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 *AMICI CURIAE* EVIDENCE AND SENTENCING LAW PROFESSORS IN SUPPORT OF JUDGMENT BELOW ON EVIDENCE EXCLUDED AT PENALTY PHASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici all are law school professors who teach or taught evidence or sentencing law, among other subjects. They cover a broad range of the spectrum of legal philosophy and ideology. Some support the death penalty in principle in some circumstances, others do not.

They are united, however, in the belief that (a) the federal death penalty, when applied at all, should be applied fairly; (b) uniform sentencing rules in federal capital prosecutions will promote that fairness; and (c) in the interest of avoiding conflict between the Eighth Amendment's requirements in capital sentencing and 18 U.S.C. § 3593(c), that section should not be construed to allow easier exclusion of a death-eligible defendant's mitigation information at the penalty phase, to which the Federal Rules of Evidence do not apply, than FED. R. EVID. 403 would allow as to other probative evidence in proceedings to which the Federal Rules of Evidence *do* apply. *Amici curiae* therefore confine their brief to the second question presented: whether the district court committed reversible error at the penalty phase of respondent's trial by excluding evidence that respondent's older brother was involved

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[1] Pursuant to SUP. CT. RULE 37.6, counsel of record states that no party's lawyer authored this brief in whole or in part. Likewise, no party or lawyer made a monetary contribution to the preparation or submission of this brief, other than counsel of record here. Both parties have consented to the filing of this *amicus* brief.

in different murders two years before the offenses for which respondent was convicted.

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SUMMARY OF ARGUMENT

Historically and today, a sentencing jury or judge may consider information that the rules of evidence would exclude. *Williams v. New York*, 337 U.S. 241, 246-51 (1949); FED. R. EVID. 1101(d)(3) (sentencing excluded from scope of Federal Rules of Evidence). For at least 45 years, since *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has read the Eighth Amendment to make that a constitutional rule in capital cases, as to mitigating evidence at a penalty phase. On the whole, the current federal death penalty structure, 18 U.S.C.

§§ 3591-3599, conforms to the contours of that Eighth Amendment and due process landscape.

Here, though, if read as the government urges, 18 U.S.C. § 3593(c) would allow a trial court to exclude mitigating information from the penalty phase if the risks of unfair prejudice, confusing issues, or misleading the jury merely "outweigh[ed]" the probative value of that mitigation. That would impose a tighter restriction on mitigating information than would Rule 403, FED. R. EVID., in a proceeding to which the rules of evidence *do* apply.

Given this Court's line of Eighth Amendment decisions on the required breadth of room for mitigating information, accepting the government's argument on § 3593(c) would raise a serious constitutional question. But because the proper meaning of the § 3593(c) balancing test is ambiguous, the Court responsibly can avoid that constitutional concern. It can save § 3593(c) by a construction that allows exclusion of mitigating information only when the risk of other considerations *substantially* outweighs probative value. *Amici* believe that the same balance can be struck as to government information rebutting mitigation and as to aggravating information, at least ordinarily.

Rightly understood, § 3593(c) allowed exclusion of respondent's mitigating information only if the government showed that other considerations substantially outweighed the probative value of Tamerlan Tsarnaev's prior triple murders on respondent's relative culpability here. The First Circuit's judgment below

applied a more favorable standard for the government, so its conclusion that the trial court erred in barring that mitigating information is more surely correct. Finally, the government here does not establish that the erroneous exclusion of this mitigating information was harmless beyond a reasonable doubt, because its argument that respondent was a willing and independent participant in the crimes goes only to eligibility for a possible death sentence, not to whether a jury would have imposed one unanimously.

ARGUMENT

I. Introduction.

A mixed-martial arts fighter, Todashev, told law enforcement officers that he "had to" participate in a triple murder because he perceived that he "did not have a way out" of Tamerlan Tsarnaev's insistence that he do so. Petition for Certiorari 68a (October 6, 2020) (Cert. Pet.).[2] Tamerlan chose the tenth anniversary of the September 11, 2001 attacks on which to commit that triple murder. Cert. Pet. 64a. An FBI agent later included Todashev's account in a sworn search warrant application and the government signaled its belief in the veracity of that account by submitting it to a magistrate judge. Cert. Pet. 81a-82a. For his part, Tamerlan's younger brother, respondent here, took no part in

[2] Citations to the opinion of the court below refer to that opinion as reprinted in Appendix A to the Petition for a Writ of Certiorari.

that triple murder but later understood it as Tamerlan committing jihad two years before the Boston Marathon bombings on which respondent stood trial for his life. Cert. Pet. 67a.

With respondent's guilt established, he urged in mitigation at the penalty phase that he acted under the influence of older brother Tamerlan and that he was particularly susceptible to Tamerlan's influence because of the older brother's age, size, aggressiveness, domineering personality, and privileged status in a Chechen family as an elder son. Respondent also noted that Tamerlan became radicalized first and planned and led the Boston Marathon bombings. Cert. Pet. 70a. Respondent, with no prior record of violence, Cert. Pet. 77a, contended that he would not have committed the crimes but for Tamerlan. Cert. Pet. 70a. To support that mitigation, he sought to offer Todashev's statements about Tamerlan's role in the triple murder.

The trial judge excluded all information about the triple murder from the penalty phase, ruling that it was "without any probative value" and would be confusing to the jury and a waste of time. Cert. Pet. 69a.

