No. 20-443

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DZHOKHAR A. TSARNAEV

Respondent.

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

BRIEF OF RESPONDENT

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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 mitigation theory was that respondent had acted under his brother's influence and had a lesser role in the offense.

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INTRODUCTION

In 2013, 19-year-old respondent Dzhokhar Tsarnaev joined his 26-year-old brother Tamerlan in placing two bombs near the finish line of the Boston Marathon. For Tamerlan, who had embraced Islamic extremism years before and had already traveled to Russia to wage jihad, the bombings were not his first extremist killings. In 2011, on the tenth anniversary of the September 11 attacks, Tamerlan robbed and murdered a close friend and two others as an act of jihad. For Dzhokhar—a teenager well-liked by teachers and peers, with no history of violence—the bombings were the culmination of Tamerlan's months-long effort to draw him into extremist violence.

There is no question that the bombings were a grievous and shocking act of terrorism. There is also no question that "[a] shocking crime puts law to its severest test." *Fisher* v. *United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting). "Law triumphs over natural impulses aroused by such a crime only * * * by due regard for those indispensable safeguards which our civilization has evolved" to ensure that the defendant receives a fair trial and a reasoned adjudication of whether death is the appropriate penalty. *Ibid*. In this case, however, those safeguards failed when they were needed most, and Dzhokhar was sentenced to death in a proceeding compromised by two serious errors.

First, the district court violated the Eighth Amendment and the Federal Death Penalty Act by excluding critical mitigating evidence. Dzhokhar's central mitigation theory was that Tamerlan—Dzhokhar's revered older brother and the principal authority figure in his

life—had embraced and acted on violent Islamic extremist beliefs, had spent months inculcating those beliefs in Dzhokhar, and then had taken the lead in the bombings. Although the court admitted some weakly probative evidence of Tamerlan's aggressiveness and radicalizing efforts, the court excluded the most powerful such evidence: Tamerlan's commission of a jihad-inspired triple murder, which Dzhokhar learned about during Tamerlan's campaign of radicalization. The excluded evidence demonstrated that Tamerlan had radicalized first; that Dzhokhar's reverence for his brother created tremendous pressure to accept Tamerlan's extremist violence and its rationale; and that Dzhokhar knew Tamerlan was capable of killing his own friend in furtherance of jihad. The evidence thus powerfully supported Dzhokhar's contention that Tamerlan exercised powerful sway over him and played the leading role in the bombings. That is precisely the kind of evidence that a capital sentencing jury must consider if it is to fulfill its constitutional responsibility to render a "reasoned moral response" to the defendant and his crime. *Brewer* v. *Quarterman*, 550 U.S. 286, 289 (2007).

The government exploited the evidence's exclusion to present a deeply distorted picture of the central moral-culpability issue at sentencing. With the evidence excluded, the government was free to denigrate Dzhokhar's lesser-culpability defense by arguing that Tamerlan was merely "bossy," that he was unable "to go into action" without Dzhokhar, and that Dzhokhar was an equal and indispensable partner in the offense. The excluded evidence would have decisively refuted those misleading assertions. But jurors never learned that there was another side to the story. The evidence's exclusion therefore undermined the reliability

of the entire penalty phase, in direct violation of this Court's Eighth Amendment precedents. And because the evidence was so central to the sentencing proceeding, the government cannot demonstrate that the error was harmless beyond a reasonable doubt.

In defending the exclusion, the government does not dispute Dzhokhar's Eighth Amendment right to introduce such critical relative-culpability evidence. Instead, the government challenges the evidence's reliability—but that is a startling and unjustified reversal of position. In a sworn search warrant application submitted by the same prosecutors, the *government itself* credited the evidence as reliable enough to establish probable cause that Tamerlan committed the murders. The government should not be permitted to disavow that sworn representation to the court—especially when it does so to prevent a capital defendant from presenting the very same evidence for the jury's consideration in mitigation.

Second, during voir dire, the district court refused to ask prospective jurors a question routinely asked in high-profile cases: what they remembered hearing about the case. If there were ever a case in which jurors needed to be asked that question, it is this one. Inadmissible commentary flooded conventional and social media. There were calls for Dzhokhar's execution, including by victims, public officials, and the people whose opinions filled the venirepersons' Facebook feeds. There was inflammatory coverage of Dzhokhar's religion and immigrant status. And there were rumors, racist attacks, and other material that threatened to prejudice jurors in ways that would have been impossible to disregard. The court's refusal to elicit basic information essential to evaluating jurors' claims

of impartiality improperly left jurors to be the judges of their own fitness to serve.

STATEMENT

1. a. Dzhokhar Tsarnaev emigrated to the United States with his family from Central Asia in 2002, when he was 8 years old. J.A.824, 859. Dzhokhar was known to his teachers, neighbors, and friends as a kind person and a diligent student. In high school, he was on the wrestling team and volunteered with special-needs children. He exhibited little interest in Islam or politics, and he was never violent. J.A.690; 17.A.7969-7970; 18.A.8150-8153, 8417-8423.[1]

Dzhokhar's reverence for his older brother Tamerlan, seven years older, was evident to everyone. A gym owner observed that Dzhokhar followed Tamerlan around "like a puppy" while Tamerlan was training to be a boxer. 17.A.7745. A close relative recalled that Dzhokhar "went along any time Tamerlan would say let's go do this and that," just as a "good younger brother" was "supposed to [do] in [a] Chechen family." 18.A.8348, 8347, 8205-8206.

b. In 2011, as Dzhokhar was graduating from high school, Tamerlan (then 24 years old) changed drastically. He abandoned his Americanized lifestyle and began engaging in heated discussions about religion and U.S. policy toward Islamic countries. J.A.762-766, 770; 17.A.7539-7549, 7608-7613. He and his American-born wife adopted Islamic dress and customs. 17.A.7609. And Tamerlan amassed a digital library of Islamic extremist materials. 15.A.6750; 17.A.7705-7729; 18.A.8220-8230.

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[1] "Volume.A.Page" citations refer to the appendix, and "S.Add." citations refer to the sealed addendum, in the First Circuit.

On September 11, 2011, Tamerlan's close friend Brendan Mess and two others were found, robbed and with their throats slit, in a Waltham apartment. Although the crime was initially unsolved, Tamerlan's friend, Ibragim Todashev, confessed to investigators shortly after the bombings that Tamerlan had proposed robbing the victims, who were drug dealers, and that Tamerlan slit their throats. After confessing, Todashev attacked the investigators and was killed. Pet.App.65a-66a.

In 2012, Tamerlan began trying to radicalize Dzhokhar. In January 2012, Tamerlan traveled to Russia for six months, hoping to join a violent jihadi group. 17.A.7489, 7861-7864. On the day he left, Tamerlan gave Dzhokhar a thumb drive containing extremist materials. Gov't.C.A.Reply.8. While in Russia, Tamerlan sent Dzhokhar extremist propaganda. 17.A. 7562-7568; 18.A.8237-8238. After Tamerlan returned that fall, Dzhokhar told his friend Dias Kadyrbayev that Tamerlan was "involved in the Waltham murders" and "'committed jihad' in Waltham." J.A.584. Dzhokhar's reference to "jihad" was consistent with a document found on Tamerlan's computer, in which Anwar al-Awlaki argued that robbing nonbelievers to support jihad accorded with Islamic principles. 25.A.11643-11655.

By September 2012, both Dzhokhar's father, who had been disabled by a brain injury, and his mother, who had radicalized concurrently with Tamerlan, left the United States permanently. Tamerlan became the only adult family figure in Dzhokhar's life. J.A.756-757.

During Dzhokhar's 2012 winter break from college, he returned home to stay with Tamerlan. J.A.697-699.

At that time, as the government argued below, Tamerlan and Dzhokhar accessed a computer file containing the al Qaeda magazine *Inspire*, which contained bomb-making instructions. J.A.169, 226. Dzhokhar's first outward expression of a desire to act on extremist views also occurred around this time; he texted a friend, "I wanna bring justice for my people." J.A.117. In January 2013, Dzhokhar "stopped drinking and smoking, began praying more," and "started regularly watching Islamic videos on YouTube." J.A.584.

2. a. On April 15, 2013, Tamerlan and Dzhokhar detonated two bombs near the Boston Marathon's finish line, killing Krystle Campbell, Lingzi Lu, and eight-year-old Martin Richard, and severely injuring many others. Pet.App.1a, 4a-6a. With the brothers at large, the FBI sought the public's help in finding them. The brothers subsequently killed MIT police officer Sean Collier, carjacked an SUV, and staged a firefight with police, which ended when Dzhokhar, fleeing in the SUV, struck and killed Tamerlan. Pet.App.7a-9a. During the manhunt for Dzhokhar, the governor ordered greater Boston residents to "shelter in place." Pet.App.10a. That night, police discovered Dzhokhar hiding in a boat. There, Dzhokhar had written "a manifesto justifying his actions," accusing "[t]he U.S. Government [of] killing our innocent civilians." Pet.App. 9a-10a.

The bombings' widespread and emotional wake was apparent in the community's response to Dzhokhar's capture. Bostonians celebrated in the streets. Red Sox star David Ortiz rallied a sold-out Fenway Park, exclaiming: "This is our f***ing city * * *. Stay strong." The city "adopted the 'Boston Strong' slogan to convey a message of courage and resilience," and

fundraising using that slogan generated millions for the victims. Pet.App.12a; Resp.C.A.Br.52-54.

b. "[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 not only horrific images of the offense's aftermath, but also a massive quantity of inadmissible and inflammatory information, such as statements from the victims' family members and elected officials calling for Dzhokhar's execution. Boston Mayor Thomas Menino opined: "this individual" should "[get] the death penalty." 23.A.10843. Krystle Campbell's mother, similarly a "longtime opponent of the death penalty," said "'an eye for an eye feels appropriate.'" 24.A.10977a-10978. Mark Fucarile, who lost a leg, agreed. 24.A.11048. Social media exploded with vitriolic calls for summary execution that persisted through the trial. Other inadmissible and inflammatory publicity included prominent commentary arguing that Dzhokhar was more blameworthy because he was an immigrant who had received public assistance; and various anti-Muslim rumors and attacks. See pp. 44-46, *infra*.

