No. 20-443

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

DZHOKHAR TSARNAEV,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF JAMES FETZER, PH. D., MARY MAXWELL, PH. D., LL. B., AND CESAR BARUJA, M. D., IN SUPPORT OF THE RESPONDENT

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The undersigned has retired from the Minnesota Bar (#3664X) after more than fifty years of practice, including service as a public defender, law professor, and chief public prosecutor. He was admitted to the Bar of this Court on August 5, 1971 (#83902), and his retirement from the Minnesota Bar in good standing was accepted by the Minnesota Office of Lawyer Registration, effective April 1, 2020, expressly subject to his reservation of rights to practice before this Court under *Theard v. United States*, 354 U. S. 278 at 281 (1957), in exercise of which he appears in this cause. He appears for and at the request of three citizens of the United States. He does not propose to argue orally. He offers the following **AMICUS CURIAE BRIEF IN SUPPORT OF THE RESPONDENT**:

INTEREST OF THESE FRIENDS OF THE COURT[1]

James Fetzer, Ph. D., emeritus professor of philosophy at the University of Minnesota at Duluth; **Mary Maxwell, Ph. D., LL. B.**, international scholar in law and politics, previously working in Australia, now living in New Hampshire; and **Cesar Baruja, M. D.**,

[1] Both the Acting Solicitor General of the United States and the court-appointed counsel for Dzhokhar Tsarnaev have granted blanket consents which allow this amicus curiae brief. Dr. James Fetzer, Dr. Mary Maxwell, and Dr. Cesar Baruja alone have paid for the preparation and submission of this amicus curiae brief from their private funds, and the undersigned alone as their counsel has prepared and submitted this amicus curiae brief in their behalf.

naturalized citizen of the United States, born and educated in Paraguay, now resident in New York, and practicing medicine in the United States over more than forty years, have long studied and published concerning the prosecution of Dzhokhar Tsarnaev. In keeping with the solemn admonition of Rule 37.1 of the Rules of this Court, they believe that **actual innocence of the accused is always relevant in any death penalty case**, **especially where, as in this cause, the proof of actual innocence is powerful, and has been suppressed**.

Dr. Fetzer, Dr. Maxwell, and Dr. Baruja wish to reveal **known exculpatory evidence which otherwise might be overlooked by this Court**. They have each discovered moral and legal deficiencies in this prosecution, among others, that it is unfounded in probable cause, because critical evidence, which was or should have been transferred to counsel for the accused under *Brady v. Maryland*, 373 U. S. 83 (1963), was in any event widely known, and proves decisively that **Mr. Tsarnaev did not in fact detonate a pressure cooker bomb in Boston on April 15, 2013**, as he was accused of. They believe that Mr. Tsarnaev was trapped into conviction and sentence of death by major news media in an egregious abuse of the First Amendment, and by lawyers on both sides who concealed unmistakable evidence, including four color photo exhibits, which clearly and plainly show, among other things, that Mr. Tsarnaev did not carry a black backpack attributed to him in the indictment, at or about the time of the explosions, but carried a white

sack over his right shoulder. Mr. Tsarnaev was therefore not guilty. Other suspects were never approached or interrogated by investigators. The evidence in question was never considered by the jury at trial or the presiding judge at sentencing during the proceedings before the United States District Court for Massachusetts. It remains obscured behind a façade of false confessions, and false framing of issues in this case. Under the circumstances, these friends of the court believe that this prosecution amounts to an attempt at judicial murder in the sense given reference in *Powell v. Alabama*, 287 U. S. 45 at 72-73 (1932).

However the phenomenon may be explained, history illustrates that any nation which practices judicial murder experiences major adverse consequences. Hence, the judicial murder of Joan of Arc led to loss of English conquests in France. The judicial murder of Charles the First led to the loss of constitutional government in England. And so it is in countless cases for many countries over long ages. Dr. Fetzer, Dr. Maxwell, and Dr. Baruja fear that the attempted but not yet consummated judicial murder of Dzhokhar Tsarnaev will lead to grave consequences for the United States which they wish to mollify or prevent as patriotic Americans. They act in this case, **lest this Court be misled**. Such is their interest in this cause.

