism. [Only applies to capital counts 1-10 and 12-15.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**4. Dzhokhar Tsarnaev demonstrated a lack of remorse. [Applies to all capital counts.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**5. Dzhokhar Tsarnaev murdered Officer Sean Collier, a law enforcement officer who was engaged in the performance of his official duties at the time of his death. [Only applies to capital counts 1, 6, 16, 17, and 18.]**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**6. Dzhokhar Tsarnaev participated in additional uncharged crimes of violence, including assault with a dangerous weapon, assault with intent to maim, mayhem, and attempted murder:**

**a. On April 15, 2013, in Boston, Massachusetts [Only applies to capital counts 1-10 and 12-15]; and/or**

**b. On or about April 19, 2013, in Watertown, Massachusetts [Applies to all capital counts].**

__✓__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

**<u>Directions:</u>**

- After you have completed your findings in this section (whether or not you have found any of the above non-statutory aggravating factors to have been proved), continue on to Section V.

## SECTION V. MITIGATING FACTORS

**General directions for Section V:**

- As used in this section, the term "capital count(s)" refers only to those counts for which you have found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- As to the alleged mitigating factors listed below, please indicate which, if any, you find Dzhokhar Tsarnaev has proven by a preponderance of the evidence.
- Recall that your vote as a jury need not be unanimous with regard to each question in this section. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established in making his or her individual determination of whether or not a sentence of death shall be imposed, regardless of the number of other jurors who agree that the factor has been established.
- In the space provided, please indicate the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence with regard to each of the capital counts.

1. **Dzhokhar Tsarnaev was 19 years old at the time of the offenses.**

Number of jurors who so find: 12

2. **Dzhokhar Tsarnaev had no prior history of violent behavior.**

Number of jurors who so find: 11

3. **Dzhokhar Tsarnaev acted under the influence of his older brother.**

Number of jurors who so find: 3

4. **Whether because of Tamerlan's age, size, aggressiveness, domineering personality, privileged status in the family, traditional authority as the eldest brother, or other reasons, Dzhokhar Tsarnaev was particularly susceptible to his older brother's influence.**

Number of jurors who so find: 3

5. **Dzhokhar Tsarnaev's brother Tamerlan planned, led, and directed the Marathon bombing.**

Number of jurors who so find: 3

6. **Dzhokhar Tsarnaev's brother Tamerlan was the person who shot and killed Officer Sean Collier.**

Number of jurors who so find: 2

7. **Dzhokhar Tsarnaev would not have committed the crimes but for his older brother Tamerlan.**

Number of jurors who so find: 3

8. **Dzhokhar Tsarnaev's teachers in elementary school, middle school, and high school knew him to be hardworking, respectful, kind, and considerate.**

Number of jurors who so find: 12

**9. Dzhokhar Tsarnaev's friends in high school and college knew him to be thoughtful, caring, and respectful of the rights and feelings of others.**

Number of jurors who so find: 11

**10. Dzhokhar Tsarnaev's teachers and friends still care for him.**

Number of jurors who so find: 3

**11. Dzhokhar Tsarnaev's aunts and cousins love and care for him.**

Number of jurors who so find: 12

**12. Mental illness and brain damage disabled Dzhokhar Tsarnaev's father.**

Number of jurors who so find: 12

**13. Dzhokhar Tsarnaev was deprived of needed stability and guidance during his adolescence by his father's mental illness and brain damage.**

Number of jurors who so find: 2

**14. Dzhokhar Tsarnaev's father's illness and disability made Tamerlan the dominant male figure in Dzhokhar's life.**

Number of jurors who so find: 2

**15. Dzhokhar Tsarnaev was deprived of the stability and guidance he needed during his adolescence due to his mother's emotional volatility and religious extremism.**

Number of jurors who so find: 1

**16. Dzhokhar Tsarnaev's mother facilitated his brother Tamerlan's radicalization.**

Number of jurors who so find: 10

17. **Tamerlan Tsarnaev became radicalized first, and then encouraged his younger brother to follow him.**

Number of jurors who so find: 5

18. **Dzhokhar Tsarnaev's parents' return to Russia in 2012 made Tamerlan the dominant adult in Dzhokhar's life.**