3. Dzhokhar was charged with 30 offenses and the government sought the death penalty.

a. In light of the extraordinary pretrial publicity, both parties urged the court to ask prospective jurors about the content of the publicity they had seen, proposing: "What did you know about the facts of this case before coming to court today (if anything)?" Pet.App.24a. The government later suggested asking jurors to list the "three or four most memorable things." Resp.C.A.Add.304; see also D.Ct.Doc.688-1, at 4 (joint proposed instruction: "We simply need to

know what you have read, seen, heard, or experienced in relation to the case.").

The government then changed position and opposed content questions. The court refused to pose them, Pet.App.26a, and largely prevented the defense from asking them. The court seated nine jurors without learning the content of the publicity they had seen. Pet.App.41a; Resp.C.A.Br.193-196.

b. At trial, Dzhokhar conceded guilt, and the jury convicted on all counts. The government's evidence showed that it was Tamerlan, not Dzhokhar, who researched the Boston Marathon and bomb construction. 15.A.6731-6733. Tamerlan purchased the pressure cookers, the BBs, and the electronic components. 14.A. 6271-6272, 6274-6286, 6295-6297. Tamerlan's fingerprints, not Dzhokhar's, were found on the bombmaking materials seized from Tamerlan's apartment. 15.A.6797-6810. And although Dzhokhar obtained the handgun used to shoot Officer Collier from a friend, 12.A.5263-5269, only Tamerlan's fingerprints were found on the weapon, 14.A.6110-6111.

At sentencing, the defense urged the jury to sentence Dzhokhar to life imprisonment, arguing "that Tamerlan was the radicalizing catalyst." Pet.App.2a. Pursuant to 18 U.S.C. 3592(a), the defense submitted several mitigating factors reflecting the brothers' relative culpability, including that Dzhokhar acted under Tamerlan's influence, and that Tamerlan planned and directed the bombings. 19.A.8690-8691. The court admitted as relevant to those factors some (weak) evidence that Tamerlan had behaved aggressively, for example, by poking a man in the chest and raising his voice. Pet.App.70a-71a.

To adduce stronger proof, the defense sought to introduce evidence that Tamerlan, with Todashev's help, committed the Waltham murders as an act of jihad, and Dzhokhar learned of Tamerlan's involvement. Prosecutors moved to exclude all such evidence, calling Todashev's confession "unreliable." Pet.App.68a. But the government itself already had relied upon Todashev's confession in obtaining a warrant to search Tamerlan's car for evidence of the murders. J.A.983-1011. In a supporting affidavit submitted by the same prosecutors, an FBI agent embraced Todashev's statements that, among other things, Tamerlan used a gun to gain entry and "decided that they should eliminate any witnesses to the crime, * * * who were ultimately murdered." J.A.998; S.Add.17. Based on those statements and corroborating evidence, the government asserted there was probable cause to believe Tamerlan and Todashev committed the murders. J.A.996.

The district court excluded all evidence of the murders, ruling that it "would be confusing to the jury and a waste of time, * * * without any probative value." J.A.650.

Having successfully excluded this powerful corroboration of Tamerlan's history of extremist violence, the government was free to belittle the defense's mitigation theory. Prosecutors told jurors that Tamerlan was merely "bossy," that Dzhokhar radicalized on his own, and that Tamerlan was able to act on his extremist views only when Dzhokhar joined him. J.A.864, 873-874.

The jury returned life sentences for the 11 death-eligible offenses where Tamerlan was present and imposed death for six offenses concerning Dzhokhar's

placement of a bomb near the finish line. Resp.C.A.Reply.115-116.

4. The court of appeals affirmed Dzhokhar's convictions and life sentences but vacated the death sentences and remanded for new penalty-phase proceedings. Pet.App.1a-188a.

a. First, the court held that the district court failed to screen venirepersons for exposure to prejudicial pretrial publicity. Pet.App.49a-60a. The court applied its long-established supervisory rule that where the judge finds "a significant possibility that jurors have been exposed to potentially prejudicial material," the judge, "on request of counsel," should ascertain the content of jurors' exposure and its effect on their ability to be impartial. *Id.* at 50a-51a (quoting *Patriarca* v. *United States*, 402 F.2d 314, 318 (1st Cir. 1968)). Neglecting that rule, the district court impermissibly allowed jurors to "judg[e] 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. That evidence was "highly probative of Tamerlan's ability to influence [Dzhokhar]" and made it more likely that Tamerlan played a greater role in the offenses. *Id.* at 76a. The court further held that the error was not harmless beyond a reasonable doubt. *Id.* at 83a-84a.

SUMMARY OF ARGUMENT

The court of appeals vacated Dzhokhar's death sentence because the district court committed two significant errors that bore directly on the reliability of that sentence. This Court should affirm.

I. The district court violated the Eighth Amendment and the Federal Death Penalty Act (FDPA) by excluding reliable evidence that went to the heart of Dzhokhar's mitigation case. The defense urged the jury to impose life on the ground that Dzhokhar was less culpable because he had been susceptible to, and acted under, Tamerlan's violent, radicalizing influence. Acknowledging the relevance of Tamerlan's aggressive and radicalized behavior, the court admitted evidence that Tamerlan previously behaved aggressively and provided Dzhokhar with extremist propaganda. But at the government's request, the district court excluded the strongest such evidence: on September 11, 2011, Tamerlan committed the Waltham murders as a form of violent jihad, and Dzhokhar learned of that fact and was likely influenced by it.

It is hard to overstate the importance of that evidence, and the damage its exclusion did to the mitigation case. In 2011, Dzhokhar graduated from high school as a popular and diligent student with no history of violence or zealotry. Beginning in 2012, Tamerlan—already radicalized himself—worked to entice his younger brother into violent extremism. A juror could have found that Tamerlan's commission of the Waltham murders was pivotal to that process: it placed tremendous pressure on Dzhokhar to accept that his revered older brother's extremist violence was justified; it forcefully demonstrated to Dzhokhar Tam-

erlan's commitment to jihad and his intimidating capacity for violence; and it showed that Tamerlan had prior experience planning and committing a violent crime. The evidence thus made it vastly more likely that Dzhokhar acted under Tamerlan's radicalizing influence and that Tamerlan led the bombings.

But with the evidence excluded, the government was able to paint a deeply misleading picture that Tamerlan was merely "bossy," and even to assert that Tamerlan was *unable* to commit violence until Dzhokhar joined him. By exploiting the evidence's exclusion in this way, the government left jurors with a distorted understanding of Dzhokhar's background, character, and role in the offense. The erroneous exclusion deprived Dzhokhar of the individualized, "reasoned moral response to [the] mitigating evidence" that the Eighth Amendment requires before any person is put to death. *Brewer*, 550 U.S. at 289 (internal quotation marks omitted).

The government does not dispute that evidence showing that Tamerlan was the driving force in the murders, and that Dzhokhar acted under his older brother's influence, is evidence that a capital sentencing jury must consider under the Eighth Amendment. Instead, the government defends the evidence's exclusion on the case-specific ground that it is unreliable. That is a breathtaking about-face. The *government itself* represented to a federal magistrate that the evidence tying Tamerlan to the murders was sufficiently reliable to establish probable cause. The exclusion therefore not only distorted the penalty phase; it was deeply unfair. The error fundamentally undermined the reliability of the sentencing proceeding, and the government therefore cannot establish harmlessness beyond a reasonable doubt.

II. The First Circuit's judgment should be affirmed for the independent reason that the district court refused to ask prospective jurors what they remembered hearing about the case. Content questioning was critical here—as the government recognized in initially joining the defense in proposing such questioning. Prospective jurors were bombarded with inflammatory, inadmissible material, including victims' calls for the death penalty and inflammatory arguments for death that the court forbade the government from asserting at trial. Jurors who saw such material could have been deeply prejudiced by it. Yet the court refused to ask content questions, improperly deferring to jurors' untested assertions of impartiality.

The court thus violated the First Circuit's *Patriarca* supervisory rule, which requires content questioning where the judge finds a significant likelihood of bias arising from prejudicial publicity—especially inadmissible, inaccurate, or inflammatory material. 402 F.2d 314. The *Patriarca* rule is a sound exercise of supervisory authority of the sort that this Court has repeatedly approved. *E.g.*, *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 n.10 (1980).

In *Mu'Min* v. *Virginia*, this Court observed—and all nine Justices agreed—that content questions, although not constitutionally required, are "helpful" in discerning bias in high-profile cases. 500 U.S. 415, 416 (1991). Indeed, content questioning is routine in high-profile cases, confirming that courts view such questioning as the "wiser course"—the basis on which this Court has used supervisory authority to require particular voir dire questioning. *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976). The First Circuit correctly held that the district court committed reversible error.

ARGUMENT

I. The district court violated the Eighth Amendment and the Federal Death Penalty Act by excluding critical mitigating evidence.

The central issue in the penalty phase was relative culpability. Evidence of Tamerlan's previous commission of violent jihad was critically relevant to that issue, and its exclusion severely weakened Dzhokhar's mitigation case. Even worse, prosecutors aggressively exploited the exclusion to suggest that *Dzhokhar* was the driving force in the bombings—that even if Tamerlan was "bossy," he was unable to act on his extremist motivation until Dzhokhar joined him. The Waltham evidence squarely contradicted that deeply misleading account. The exclusion undermined the reliability of the penalty phase, violating bedrock Eighth Amendment principles and the FDPA.

The government does not contest Dzhokhar's Eighth Amendment right to present relative-culpability evidence, or defend the district court's conclusion that the evidence lacked "any" probative value, J.A. 650. Instead, the government argues that the evidence was unreliable and confusing. The former is not only incorrect; it is also an unjustified reversal of the government's own representations to the court. And the latter reduces to an assertion that mitigating evidence is confusing whenever it is contested—which cannot be right, particularly given the government's routine presentation of contested *aggravating* evidence of unadjudicated offenses in arguing for death.

A. The Eighth Amendment and the FDPA entitle a defendant to present any mitigating evidence that would support a sentence less than death.

1. The Eighth Amendment entitles a capital defendant to present, and to have the jury consider, mitigating factors addressing "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982). It is especially important that the right to mitigating evidence be observed scrupulously in cases like this one, where the public is inflamed and jurors' ability to make the reasoned moral judgment required by the Eighth Amendment is most imperiled. *Brewer*, 550 U.S. at 289.