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SUMMARY OF THE ARGUMENT OF THESE FRIENDS OF THE COURT

We ask this Court to take judicial notice of facts available to the United States District Court for Massachusetts, called to its attention by Maret Tsarnaeva in her pro se argument on May 15, 2015, and judicially ordered part of the record (electronic order #1469). The same evidence is also displayed on the record, especially the facts displayed in the appendix to this amicus curiae brief which is included on the record of the United States Court of Appeals for First Circuit and, on motion granted, was called to its attention by Dr. Fetzer, Dr. Maxwell, and Dr. Baruja: all pertinent documents are exhibited in the addendum to the submission of these friends of the court to, and on order of the First Circuit, as filed on November 24, 2017.

In sum, during the trial of Dzhokhar Tsarnaev in Boston, decisive exculpatory evidence of record or subject to judicial notice, and showing the actual innocence of Mr. Tsarnaev, was never called to the attention of the jury at trial, was left unmentioned by counsel on both sides, and was ignored by the presiding judge when the sentence of death was imposed. The same decisive exculpatory evidence was called to the attention of the circuit court by these friends of the court on motion granted, then again ignored.

ARGUMENT OF THESE FRIENDS OF THE COURT

The key particulars of the evidence here in question were stated on the record by Maret Tsarnaeva, a Russian aunt of the accused, acting pro se with assistance "of counsel" on the advice of the bar liaison officer of the district court. Mme Tsarnaeva is licensed to practice law in the now independent Kyrgyz Republic once part of the Russian Empire and the Soviet Union. Her pro se argument before the district court on May 15, 2015, **featured in the appendix to this amicus curiae brief**, is repeated here by these friends of the court, and is the most important document in the addendum in the court-ordered submission by Dr. Fetzer, Dr. Maxwell, and Dr. Baruja before the First Circuit on November 24, 2017, including four color photo exhibits (marked and offered as Tarnaeva exhibits 1, 2, 3, and 4), the same described on pages App. 3, App. 4, App. 5, App. 6, App. 8, and App. 10, and reproduced on pages App. 12 and App. 13 of the appendix to this amicus curiae brief: **The FBI crime lab determined from fragments at the scene of the explosions, and the indictment returned on June 27, 2013, stated in paragraphs 6, 7, and 24 of the general allegations applicable to all counts, that the accused was carrying a black backpack at the time of the explosions. The FBI identified culprits by reference to a street video which included a still-frame photo showing that, only minutes before the explosions on Boylston Street in Boston on April 15, 2013, Dzhokhar Tsarnaev carried, not a**

black backpack as alleged, but a white bag over his right shoulder. The very evidence used by the FBI to identify the accused referenced in the indictment excludes Dzhokhar Tsarnaev as a suspect, as plainly as white is distinguished from black. Other suspects were not approached and interrogated.

Confessions have been attributed to Dzhokhar Tsarnaev. Dr. Fetzer, Dr. Maxwell, and Dr. Baruja answer that confessions have always been considered dubious in Anglo-American legal tradition (e.g., noted by Sir William Blackstone in the fourth book of his *Commentaries*, page 357), and confessions attributed to Dzhokhar are positively disproved by undeniable exculpatory evidence which has been described in argument before the First Circuit and this Court, and in the argument of Mme Tsarnaeva before the district court.

The misconduct of counsel in this case was incomparably worse than anything of the sort in *McCoy v. Louisiana*, 584 U. S. ___ (2018), or claims of misconduct in *Florida v. Nixon*, 543 U. S. 175 (2004), because here unanswerable exculpatory evidence existed, was known, and could have been used, but was inexcusably ignored and concealed.

Our motion for leave to appear as friends of the court before the First Circuit, in light of the said exculpatory evidence, including everything mentioned in the appendix to this amicus brief, **was granted** by the First Circuit on November 9, 2017, and, on

November 16, 2018, the First Circuit **entered an order assuring us** that the said exculpatory evidence, as presented in our court-ordered argument and addendum filed on November 24, 2017, would receive due consideration. We were, therefore, surprised when, on July 31, 2020, the First Circuit handed down its opinion and judgment, but did not mention or discuss the said exculpatory evidence.

CONCLUSION

This Court should consider the exculpatory evidence of record included in the addendum to the submission of Dr. Fetzer, Dr. Maxwell, and Dr. Baruja to the First Circuit on November 24, 2017, and explained by Mme Tsarnaeva in her pro se argument to the district court set forth in the appendix of this amicus curiae brief. A man is a candidate for death by execution because decisive evidence of actual innocence has been overlooked and concealed, as must not be allowed. Nothing could be more relevant under Rule 37.1 of the Rules of this Court.

The foregoing amicus curiae brief is

Respectfully submitted,

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