Number of jurors who so find: 2

19. **Dzhokhar Tsarnaev is highly unlikely to commit, incite, or facilitate any acts of violence in the future while serving a life-without-release sentence in federal custody.**

Number of jurors who so find: 1

20. **The government has the power to severely restrict Dzhokhar Tsarnaev's communications with the outside world.**

Number of jurors who so find: 2

21. **Dzhokhar Tsarnaev has expressed sorrow and remorse for what he did and for the suffering he caused.**

Number of jurors who so find: 2

**General directions for Section V, continued:**

- The law does not limit your consideration of mitigating factors to those that can be articulated in advance. Therefore, you may consider during your deliberations any other factor or factors in Dzhokhar Tsarnaev's background, record, character, or any other circumstances of the offense that mitigate against imposition of a death sentence.

- The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors.
- If more space is needed, write "CONTINUED" and use the reverse side of this page.

**22**. _____
_____

Number of jurors who so find: _____

**23**. _____
_____

Number of jurors who so find: _____

**24**. _____
_____

Number of jurors who so find: _____

**25**. _____
_____

Number of jurors who so find: _____

**26**. _____
_____

Number of jurors who so find: _____

**27**. _____
_____

Number of jurors who so find: _____

**28**. _____
_____

Number of jurors who so find: _____

**29**. _____
_____

Number of jurors who so find: _____

**30**. _____

_____

Number of jurors who so find: _____

**31**. _____

_____

Number of jurors who so find: _____

**Directions**:

- After you have completed your findings in this section (whether or not you have found any mitigating factors in this section), continue on to Section VI.

## SECTION VI. DETERMINATION OF SENTENCE

**General directions for Section VI:**

- As used in this section, the term "capital counts" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged in the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III. You may not impose a sentence of death on a particular capital count unless you have first found with regard to that count, unanimously and beyond a reasonable doubt, the defendant was eighteen years of age or older at the time of the offense charged in the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- In this section, enter your determination of Dzhokhar Tsarnaev's sentence with regard to each of the capital counts.

**Based upon consideration of whether the aggravating factor or factors found to exist for each count sufficiently outweigh the mitigating factor or factors found to exist for that count to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death:**

_____ **We, the jury, unanimously find, for all the capital counts, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of any mitigating factors, that the aggravating factor or factors are**

**alone sufficient—so that death is the appropriate sentence for Dzhokhar Tsarnaev. We vote unanimously that Dzhokhar Tsarnaev shall be sentenced to death separately as to each count.**

_____ **We, the jury, unanimously find that a sentence of life in prison without the possibility of release is the appropriate sentence for Dzhokhar Tsarnaev for all of the capital counts. We vote unanimously that Dzhokhar Tsarnaev shall be sentenced to life imprisonment without the possibility of release separately as to each count.**

__X__ **We, the jury, unanimously find, for <u>some</u> of the capital counts, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of any mitigating factors, that the aggravating factor or factors are themselves sufficient—so that death is the appropriate sentence for Dzhokhar Tsarnaev with regard to each of the following capital counts only (identify each count by count number):**

*4, 5, 9, 10, 14, 15*

**With regard to the above listed capital counts, we vote unanimously that Dzhokhar Tsarnaev shall be sentenced to death as to each count.**

_____ **Based upon our consideration of the evidence and in accordance with the Court's instructions, after making all reasonable efforts, we, the jury, are unable to reach a unanimous verdict in favor of a life sentence or in favor of a death sentence, for any of the capital counts.**

**Directions:**

- After you have completed your sentence determination in this section (regardless of what the determination was), continue on to Section VII.

**SECTION VII. CERTIFICATION REGARDING DETERMINATION OF SENTENCE**

Each juror must sign his or her name and juror number below, indicating that the above sentence determinations accurately reflect the jury's decisions:

[REDACTED]

Date: 5/15/15

**Directions:**

- After you have completed this section, continue on to Section VIII.

**SECTION VIII. CERTIFICATION**

By signing your name below, each of you individually certifies that consideration of the race, color, religious beliefs, national origin, or the sex of Dzhokhar Tsarnaev or the victims was not involved in reaching your individual decision. Each of you further certifies that you, as an individual, would have made the same recommendation regarding a sentence for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or the sex of Dzhokhar Tsarnaev, or the victims.

[REDACTED]

Date: 5/15/15