When multiple people commit an offense, the defendant has a constitutional right to argue in mitigation that he was the less culpable actor. *Lockett*, 438 U.S. at 608; *Green* v. *Georgia*, 442 U.S. 95, 97 (1979). That right ensures an "individualized determination * * * [based on] the character of the individual and the circumstances of the crime." *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983).

The "corollary rule" to the right to offer mitigating factors is "that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986) (citation omitted). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value." *Tennard* v. *Dretke*, 542 U.S. 274, 284-285

(2004) (citation omitted). That standard is "low." *Id.* at 285. Moreover, the right to present relevant mitigating evidence overcomes even otherwise-applicable substantive evidentiary rules such as hearsay rules, so long as the evidence has hallmarks of reliability. *Green*, 442 U.S. at 97; see *Sears* v. *Upton*, 561 U.S. 945, 950 & n.6 (2010). If evidence is relevant to mitigating aspects of the defendant's character, background, or role in the offense—and reliable—the Eighth Amendment entitles the defendant to present it.

2. The FDPA, which governs the penalty-phase presentation of evidence, implements those constitutional requirements. The FDPA requires jurors to consider "*any* mitigating factor," including relative culpability. 18 U.S.C. 3592(a) (emphasis added). "The defendant may present *any* information relevant to a mitigating factor." 18 U.S.C. 3593(c) (emphasis added). Consistent with *Skipper* and *Green*, "[i]nformation" pertaining to mitigating factors is "admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials." *Ibid.*

Section 3593(c) further provides that evidence "may" be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Ibid.* The government argues (Br.39) that Section 3593(c) permits the court to exclude relevant mitigating evidence *more* readily than under the Federal Rules of Evidence. But Section 3593(c) "does not eliminate" the "function of the judge" in implementing *constitutional* standards governing presentation of evidence at the penalty phase. *United States* v. *Fell*, 360 F.3d 135, 145 (2d Cir. 2004). The FDPA necessarily contemplates that the court will exercise its statutory discretion consistent with constitutional standards. *Ibid.*; *United States* v.

X-Citement Video, Inc., 513 U.S. 64, 73 (1994) (Congress legislates consistently with Constitution). Section 3593(c) does not—indeed it cannot—alter a defendant's constitutional right to present relevant, reliable mitigating evidence concerning his character, record, and offense, or give the court discretion to *entirely* preclude such evidence.[2] *Skipper*, 476 U.S. at 4.

B. The evidence that Tamerlan committed jihad in Waltham was highly probative and reliable.

1. The defense's central mitigation theory was that Dzhokhar was less culpable because he acted under Tamerlan's violent, radicalizing influence and leadership.

The defense argued in mitigation that Dzhokhar's culpability was lessened because he acted under Tamerlan's violent, radicalizing influence, and because Tamerlan was the leader in the offense. Ensuring that jurors had an accurate understanding of the brothers' relative culpability was especially important because Tamerlan died during the offense, creating a risk that the jury would hold Dzhokhar, as the sole surviving perpetrator, responsible for Tamerlan's role as well as his own. Relative-culpability evidence therefore was vital to the individualized sentencing determination required by the Eighth Amendment.

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[2] Because Section 3593(c) governs admission of both aggravating and mitigating evidence, its "outweigh[s]" standard facilitates exclusion of inflammatory aggravating evidence. For mitigating evidence, the court must respect the defendant's Eighth Amendment right to present all relevant, reliable evidence.

The defense proffered, and the court adopted, multiple mitigating factors concerning Dzhokhar's relative culpability, including:

- Dzhokhar "acted under the influence of his older brother";
- "because of Tamerlan's age, size, aggressiveness, domineering personality, privileged status in the family, traditional authority as the eldest brother, or other reasons, [Dzhokhar] was particularly susceptible to his older brother's influence";
- "[Dzhokhar] would not have committed the crimes but for his older brother Tamerlan";
- Tamerlan "planned [and] led" the bombings; and
- "Tamerlan Tsarnaev became radicalized first and then encouraged his younger brother to follow him."

J.A.614-616.

The district court correctly recognized that evidence of Tamerlan's aggressive, radicalized behavior was directly relevant to those factors. The court accordingly admitted other evidence of Tamerlan's aggressiveness, including that Tamerlan had once "pok[ed]" a stranger in the chest during an argument, 17.A.7548-7549; and shouted at people, J.A.763-765, 766-769, 772-774. The court also permitted evidence of Tamerlan's earlier radicalization and radicalizing effect on Dzhokhar, including that Tamerlan traveled to Russia in early 2012 in an unsuccessful attempt to wage jihad, 17.A.7861-7864; that Tamerlan provided extremist propaganda to Dzhokhar, 17.A.7562-7569;

and that Dzhokhar looked up to Tamerlan, who occupied a superior position in the Chechen family's hierarchical structure, 18.A.8039, 8206, 8293, 8348.

Recognizing that Tamerlan's influence was central to the mitigation case, the government successfully urged the jury to dismiss the evidence of Tamerlan's prior behavior as insubstantial. Prosecutors argued—repeatedly and at length—that Dzhokhar could not have been influenced by Tamerlan because Tamerlan was merely "bossy." J.A.864; see J.A.816, 857, 858, 861, 862-863, 864-865, 870-871, 873-874. And they argued that Dzhokhar must have radicalized on his own because evidence of Tamerlan's radicalizing influence was slight. J.A.863-864, 871-872, 873. From those premises, the government argued that Dzhokhar and Tamerlan bore "the same moral culpability," and had "a partnership of equals." J.A.874.

Indeed, prosecutors went even further, exploiting the Waltham evidence's exclusion by arguing that Tamerlan was *incapable* of acting without Dzhokhar. Alluding to Tamerlan's failure to wage jihad in Russia, the government argued that Tamerlan went to Russia "hoping to find a partner there," and "came back when he didn't succeed." J.A.873. "But by then," Dzhokhar "was ready to partner up. It was *only then*, when [Dzhokhar] made the decision to become a terrorist, that Tamerlan *was able to go into action*." J.A.873-874 (emphases added).

2. The Waltham evidence was highly probative of Dzhokhar's lesser culpability.

The jury never learned that prosecutors' assertions that Tamerlan was merely bossy, and incapable of acting without Dzhokhar, were fundamentally misleading. Jurors learned that Tamerlan sometimes raised

his voice. But they did not hear that Tamerlan, together with Todashev, had robbed three people and slit their throats in furtherance of jihad, and that Dzhokhar learned of the murders and their extremist motivation. And jurors were not permitted to consider what the murders showed about Tamerlan's powerful radicalizing effect on Dzhokhar. J.A.584.

a. Abundant evidence showed that Tamerlan committed the Waltham murders as a form of violent jihad:

- Public records showed that on September 11, 2011, Brendan Mess and two others were beaten, robbed, and had their throats slit, in a Waltham apartment. Mess was Tamerlan's close friend, J.A.998, and there was no sign of forced entry.
- After the bombings, Todashev confessed to investigators that he and Tamerlan committed the murders. He stated that Tamerlan planned the robbery, brought a gun, decided to kill the victims, and committed the murders. J.A.912-916. That statement was memorialized in audio recordings and an FBI "302" report. The government recounted some of Todashev's statements in seeking a search warrant for Tamerlan's car, representing in a sworn affidavit that those statements, together with corroborating evidence, established probable cause that Tamerlan committed the Waltham murders. J.A. 998.
- Independently, Dzhokhar's friend Dias Kadyrbayev told the government, through counsel, that Dzhokhar said in fall 2012 that Tamerlan was "involved in the Waltham murders" and "'committed jihad' in Waltham." J.A.584. Dzhokhar also stated

that Tamerlan had a gun that he disposed of before being interviewed by law enforcement. *Ibid*.

- Tamerlan's computer contained Anwar al-Awlaki's argument that stealing money from nonbelievers to support jihad conformed to Islamic precepts. 25.A. 11643-11655.
- Within a week of the murders, Tamerlan's wife (or Tamerlan himself) performed Internet searches for "3 men killed in waltham," "men kill in waltham," and "tamerlan tsarnaev." J.A.590.

Evidence that Tamerlan murdered three people as an act of violent jihad, and that Dzhokhar knew about it, strongly supported the mitigating factors. Those factors, after all, focused on Tamerlan's aggressive, radicalized behavior and its effect on Dzhokhar. That is why the court admitted evidence of Tamerlan's *other* past aggressive, radicalized behavior and why the government does not contend (Br.43) that the court erred in doing so. Against that backdrop, the probative value of the excluded material should have been self-evident.

In any event, a more detailed examination of the Waltham evidence in light of the mitigating factors leaves no doubt that it tended to make those factors more likely to be true. *Tennard*, 542 U.S. at 284.

Tamerlan radicalized first. Evidence that Tamerlan committed jihad in Waltham made it vastly more likely that Tamerlan radicalized first. By September 11, 2011, Tamerlan had *acted on* al-Awlaki's teachings: he had stolen from and murdered nonbelievers, thereby "committ[ing] jihad." J.A.584. Contrary to the government's misleading portrayal, Tamerlan had not failed to effectuate his extremist beliefs before the

bombings; he had acted on them, long before Dzhokhar expressed any radicalized views. J.A.873-874.

Tamerlan was not "bossy"; he was a violent criminal. The Waltham evidence was also probative of Tamerlan's aggression and dominance. Had this evidence been admitted, the jury would have found the government's characterization of Tamerlan as merely ill-tempered implausible.

Dzhokhar was susceptible to Tamerlan's influence. By the same token, Dzhokhar could not have viewed Tamerlan as an ineffectual blowhard, as the government portrayed him. Dzhokhar knew that Tamerlan had murdered three people in furtherance of jihad. J.A.584. Together with the overwhelming evidence that Dzhokhar revered his brother, the Waltham evidence made it far more likely that Tamerlan exerted tremendous influence on Dzhokhar in a number of ways.

For one thing, a juror could have found that Tamerlan's commission of jihad had a compelling radicalizing influence. Given the deep filial ties that bound Dzhokhar to Tamerlan—the only family left in his life—knowledge of the murders exerted profound pressure to accept the extremist ideology that Tamerlan invoked to justify his actions. Dzhokhar's knowledge of the murders thus explained, as no other evidence did, how both shocking violence and extremist ideology could become normalized in his mind, making it more likely that he would go along with Tamerlan's plan to perpetrate jihad. Indeed, younger siblings commonly follow older siblings into violent extremism for just

such reasons.[3] A juror could have seen that understandable human dynamic at work here.

A juror also could have concluded that Tamerlan's extremist murders instilled loyalty or fear (or both) in Dzhokhar. Terrorists use acts of violence against nonbelievers—videos of executions and combat, for example—to recruit and influence followers because such acts demonstrate commitment and encourage loyalty. Cf. 18.A.8229-8230. The murders demonstrated that Tamerlan was totally committed to the ideology he preached, making him more persuasive. Knowledge of the murders also made Dzhokhar responsible for protecting Tamerlan, fostering loyalty. And Tamerlan's capability for brutal violence against a close friend made him intimidating. All of this increased Tamerlan's influence, particularly given Dzhokhar's youth, Tamerlan's superior status, and Tamerlan's overall aggressiveness.

Tamerlan was the leader, and Dzhokhar the follower. Tamerlan was not only older, bigger, stronger, and more aggressive—*he had previously committed violent jihad*. J.A.583-585. As between him and Dzhokhar, who was younger, recently radicalized, and had no history of violence, Tamerlan was far more likely to lead. In addition, the physical evidence tied only Tamerlan, not Dzhokhar, to the bombmaking preparations, see p. 8, *supra*—but the government characterized that as evidence of Dzhokhar's superior criminal savvy. J.A.267-268. The Waltham evidence

[3] The process of normalizing family members' wrongful actions is a basic and well-documented human dynamic. See generally Mohammed M. Hafez, *The Ties that Bind: How Terrorists Exploit Family Bonds*, Combating Terrorism Center at West Point: CTCSentinel 16 (Feb. 2016).

decisively rebutted that argument. Tamerlan, not Dzhokhar, had experience planning a violent crime and then scrubbing the grisly scene.

All of the inferences described above arise from facts the government itself recounted in its sworn search warrant affidavit establishing Tamerlan's participation in the murders (plus evidence corroborating those facts), see p. 27-29, *infra*. Of course, Todashev's additional description of exactly how he and Tamerlan committed the murders provided *additional* evidence of Tamerlan's leadership role. Todashev said Tamerlan planned the Waltham crime; slit the men's throats despite Todashev's misgivings; and enlisted Todashev's help cleaning up. Pet.App.86a. That Tamerlan had previously *planned* and *directed* a violent crime, which he committed with an accomplice, made it more likely that he planned the bombings.

The Waltham evidence therefore was powerfully probative, giving jurors multiple ways to conclude that Dzhokhar acted under Tamerlan's violent, radicalizing influence—and thus that Dzhokhar was less culpable in the offense. See *Sears*, 561 U.S. at 950 (older brother's criminal record and introduction of defendant to crime supported mitigation theory that defendant "follow[ed] * * * [his] older brother" into crime).

b. The district court nonetheless summarily dismissed the evidence as "without any probative value." J.A.650. The government barely defends (Br.40-43) that ruling.

The government's sole argument on relevance (Br.40-41) is its suggestion that "any" relevance of Tamerlan's commission of a separate crime is "attenuated." But Tamerlan's commission of violent jihad was self-evidently probative of his ability to influence

Dzhokhar and lead the bombings, and therefore of Dzhokhar's relative culpability. Where a capital defendant's relative culpability is at issue, the "background" of the other perpetrator "could be crucial" to a reasoned sentencing. *Thompson* v. *Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986); *Sears*, 561 U.S. at 950. It is therefore error to exclude a codefendant's violent acts against others, because that evidence shows the codefendant's ability to influence the defendant and lead the offense. See, *e.g., Buttrum* v. *Black*, 721 F. Supp. 1268, 1314-1316 (N.D. Ga. 1989); *Troedel* v. *Wainwright*, 667 F. Supp. 1456, 1461-1462 (S.D. Fla. 1986); *Cooper* v. *Dugger*, 526 So.2d 900, 902-903 (Fla. 1988).

Moreover, the government ignores the *prosecutors' own argument* that the brothers were equally culpable because Tamerlan was not especially aggressive and was unable to act without Dzhokhar. See p. 19, *supra*. This Court has held that the Eighth Amendment entitles the defendant to "an opportunity to introduce" evidence rebutting the prosecution's case for death, *Skipper*, 476 U.S. at 5 n.1, and the FDPA codifies that holding, 18 U.S.C. 3593(c). Here, prosecutors exploited the Waltham evidence's exclusion to paint a fundamentally misleading picture of relative culpability—again, the critical mitigation issue—by making arguments they *knew* were contradicted by the Waltham evidence. The evidence thus was not merely probative; its exclusion enabled prosecutors to distort the entire sentencing proceeding.

The government also suggests (Br.42-43) that jurors could have concluded, despite the Waltham evidence, that Dzhokhar was a willing participant in the bombings. That hardly makes the evidence irrelevant or not probative. Dzhokhar's argument was not that

Tamerlan coerced him, but rather that Dzhokhar was less culpable because he participated only under Tamerlan's violent, radicalizing influence. And the government's assertion (Br.42) that jurors could have viewed aspects of the evidence as "complicat[ing]" that argument goes to weight, not admissibility.

3. The Waltham evidence was more than reliable enough to go to the jurors.

The government's principal contention (Br.41) is that the district court nonetheless properly excluded the Waltham evidence as unreliable. To make that argument, the government must disavow (Br.44)—without any evident justification—its own contemporaneous assessment that the evidence was reliable enough to justify the government's sworn representation to a federal magistrate that it had probable cause to believe Tamerlan committed the murders. That about-face would be troubling—not to mention legally unsupported—in any context. But it is especially troubling here, where the government seeks to prevent a capital defendant from presenting the very same evidence in mitigation and to deprive the sentencing jury of the opportunity to evaluate the evidence for itself in making its reasoned moral judgment.

a. Dzhokhar could have presented the Waltham argument—that Tamerlan played a major role in the murders, that he was motivated by jihad, and that Dzhokhar knew about it—using only the Todashev assertions whose reliability the government expressly endorsed in its sworn warrant affidavit, plus evidence whose reliability the government has never challenged (the Kadyrbayev proffer showing Dzhokhar's knowledge that Tamerlan committed the murders and other corroborating documentary evidence). Indeed, the

government has never seriously disputed that Tamerlan participated in the murders (nor could it, given its search warrant affidavit), Pet.App.76a n.41, or that Dzhokhar knew about it.

That evidence easily clears the low bar for admissibility. All relevant evidence is admissible at sentencing upon a showing of "minimal indicia of reliability." *United States* v. *Fields*, 483 F.3d 313, 337-338 (5th Cir. 2007) (applying FDPA); see, *e.g.*, *United States* v. *Coonce*, 932 F.3d 623, 641 (8th Cir. 2019) (same). The Waltham evidence was far better than minimally reliable. It was reliable enough for the government to use, and it was corroborated in multiple respects.

i. The government itself vouched for the reliability of Todashev's statements establishing Tamerlan's major role in the Waltham murders. The government relied on those statements in representing to a magistrate that "there is probable cause to believe that Todashev and Tamerlan planned and carried out the murder of three individuals in Waltham, Massachusetts in September 2011." J.A.996.

Specifically, the government credited Todashev's statements that Tamerlan "had a gun, which he brandished to enter the residence"; Tamerlan decided to kill the victims; and both men bound the victims and scrubbed the scene. J.A.998. The government also explained that Todashev's confession was corroborated by other evidence, including Todashev's possession of jihadi material from Tamerlan. J.A.996-1002. The Fourth Amendment requires that those statements—as "information put forth [in a warrant affidavit]"—are "believed or appropriately accepted by the affiant as true." *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978). The warrant affidavit therefore reflected the

government's official conclusion—memorialized in a sworn declaration—that the recounted statements were sufficiently reliable to support probable cause.

This Court should not countenance the government's unjustified attempt to disavow that conclusion now. The government's claim (Br.44) that the affidavit need only have "truthfully describ[ed] what Todashev had claimed" is irreconcilable with *Franks*, *ibid.* (emphasis omitted), and with the government's obligation to independently conclude that the recounted evidence suffices for probable cause, *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986). Under the government's view, it can seek a warrant based on statements that it knows to be unreliable or false, so long as they are accurately transcribed. That cannot be right.

If the Todashev statements recounted in the affidavit were reliable enough to support a search warrant request—that is, to permit agents to search an automobile or even a home consistent with the Fourth Amendment—they were certainly reliable enough to be presented to the jury for evaluation as mitigating evidence at sentencing. In both situations, the question is whether the statements bear minimal indicia of reliability. *United States* v. *O'Dell*, 766 F.3d 870, 874 (8th Cir. 2014) (assessing reliability for probable-cause purposes). The government protests (Br.44) that at most the affidavit represented that Todashev's statements warranted further investigation. Not quite: the affidavit represented that Todashev's statements *were reliable enough* to justify further investigation and to overcome constitutionally-recognized privacy interests. Accordingly, those statements were surely reliable enough for the jury to weigh for itself.

ii. Multiple additional pieces of evidence corroborated Tamerlan's involvement in the murders and his extremist motivation. Dzhokhar's friend Kadyrbayev told the government that Dzhokhar told him that Tamerlan was "involved in the Waltham murders," and "'committed jihad' in Waltham." J.A.584. Just days after the murders, Tamerlan's wife searched the Internet for mention of Tamerlan and the murders, J.A.590, suggesting that Tamerlan had confessed to her at the time (or that Tamerlan performed the searches himself). Todashev's statement that Tamerlan brought a gun to the murders, recounted in the warrant affidavit, was corroborated by Kadyrbayev's statement that Tamerlan had a gun that he had disposed of before being interviewed by law enforcement, as well as by earlier photographs of Tamerlan brandishing guns. J.A.584; 25.A.11656-11657. Tamerlan's possession of al-Awlaki's teachings on stealing from nonbelievers for jihad, 25.A.11643-11655, and his subsequent jihadist trip to Russia using funds of unknown provenance, corroborated his extremist motivation.

Dzhokhar's knowledge that Tamerlan had committed jihad in Waltham could have been established by Kadyrbayev's proffer statement, whose reliability the government has never questioned. Kadyrbayev could have testified, or if necessary, his statement could have been admitted. See *United States* v. *Moncivais*, 492 F.3d 652, 659 (6th Cir. 2007).

b. The government does not mention, much less seriously challenge the reliability of, the mutually reinforcing pieces of evidence just described. Instead, the government makes (Br.41, 43) only the more limited argument that elements of Todashev's confession *not* recounted in the warrant affidavit—*e.g.*, Todashev's statement that he had "no way out"—are unreliable.

But the defense need not have used those statements to establish the inferences described above. In any case, those statements also were reliable enough to admit, as Todashev inculpated himself in the offense. Furthermore, the corroboration of, and government reliance on, parts of Todashev's confession reinforced the reliability of its uncorroborated aspects.

Finally, it is important to place the government's claims of unreliability in context. In a capital sentencing proceeding, the government is routinely permitted to present aggravating evidence of uncharged conduct through hearsay or circumstantial evidence with similar indicia of reliability. See, *e.g.*, *United States* v. *Corley*, 519 F.3d 716, 723 (7th Cir. 2008). Courts have recognized in that context that "the jury, not the judge," is the primary adjudicator of reliability. *United States* v. *Runyon*, 707 F.3d 475, 506 (4th Cir. 2013). That principle must apply with no less force to mitigating evidence.

C. The exclusion of the Waltham evidence violated the Eighth Amendment and the FDPA.

1. a. Because evidence of Tamerlan's commission of jihad in Waltham and Dzhokhar's knowledge thereof was both probative and reliable, Dzhokhar had an Eighth Amendment right to present that evidence to the jury. *Green*, 442 U.S. at 97; *Skipper*, 476 U.S. at 8. The district court nonetheless excluded the evidence as a "waste of time" and "confusing." J.A.650. But given that *substantive* evidentiary rules such as hearsay rules cannot overcome the Eighth Amendment right to present relevant, reliable mitigating evidence, *Green*, 442 U.S. at 97, concerns relating solely to the scope and length of presentation cannot possibly

suffice. The court of course retained discretion to address its confusion-related concerns—though they were misplaced—by regulating the manner of presentation. But the Eighth Amendment did not permit the court to exclude *all* mention of the Waltham murders for such insubstantial reasons.

The government does not cite a single appellate case, and we are aware of none, permitting a district court to *completely* exclude a category of constitutionally protected mitigating evidence on "confusi[on]" or "waste of time" grounds. The only two decisions the government cites (Br.40) prove the point. In both, the defendants were allowed to establish that their co-perpetrators had committed prior violent crimes, and the courts upheld only the exclusion of particular *details* of those crimes. *United States* v. *Umaña*, 750 F.3d 320, 350-351 (4th Cir. 2014); *United States* v. *Mitchell*, 502 F.3d 931, 991 (9th Cir. 2007). Here, by contrast, the defense was entirely precluded from introducing a category of evidence that was critical to both proving the affirmative mitigation case and rebutting the government's misleading assertions. The exclusion violated the Eighth Amendment.

b. In all events, the district court's justifications for exclusion fail on their own terms.

As a matter of bedrock Eighth Amendment law, presentation of constitutionally protected mitigating evidence cannot be a "waste of time," J.A.650.

"Juror confusion," *ibid*., is equally inapt. That concern describes evidence that would "sidetrack the jury" into resolving tangential "factual disputes," such as "unsupported speculation that another person may have done the crime." *United States* v. *McVeigh*, 153

F.3d 1166, 1191 (10th Cir. 1998). The Waltham evidence was hardly that. The only possible "confusion" the government identifies is the purported need to decide exactly who did what in the Waltham apartment. But there was no such need. The defense needed to establish only that Tamerlan played a significant role in the murders and Dzhokhar knew about it.

For those points, the defense could have relied solely on the streamlined evidence described above—the Todashev statements in the search warrant affidavit; Kadyrbayev's testimony or proffer; and the corroborating documentary evidence.[4] Of course, the government could have contested that evidence, notwithstanding its own previous reliance on Todashev's statements. But mitigating evidence is not "confusing" just because it is contested. The government routinely presents contested evidence of unadjudicated offenses in aggravation, including through evidence far more intricate and time-consuming than here. See, *e.g.*, *Corley*, 519 F.3d at 724-725; *United States* v. *Lujan*, 603 F.3d 850, 853-859 (10th Cir. 2010). Defendants are, of course, able to contest such evidence. Surely the government would not accept that such aggravating evidence could properly be excluded simply because its contested status would trigger a "mini-trial." If the Eighth Amendment allows prosecutors to admit evidence of unadjudicated crimes in aggravation despite such complications, it necessarily requires that defendants be given the opportunity to admit comparable evidence in mitigation.

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[4] Todashev's statements could have been presented using the search warrant or excerpted 302 report. The court admitted other witness statements in 302s and instructed the jury how to weigh them. *E.g.*, 17.A.7810-7811. The court could have done that here.

2. For much the same reasons, the exclusion also violated the FDPA, which entitles a capital defendant to "present any information relevant to a mitigating factor." 18 U.S.C. 3593(c). Because the court wrongly concluded that the Waltham evidence lacked "any" probative value, J.A.650, the court failed to weigh the Waltham evidence's significant probative value against the court's stated justifications for exclusion, as Section 3593(c) requires. And of those justifications, "waste of time" is not even a permissible basis for exclusion under Section 3593(c), and "confusion" is insubstantial for the reasons stated above. The exclusion of the Waltham evidence was an egregious error under both the Eighth Amendment and the FDPA.

D. The district court's error was not harmless beyond a reasonable doubt.

The government cannot prove that the erroneous exclusion of the Waltham evidence was harmless beyond a reasonable doubt—that is, that there is a "near certitude," *Victor* v. *Nebraska*, 511 U.S. 1, 15 (1994), that the exclusion "did not contribute to the verdict obtained," *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Because a death verdict must be unanimous, 18 U.S.C. 3593(e), the error is not harmless unless it is a virtual certainty that not even a *single* juror could have been persuaded by the Waltham evidence to vote for life. The government cannot satisfy that demanding standard.

1. The evidence that Tamerlan had previously committed violent jihad and confided in Dzhokhar was the difference between a compelling mitigation case and a weak one. The admitted evidence showed, among other things, that Dzhokhar had idolized Tamerlan since childhood; Dzhokhar, formerly studious, kind,

and popular, was only a teenager when Tamerlan began indoctrinating him; by 2012, Tamerlan was the only adult family member left in Dzhokhar's life; and Dzhokhar began making extremist statements in earnest only after spending the 2012 winter break with Tamerlan. J.A.756-757, 697-699; pp. 4-6, *supra*. But that evidence lacked real force without the Waltham evidence, because the government was able to argue that without more concrete evidence of Tamerlan's radicalizing influence, Dzhokhar must have radicalized "entirely by himself." J.A.872. Nine jurors accordingly found the relevant mitigating factors not established. J.A.614-616.

Evidence that Tamerlan committed jihad in Waltham and that Dzhokhar knew about it would have transformed the defense's evidence of influence into a compelling account explaining how Dzhokhar, a teenager with no history of violence, could have come to join his brother in the bombings—and why he should be seen as less culpable. A juror could have concluded that to Dzhokhar—a teenager raised in a Chechen family, where kinship bonds and hierarchical respect ran deep—the revelation of Tamerlan's commission of jihadist murder would have had a powerful radicalizing effect. Dzhokhar would have felt tremendous pressure to be loyal to Tamerlan, and to accept Tamerlan's view that the murders were justified. The evidence also vividly illustrated that Tamerlan had pre-existing violent proclivities and experience that made it likely he was the leader in the bombings, and Dzhokhar the follower.

Indeed, the exclusion of the Waltham jihad evidence did not merely disable Dzhokhar from fully presenting his mitigation case—though it unquestionably did that. It also gave prosecutors free rein to paint a

highly misleading picture of the central issue at sentencing—Dzhokhar's moral culpability. They did so aggressively. The Waltham murders went directly to relative culpability, and with that evidence excluded, prosecutors were able to argue that Dzhokhar should receive death because Tamerlan was not particularly aggressive and it was "*only* * * * when [Dzhokhar] made the decision to become a terrorist, that Tamerlan was able to go into action." J.A.873-874 (emphasis added). But Tamerlan obviously *was* capable of committing extremist violence without Dzhokhar, because he had done it before. Jurors therefore received a fundamentally inaccurate understanding of a critical mitigation issue. A constitutional error of this kind cannot possibly be deemed harmless where the prosecution forcefully exploits the error on a matter central to a capital defendant's sentencing defense. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 753 (1990) (error not harmless where "the State repeatedly emphasized" it during sentencing); *Skipper*, 476 U.S. at 8.

2. Had jurors received an accurate understanding of Tamerlan's violent, extremist influence, at least one juror could well have reasoned that Dzhokhar's actions on which the government relies (Br.46-47) reflected Tamerlan's indoctrination, influence, and leadership. And a juror could have concluded that Dzhokhar's actions, viewed in that light, were insufficiently culpable to warrant death. Indeed, jurors here were concerned about relative culpability: even though most concluded that (without the Waltham evidence) Dzhokhar had not established Tamerlan's radicalizing influence or leadership, the jury nonetheless rejected a death sentence for all acts for which Tamerlan was present. The jury evidently determined that Dzhokhar's culpability for the brothers' joint acts was insufficient to

warrant death. Pet.App.83a. Had Dzhokhar been permitted to establish the true nature of Tamerlan's violent influence, a juror could have concluded not only that the mitigating factors were present, but that Tamerlan's influence made Dzhokhar less culpable with respect to *all* charged acts. And one of the three jurors who found the influence factors present even without the Waltham evidence could well have voted for life. Certainly it is impossible to conclude otherwise beyond a reasonable doubt.

Although, as the government emphasizes (Br.47), the offense was a grave one, a juror's decision to vote for death or life requires formulating a "reasoned moral response" not only to the crime, but to the defendant's background, character, and role. *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 252 (2007) (internal quotation marks omitted). Exercising that judgment, any one juror—and one is all it would have taken—could reasonably have concluded that a teenager with no history of violence who acted under the influence of his revered, aggressive, violent-extremist older brother, after months of indoctrination that included a revelation of brutal jihadi murder, did not deserve the law's most severe and final penalty.

That conclusion would have been consistent with the general understanding, evident in jury verdicts and court decisions, that younger defendants who act under the influence of a violent, dominant leader often do not deserve death—even in cases involving some of the most heinous crimes in recent memory. For instance, a jury rejected a death sentence for Lee Malvo—then a teenager, like Dzhokhar—for killing several people in the 2001 D.C. sniper attacks, despite the fact that Malvo believed throughout the terror

campaign that his crimes were religiously justified.[5] At least one juror accepted Malvo's argument that he acted under the influence of the older John Muhammad, who was sentenced to death for leading the offense.[6] Other examples abound. See, *e.g.*, *State* v. *Smith*, 792 P.2d 916, 919, 923-924 (Idaho 1990); *DuBoise* v. *State*, 520 So.2d 260, 266 (Fla. 1988); *United States* v. *Kehoe*, 310 F.3d 579, 584 (8th Cir. 2002).[7] Even where the follower defendant is not young, jurors have voted for life. Terry Nichols received life, despite his conviction on 161 counts of first-degree murder in the Oklahoma City bombing, after arguing that Timothy McVeigh was "dominant, manipulative and controlling."[8] And courts considering the erroneous exclusion of influence evidence in the postconviction context have repeatedly concluded that exclusion affected the jury's verdict, even in cases involving horrific offenses. See, *e.g.*, *Cooper* v. *Sec'y, Dep't of Corrs.*, 646 F.3d 1328, 1355-1356 (11th Cir. 2011); *Buttrum*, 721 F. Supp. at

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[5] Andrea F. Siegel, *Psychologist Says Malvo Agreed to Martyrdom*, Baltimore Sun (Dec. 9, 2003).

[6] Matthew Barakat, *Jurors Split on Malvo Fate in Sniper Case*, AP News (Dec. 24, 2003), https://apnews.com/article/da4371fe3f9d1f27d24b37868d3357b1.

[7] See also, *e.g.*, *Fugitive Who Was Caught in Utah Sentenced to Life Without Parole*, Deseret News (May 11, 1999) (*U.S.* v. *Kehoe*), https://www.deseret.com/1999/5/11/19444845/fugitive-who-was-caught-in-utah-sentenced-to-life-without-parole-br-supremacist-is-convicted-of-kill; Ruben Castaneda, *Maximum Sentence in '96 Triple Killing*, Wash. Post (Aug. 25, 2000) (*U.S.* v. *Haynes*), https://www.washingtonpost.com/archive/local/2000/08/25/maximum-sentence-in-96-triple-killing/8e6deb67-3b64-4d9b-947c-ad80020a4280.

[8] *Jury Deadlocks, Sparing Nichols from Death Penalty*, CNN.com (June 11, 2004), http://www.cnn.com/2004/LAW/06/11/nichols.trial/index.html.

1314-1316; *Troedel*, 667 F. Supp. at 1461-1462; *Cooper*, 526 So.2d at 902-903.

When jurors are given a full picture of the relationship between an influential leader and a follower, they are willing to conclude that the follower should receive a sentence less than death. Had jurors here seen Dzhokhar's full mitigation case, at least one may well have reached the same conclusion here. The government defends (Br.47) the jury's verdict as "conscientious." But the jurors could be conscientious only with respect to the evidence they were allowed to see, and here they were deprived of evidence critical to the individualized moral judgment that the Eighth Amendment requires. *Skipper*, 476 U.S. at 8. Dzhokhar's death sentence cannot stand.

II. The district court failed to determine whether prospective jurors were biased by pretrial publicity.

In this case involving extraordinarily prejudicial pretrial publicity, the district court refused to ask prospective jurors a simple question: what do you remember hearing about the case? That question is routinely asked in high-profile cases (including in *Skilling* v. *United States*, 561 U.S. 358, 374 (2010)), often with the government's agreement—for good reason. The question helps both parties by eliciting whether jurors remember prejudicial coverage or commentary—especially material that is inadmissible, inaccurate, or inflammatory. Ascertaining jurors' exposure to such highly prejudicial material is critical to assessing bias. And asking the question is costless: here, it would have been 1 question out of 100 on a questionnaire, subject to follow-up at the court's discretion.

Yet despite the deluge of inflammatory publicity attending this case, the district court refused to ask the question. Instead, it seated jurors in near-total ignorance of whether they remembered, and were biased by, publicity that included victims' powerful—and inadmissible—calls for the death penalty. In this case, where ensuring an impartial jury was especially difficult, the court failed to elicit the basic information necessary to that task. That failure violated the supervisory rule established in *Patriarca*.

A. The *Patriarca* rule is a reasonable supervisory rule.

Patriarca holds that the district court must ask jurors what they have heard about a case if counsel requests it and "in the opinion of the [trial judge]," there is "a significant possibility that jurors have been exposed to potentially prejudicial material." 402 F.2d at 318; Pet.App.53a. "'[P]otentially prejudicial material'" is coverage that would skew jurors' consideration of the evidence—especially inadmissible, inaccurate, or inflammatory material. Pet.App.53a-54a. The *Patriarca* rule thus addresses situations that the government acknowledges (Br.35) threaten jurors' impartiality: those "in which impartiality may have been unduly influenced by some key piece of pretrial publicity that only some people saw." The rule is not only eminently reasonable; it also reflects the established norm of asking content questions in high-profile federal cases. See App., *infra* (listing exemplary cases).

1. This Court has long held that the courts of appeals have broad authority to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise 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." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). This Court's "review of rules adopted by the courts of appeals in their supervisory capacity is limited." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 244 (1993). Such rules pass muster if 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.

2. The *Patriarca* rule easily clears that bar. The government identifies no constitutional or statutory provision that *Patriarca* offends. And the rule is a reasonable response to long-acknowledged challenges in seating unbiased jurors in high-profile cases.

a. The purpose of voir dire is to elicit enough information from prospective jurors to enable the court and the parties to detect "possible biases, both known and unknown." *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984). As the government observes (Br.34), because a juror's mind can never be known with certainty, the judge and the parties must rely to some extent on "the juror's assurances" that he can impartially decide the case. *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). But those assurances "cannot be dispositive of the accused's rights," *ibid.*; otherwise, the right to an impartial jury would be illusory. In cases presenting a significant prospect of juror bias, therefore, voir dire must elicit objective information about jurors' preconceptions. Only then can the judge and parties critically assess jurors' assertions of impartiality. *United States* v. *Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (Marshall, C.J.) ("the law will not

trust" blindly jurors' assurances of impartiality). The "guarantee of a defendant's right to an impartial jury" thus includes the right to obtain sufficient information to ensure an "opportunity to prove actual bias." *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950).

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

b. *Patriarca* likewise deployed supervisory authority to address a source of juror bias that the Judiciary has recognized as endangering fair trials since the prosecution of Aaron Burr: exposure to prejudicial

pretrial publicity, especially coverage that would be inadmissible at trial. *Burr*, 25 F. Cas. at 52; *Skilling*, 561 U.S. at 378.

In *Mu'Min* v. *Virginia*, this Court stated that content questioning is "helpful in assessing whether a juror is impartial." 500 U.S. at 425. All nine Justices agreed. *Id*. at 433 (O'Connor, J., concurring); *id*. at 434 (Marshall, J., dissenting); *id*. at 451 (Kennedy, J., dissenting). The Court, however, held that content questioning is not *constitutionally* required in all high-profile cases. That holding rested on the assumption that the trial judge was already aware of "all" prejudicial information. *Id*. at 432-433 (O'Connor, J., concurring). The Court reasoned that relying on the "judgment of the trial court" to ascertain bias made "good sense" because the judge necessarily understood "the depth and extent of news stories that might influence a juror" even without asking content questions. *Id*. at 427.

At the same time, *Mu'Min* left the door open for supervisory rules governing content questioning. The Court acknowledged that federal courts "enjoy more latitude in setting standards for *voir dire*" under their "supervisory power," and observed that some federal courts of appeals already had supervisory rules requiring content questioning.[9] *Id*. at 424; *id*. at 447 n.6 (Marshall, J., dissenting) (*Mu'Min* did not preclude circuits' supervisory rules).

c. The *Patriarca* rule falls squarely within *Mu'Min*'s contemplation of supervisory rules governing content questioning. The First Circuit permissibly concluded that a supervisory rule governing content questioning is the "wiser course" in a small set of cases

[9] Many courts require such questioning. Br. in Opp. 27 n.6.

involving highly prejudicial publicity. *Ristaino*, 424 U.S. at 597 n.9; Pet.App.53a-54a. Given that all nine Justices *agreed* that content questioning is "helpful," *Mu'Min*, 500 U.S. at 425, instituting a rule requiring it in the cases in which it is most necessary could hardly be unreasonable. *Ortega-Rodriguez*, 507 U.S. at 244. Moreover, content questioning is ubiquitous in high-profile cases. App., *infra*; *e.g.*, *Skilling*, 561 U.S. at 374 (district court asked about "the content of" Enron-related news that jurors remembered). Trial courts have found to be true in practice what this Court stated in principle: asking jurors what publicity they remember is helpful in assessing impartiality in cases involving pervasive prejudicial publicity. The *Patriarca* rule is therefore a reasonable exercise of supervisory authority.

To be sure, mere exposure to prejudicial material is not in itself sufficient to strike jurors for cause. *Patriarca* does not suggest otherwise, but instead directs courts to ascertain the "effect" of prejudicial publicity on jurors' "present state of mind," including whether jurors' opinions are "subject to change from evidence." 412 F.2d at 318. Where a juror remembers highly prejudicial publicity, further probing is essential to determine whether that juror can be impartial. Indeed, where jurors may have seen inadmissible publicity *during* trial, courts generally must ascertain jurors' exposure to it. *E.g.*, *United States* v. *Waits*, 919 F.3d 1090, 1095 (8th Cir. 2019). *Patriarca* rests on the same principle. And because extraordinary publicity raises concerns for the public and the parties about the fairness of the trial, content questioning also protects "the appearance and reality of a fair trial." *Rosales-Lopez*, 451 U.S. at 191 n.7.

d. i. The circumstances of this case underscore *Patriarca*'s wisdom. If there were ever a case in which jurors needed to be asked what they remembered of the pretrial coverage, it is this one. The trial was preceded by a deluge of highly prejudicial, inadmissible, and inflammatory reporting and commentary. Contrary to the government's argument (Br.35), the public discourse was not largely accurate or factual. Far from it.

For instance, numerous prominent reports detailed statements by victims, victims' families, nurses who treated Dzhokhar, and community leaders demanding the death penalty. Pet.App.20a-21a, 165a-170a; 23.A. 10843; 24.A.10977-10978, 10939. This Court has long held that victims' opinions of the crime and the appropriate penalty have such an overriding tendency to "inflame" the jury that the Eighth Amendment forbids their admission. *Booth* v. *Maryland*, 482 U.S. 496, 508-509 (1987), overruled on other grounds by *Payne* v. *Tennessee*, 501 U.S. 808 (1991); *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). In addition, inflammatory commentary pervaded both conventional and social media: Dzhokhar was described as "evil," a "monster," "vile," and the "devil," and innumerable online comments called for his summary execution. Pet.App.21a, 167a. Indeed, the social media feeds of several *seated* jurors exposed them (during trial) to comments like "[b]urn him tied to a pole in the commons"; photos of gallows; and virulent anti-Muslim hate speech. D.Ct.Doc.No.1509, at 14-27. That is no doubt a minuscule portion of what *prospective* jurors saw on social media before trial.

Other prevalent commentary made the inflammatory and inadmissible argument that Dzhokhar was

particularly blameworthy because he was an ungrateful immigrant whose family received public assistance.[10] Some speculated that the bombings were financed with taxpayer dollars, and the Massachusetts legislature opened a high-profile investigation.[11] The government itself thought those arguments quite influential, as it sought to argue during the penalty phase that Dzhokhar was more blameworthy because he was a naturalized citizen who had "enjoyed the freedoms" of citizenship and "betrayed" his oath to America. 1.A.137-138. The court barred that proposed aggravating factor as "unduly prejudicial." 24.A.11094. But that very same argument was highly publicized.

Other highly prejudicial public discourse included inflammatory anti-Muslim commentary, such as racial and religious slurs, attacks on the Muslim community for allegedly not policing itself, and inaccurate rumors that a mosque that Dzhokhar attended was linked to international terrorism.[12] And some coverage undercut Dzhokhar's mitigation case, including a *Boston*

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[10] See, *e.g.*, Chris Cassidy, *Tamerlan Tsarnaev Got Mass. Welfare Benefits*, Boston Herald (Apr. 25, 2013); Ayaan Ali, *Swearing in the Enemy*, Wall Street J. (May 18, 2013); John Hayward, *Welfare Benefits for the Boston Bombers*, Human Events (Apr. 24, 2013); see also, *e.g.*, Janet Wu, *Benefits for Family of Bombing Suspects Likely Exceeded $100k*, WCVB.com (Apr. 30, 2013), https://www.wcvb.com/article/benefits-for-family-of-bombing-suspects-likely-exceeded-100k-1/8181171.

[11] Hearing (Apr. 29, 2013), https://malegislature.gov/Events/Hearings/Detail/588; Andy Metzger, *Lawmakers Get 500 Pages of Documents Regarding Tzarnaev Benefits*, WickedLocal.com (May 1, 2013), https://www.wickedlocal.com/article/20130501/News/305019568.

[12] *Boston Bomber Exposes Islamist Secret*, IPT News (Apr. 23, 2013); Oren Dorell, *Mosque that Boston Suspects Attended Has Radical Ties*, USA Today (Apr. 25, 2013); see also Ilya Feoktistov,

Globe portrait stating that unidentified friends saw Dzhokhar as "a leader not a follower."[13]

ii. The danger of prejudice from such pervasive inadmissible and inflammatory commentary was greatly amplified by three circumstances.

First, as the recitation above demonstrates, much of the publicity played out across the Internet and social media—leaving the trial judge unable to know the full universe of publicity to which jurors had been exposed. Because the offense implicated a vast range of public concerns—national security, Islamic extremism, immigration policy, public benefits, the Boston community, capital punishment—innumerable Internet outlets from the Boston Globe to Breitbart to blogs discussed the offenses. On sites like Facebook and Twitter, prospective jurors were presented with individualized feeds of community opinions and personalized content designed to reaffirm their pre-existing beliefs and prejudices. ABA.Amicus.Br.15-16. The trial judge therefore could not be expected to have seen the entire universe of publicity, or even to know the limits of his exposure. *Mu'Min*, by contrast, involved 47 newspaper articles, and the judge knew the "full range" of the publicity. 500 U.S. at 432 (O'Connor, J., concurring). That was impossible here, and failing to ask jurors what they had seen left them to judge their own impartiality. Cf. *Murphy*, 421 U.S. at 800.

Bank Records Reveal Saudi Elites Gave Millions to Boston Marathon Bombers' Mosque, Breitbart (Mar. 8, 2015), https://www.breitbart.com/politics/2015/03/08/bank-records-reveal-saudi-elites-gave-millions-to-boston-marathon-bombers-mosque.

[13] Sally Jacobs et al., *The Fall of the House of Tsarnaev*, Boston Globe (Dec. 15, 2013).

Second, because the discourse featured so much inflammatory publicity, prospective jurors could not reliably assess their own impartiality. Although (as the government emphasizes, Br.21-22) prospective jurors need not be ignorant of publicity *generally*, *Patriarca* detects exposure to inadmissible material that this Court has recognized presents an especially acute threat to impartiality. Pet.App.53a-54a. The material described above was inadmissible precisely because it would unduly sway jurors if admitted. But because prospective jurors would have seen the prejudicial material outside of court, they would not have known that it was inadmissible or should be disregarded. See *Marshall* v. *United States*, 360 U.S. 310, 312-313 (1959) (jurors could not be expected to disregard out-of-court exposure to inadmissible material). Jurors therefore were not aware of their own biases. See *Smith* v. *Phillips*, 455 U.S. 209, 221-222 (1982) (O'Connor, J., concurring).

Third, the effect of every prejudicial comment was magnified by the sense of shared community injury engendered by the bombings. All of the statements described above—but especially survivors' calls for the death penalty—exerted tremendous pressure on jurors who saw those statements and felt duty-bound to provide justice for the community.

In sum, this was exactly the sort of case that the government identifies (Br.35) as warranting concern: one "in which impartiality may have been unduly influenced by some key piece of pretrial publicity that only some people saw." A rule requiring content questioning in such cases is eminently reasonable.

3. The government's arguments against the *Patriarca* rule lack merit.

a. The government's primary contention (Br.32-34) is that because content questioning is not constitutionally required, it may not be required as a supervisory matter. The government relies (Br.31-32) on *United States* v. *Payner*, 447 U.S. 727 (1980), but that decision held only that a court may not use supervisory authority to re-weigh interests that the Court has held do not justify suppressing evidence under the Fourth Amendment. *Id*. at 735-736. That makes sense: because suppressing evidence imposes substantial costs on the truth-seeking process, those costs are justified only by a *constitutional* violation. The voir dire context is different. Asking an additional question obtains *more* information, costlessly. The Court reached the same conclusion just a year after *Payner*, as *Rosales-Lopez* used supervisory authority to require questioning that was not constitutionally mandated. The Court explained that such questioning was the "wiser course," *Ristaino*, 424 U.S. at 597 n.9; that cost-benefit weighing does not drive voir dire supervisory rules, *Rosales-Lopez*, 451 U.S. at 190; and that voir dire rules further interests beyond those animating constitutional rules, such as "the appearance of justice in the federal courts," *ibid*. That a question is not constitutionally mandated therefore does not foreclose a supervisory rule requiring it.

Perhaps recognizing that *Ristaino* and *Rosales-Lopez* refute its arguments, the government contends (Br.23) that racial bias raises special concerns that partiality based on publicity does not. But if a juror cannot be impartial for any reason—particularly in a capital case—the defendant is denied a fair trial, with his life at stake. And as the Court has long recognized, the potential for prejudice based on publicity threatens

the integrity of the judicial system—just as does prejudice based on racial bias. *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907).

b. The government next argues (Br.22-23) that *Patriarca* trenches on the judge's discretion over voir dire—despite the ubiquity of content questioning in high-profile voir dire proceedings.

Although the Court has recognized that trial-judge discretion over voir dire is generally broad, *Skilling*, 561 U.S. at 386, that discretion is simply a means to an end. It reflects a pragmatic determination that the judge is ordinarily best placed to ensure impartiality through on-the-spot assessments. *Ibid*. Where that assumption does not hold, or other concerns (such as protecting the integrity of the federal courts) prevail, the Court has not hesitated to cabin trial-judge discretion by requiring particular questions. See p. 41, *supra*. That makes sense. Rules like *Patriarca* minimally constrain the judge's discretion over questioning to ensure that the judge has adequate information to exercise his ultimate discretion over whom to seat. That cannot possibly offend any legitimate conception of the court's discretion.

Contrary to the government's argument (Br.33), *Mu'Min* did not suggest that trial-judge discretion was sufficient reason to reject the petitioner's proposed constitutional rule. Instead, the Court explained that leaving content questioning to the judge's discretion made sense because, in that pre-Internet case, the judge could discern bias without asking content questions. See p. 42, *supra*. That reasoning, combined with the Court's acknowledgment of greater "latitude" in the supervisory context, leaves ample leeway for appellate courts to craft supervisory rules addressing

narrow situations in which placing a limited constraint on the judge's discretion is the wiser course.

c. Finally, the government argues (Br.15, 29, 31, 33-34) that the *Patriarca* rule is inflexible and burdensome. That argument too is meritless.

Contrary to the government's assertion (Br.29), district courts need not "*always*" ask content questions. The court has discretion to determine whether the case implicates the rule, that is, whether there is a significant possibility that jurors have been exposed to prejudicial publicity.

The government is also wrong to suggest (Br.33) that *Patriarca* requires inflexible "granular questions." The court merely must make *some* inquiry. For instance, the government proposed asking jurors the "three or four most memorable things" they had heard. J.A.480. The court retains discretion regarding question form and whether to follow up. Pet.App.53a-54a.

Finally, the government's newly-minted complaint of burdensomeness (Br.37-38) is meritless. The prosecutors here who initially proposed content questioning did not think it burdensome. And the government has proposed content questions in other high-profile cases, including another capital case that went to trial in Boston in 2015. Gov't Proposed Jury Questionnaire, *United States* v. *Sampson*, No. 1:01-cr-10384 (D. Mass. 2015), ECF 2039-1 (Question 65); see also Gov't Proposed Juror Questionnaire, *United States* v. *Turner*, No. 1:08-cr-10345 (D. Mass. 2021), ECF 226-1 (Question 35) (public corruption). District courts—which have a strong interest in efficiency—routinely ask content questions and still complete voir dire expeditiously. App., *infra*; *Skilling*, 561 U.S. at 373-374.

B. The district court failed to elicit what seated jurors remembered hearing about the case, thereby violating *Patriarca* and committing reversible error.

1. For the reasons stated above, *Patriarca*'s prerequisites unquestionably were satisfied here because "there was 'a significant possibility' that the prospective jurors had been 'exposed to potentially prejudicial material,'" including "inadmissible information." Pet. App.53a (citation omitted). The parties accordingly requested content questioning, Pet.App.24a; J.A.480, and the district court *agreed* that juror prejudice was likely, J.A.482.

Nonetheless, the court did not gather basic information necessary to assess jurors' impartiality. The only publicity question venirepersons were asked—what "amount" of coverage they had seen, Pet.App. 372a—did not reveal *what* they remembered. And although the government emphasizes (Br.26) that most seated jurors had seen a "moderate" amount of coverage, that category was defined as "basic coverage in the news," Pet.App.372a—which, in this case involving pervasive publicity, is hardly a small amount. *Ibid*. Nor is quantity meaningful: jurors could be deeply affected by a single report that Patricia Campbell favored a death sentence for her daughter's killing.

Of the twelve jurors, nine were seated without revealing anything about what publicity they remembered. Two of the nine had seen "a lot" of coverage, and their "primary source[s] of news" included the Internet. 26.A.11701-11703, 11925-11927. Six more had seen "a moderate amount." 26.A.11730, 11814, 11871, 11898; C.A.Add.524, 552. The ninth had seen "[a] little" coverage—but Facebook was a "primary source" of

news. 26.A.11750, 11757-11759. Four of the nine already believed, based on coverage, that Dzhokhar was guilty. J.A.312, 372, 384; 6.A.2632. Although Dzhokhar conceded guilt, those jurors credited some publicity, warranting further investigation.[14] J.A.318, 372.

The district court's unjustified refusal to inquire into what jurors had heard deprived the court of essential information necessary to determine the jurors' impartiality. Inadmissible and inflammatory publicity pervaded the pretrial public discourse—yet the court seated jurors in near-total ignorance of whether they remembered deeply prejudicial material. That was "reversible error." *Rosales-Lopez*, 451 U.S. at 191. The First Circuit accordingly vacated Dzhokhar's death sentences, and this Court should not disturb that reasonable exercise of supervisory authority.

2. The government resists (Br.26-29) that conclusion, arguing that there is no evidence of juror bias. But as this Court has explained, failing to ask a question required by either the Constitution or supervisory authority deprives the court of information necessary to evaluate bias, requiring vacatur based on the existence of an "unacceptable risk" of bias. See *Turner*, 476 U.S. at 37; *Aldridge*, 283 U.S. at 314 (supervisory). That risk unquestionably exists here.

Indeed, even on the inadequate record created without content questioning, there was ample reason to fear bias. Five jurors had contributed to victims' charities, raising concerns that victims' calls for the

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[14] The government's suggestion (Br.23) that the defense had "latitude" to ask about publicity is overstated. Content questions were allowed only rarely, when the government failed to object (J.A.410). By the government's tally (Br.9-10), 11 of 256 venirepersons were asked content questions.

death penalty would have carried great weight. Several were regular social media users whose feeds were filled with inflammatory commentary, including pre-penalty-phase exhortations to "HANG the bastard" and many more in that vein—and there is no reason to think their pretrial feeds were different. Resp.C.A. Br.82; D.Ct.Doc.No.1509, at 14-27. The depth and breadth of the outrage expressed in conventional and social media, and the ubiquity of inflammatory and inadmissible commentary, cannot be overstated. In this case where seating an impartial jury was especially difficult and vitally important, the court failed to elicit basic information necessary to that critical task.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Illustrative Examples of High-Profile Cases Involving Content Questioning

A. First Circuit

1. *United States* v. *Candelario-Santana*, No. 3:09-cr-00427 (D.P.R.) (trial of Alexis Candelario-Santana for La Tombola mass shooting). See final juror questionnaire, Dkt. No. 737-2.

2. *United States* v. *DiMasi*, No. 1:09-cr-10166 (D. Mass.) (trial of former Massachusetts House Speaker Salvatore DiMasi on public corruption charges). See final juror questionnaire, Dkt. No. 507.

3. *United States* v. *Hart*, No. 1:02-cr-10301 (D. Mass.) (trial of alleged gang members for murder and other crimes at Boston's Caribbean Carnival festival). See final juror questionnaire, Dkt. No. 438.

4. *United States* v. *Jacques*, No. 3:09-cr-30001 (D. Mass.) (trial of Michael Jacques for arson of predominantly black church). See court's proposed juror questionnaire, Dkt. No. 247; jury selection transcripts, Dkt. Nos. 344-346.

5. *United States* v. *Sampson*, No. 1:01-cr-10384 (D. Mass.) (trial of serial killer Gary Lee Sampson). See final juror questionnaire, Dkt. No. 2489.

6. *United States* v. *Tazhayakov*, No. 1:13-cr-10238 (D. Mass.) (trial of Dzhokhar's friends Azamat Tazhayakov and Robel Phillipos for obstruction of justice and other crimes related to the

investigation of the Boston Marathon bombings). See jury selection transcripts, Dkt. Nos. 448-450 (Tazhayakov) and 628-630 (Phillipos).

7. *United States* v. *Trenkler*, No. 1:92-cr-10369 (D. Mass.) (trial of Thomas Shay Jr. and Alfred W. Trenkler for 1991 bombing incident that killed police officer). See jury selection transcripts, Dkt. Nos. 415 and 763-5.

8. *United States* v. *Turner*, No. 1:08-cr-10345 (D. Mass.) (trial of former state senator Dianne Wilkerson and Boston city council member Charles Turner on public corruption charges). See jury selection transcripts, Dkt Nos. 451, 452, 456; government's proposed jury questionnaire, Dkt. No. 226-1.

B. Other Jurisdictions

1. *State* v. *Chauvin*, 27-CR-20-12646 (Minn. Dist. Ct.) (trial of Derek Chauvin for the murder of George Floyd). See final juror questionnaire, available at bit.ly/3yn31ze.

2. *People* v. *Peterson*, No. SC55500 (Cal. Super. Ct.) (trial of Scott Peterson for murder of his pregnant wife, Laci Peterson, and their unborn son). See Michael Taylor, *Petersen Trial / 116-Question Test to Pick the Jurors / Jury Pool Must Answer a 22-page Survey*, S.F. Gate (Mar. 6, 2004), available at bit.ly/3725EL4.

3. *People* v. *Simpson*, No. BA097211 (Cal. Super. Ct.) (trial of O.J. Simpson for murder). See final juror questionnaire, available at bit.ly/2VenRST.

4. *People* v. *Spector*, No. BA255233 (Cal. Super. Ct.) (trial of Phil Spector for murder). See final juror questionnaire, available at bit.ly/3x4qIuU.

5. *United States* v. *Bonds*, No. 3:07-cr-00732 (N.D. Cal.) (trial of Barry Bonds for perjury and obstruction of justice in connection with steroid use). See final juror questionnaire, Dkt. No. 304.

6. *United States* v. *Kelly*, No. 1:19-cr-00286 (E.D.N.Y.) (trial of "R. Kelly" (Robert Sylvester Kelly) for sex crimes). See final juror questionnaire, Dkt. No. 115.

7. *United States* v. *Manafort*, No. 1:18-cr-00083 (E.D. Va.) (trial of Paul Manafort for financial crimes). See court-proposed juror questionnaire, Dkt. No. 122; jury selection transcript, Dkt. No. 290.

8. *United States* v. *Montgomery*, No. 5:05-cr-06002 (W.D. Mo.) (trial of Lisa Montgomery for murder of pregnant woman and kidnapping of unborn baby). See final juror questionnaire, subsequently filed in habeas case, No. 4:12-cv-08001 (W.D. Mo.), Dkt. No. 149-7.

9. *United States* v. *Moussaoui*, No. 1:01-cr-00455 (E.D.V.A.) (trial of Zacarias Moussaoui for participation in September 11, 2001 terrorist attacks). See final juror questionnaire, available on Westlaw (2006 WL 1182459).

10. *United States* v. *Rahman*, No. 1:93-cr-00181 (S.D.N.Y.) (trial of perpetrators of 1993 World Trade Center bombing). See final juror questionnaire, available at bit.ly/3l0shaW.

11. *United States* v. *Roof*, No. 2:15-cr-00472 (D.S.C.) (trial of Dylann Roof for Charleston church shooting). See final juror questionnaire, Dkt. No. 365.

12. *United States* v. *Shkreli*, No. 1:15-cr-00637 (E.D.N.Y.) (trial of "Pharma Bro" Martin Shkreli on securities-fraud charges). See joint proposed juror questionnaire, Dkt. No. 399-1; jury selection transcript, Dkt. No. 393; see also Readings, *Public Enemy*, Harper's Magazine (Sept. 2017), available at bit.ly/3l5Z3r2.

13. *United States* v. *Skilling*, No. 4:04-cr-00025 (S.D. Tex.) (trial of former Enron CEO Jeffrey Skilling for financial crimes). See final juror questionnaire, Dkt. No. 1214; see also Joint Appendix Vol. 2 at 811a-1032a, *Skilling* v. *United States*, No. 08-1394 (S. Ct. Dec. 11, 2009) (jury selection transcripts).

14. *United States* v. *Stone*, No. 1:19-cr-00018 (D.D.C.) (trial of Roger Stone for obstruction of justice and related charges arising out of special prosecutor investigation). See final juror questionnaire, Dkt. No. 247.