As relevant to this brief of *amici curiae*, the court of appeals later reviewed only for abuse of discretion. Cert. Pet. 72a-73a. It read 18 U.S.C. § 3593(c) as allowing a trial judge to "exclude 'information' if 'its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.' " Cert. Pet. 75a.

On that understanding, the court of appeals held that the trial court had abused its discretion in excluding the triple murders, Cert. Pet. 83a, and that the error was not harmless beyond a reasonable doubt. Cert. Pet. 83a-84a. It also found a *Brady* violation in nondisclosure of Todashev's statements, *see* Cert. Pet. 85a-86a, and rejected the government's effort to invoke a qualified law enforcement investigatory privilege. Cert. Pet. 86a-87a. *Amici* do not address either *Brady* or the qualified privilege.

II. A Significant History: Constitutional Rules of Evidence and Aggravating and Mitigating Information Without Rules of Evidence.

A. The United States Constitution supplies, in some contexts, positive rules of evidence. The Fifth Amendment, for example, has an evidentiary privilege: the Self-Incrimination Clause. Article III, § 3, U.S. CONST., in its Treason Clause, includes specific evidentiary requirements. And the Constitution also negates application of some rules of evidence, again in some contexts. *See, e.g.*, *Washington v. Texas*, 388 U.S. 14 (1967) (Fourteenth Amendment due process clause incorporates Sixth Amendment compulsory process clause as to states, and overrides state rule of evidence forbidding defendants from calling accomplices as witnesses, when fair trial requires); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process requires state rule of evidence that a party vouches for his witnesses, and may not impeach them, to yield when fair trial demands); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state's

blanket rule of evidence forbidding hypnotically-refreshed testimony must yield to defendant's due process right to testify in her own behalf). These constitutional rules apply in criminal trials when guilt or innocence are at stake and the usual rules of evidence otherwise control admissible proof.

B. After guilt is determined, historically, United States courts at sentencing are unbound by rules of evidence (legal privileges aside) and may consider most reliable information. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 246-51 (1949); *Stephan v. United States*, 133 F.2d 87, 100 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943) (trial judge alone conducted *in camera* interviews about defendant, and one with him, before sentencing); *but see Townsend v. Burke*, 334 U.S. 736, 739-41 (1948) (due process violation for unrepresented defendant to be sentenced on "materially untrue" information about prior criminal record), and *Mempa v. Rhay*, 389 U.S. 128, 133-37 (1967) (Sixth Amendment right to counsel at sentencing in part to avoid reliance on inaccurate court records). Since 1975, the Federal Rules of Evidence explicitly have excepted sentencing hearings from their scope. FED. R. EVID. 1101(d)(3).

The inapplicability of the rules of evidence at sentencing may work both to the detriment and the benefit of a criminal defendant. But cases like *Williams* and *Stephan*, in which the judges chose sentences of death, illustrate how the absence of rules of evidence at sentencing and the breadth of information a sentencing court may consider (if reasonably accurate) often work to the advantage of the government at sentencing and

on review. *See Williams v. Oklahoma*, 358 U.S. 576, 585 (1959) ("In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."). Due process tolerates information at sentencing that may lead to an increased sentence or even death, where the rules of evidence might have excluded that information.

C. In capital cases, though, the Eighth Amendment opens the field of admissible information in mitigation and potentially aids the defendant. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, 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") (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (adopting the rule that the *Lockett* plurality described); *Skipper v. South Carolina*, 476 U.S. 1, 4-8 (1986); *McKoy v. North Carolina*, 494 U.S. 434, 437-43 (1990); *Boyde v. California*, 494 U.S. 370, 377-78 (1990); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); *Smith v. Texas*, 543 U.S. 37, 43-44 (2004).

Of course, the prosecution also has a free hand to rebut mitigating evidence in the penalty phase of a capital trial. 18 U.S.C. § 3593(c) ("The government and the defendant shall be permitted to rebut any information received at the hearing."). Aggravating factors are limited by statute, 18 U.S.C. § 3592(b), (c), (d),

while mitigating factors are not. But government rebuttal of those mitigating factors ranges as wide as the factors themselves.

D. As to both mitigating information and rebuttal of it, a sentencing court retains authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12.

Importantly, though, for Eighth Amendment purposes that traditional authority to exclude extends only to the "irrelevant"; it does not extend to excluding relevant information. *See Tennard v. Dretke*, 542 U.S. 274, 283-85 (2004) (rejecting a "screening test" for "constitutional relevance" and holding instead that the general evidentiary standard for relevance applies to mitigating evidence in a capital case and that, "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence"); *Smith*, 543 U.S. at 44; *see also Payne*, 501 U.S. at 822 ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"; quoting *Eddings*, 455 U.S. at 114).

III. Properly Understanding 18 U.S.C. § 3593(c) to Avoid Constitutional Concerns.

With the due process room for aggravating information and rebuttal of mitigating information outside the rules of evidence, and the Eighth Amendment's requirement that a capital sentencer hear and be able to give effect to any information relevant to mitigation again outside the rules of evidence, the government presents a statutory interpretation problem here. Surely on the whole, Congress drafted § 3593 with that history in mind. The statute's overall structure tracks this Court's Eighth Amendment jurisprudence in capital cases.

Yet, read with incautious rigidity as the government urges, § 3593(c) would allow exclusion of relevant information when "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *See* Brief for the United States at 44. The balancing test differs in its wording from the balancing test that applies in proceedings that are subject to the rules of evidence. Rule 403, FED. R. EVID., implements the rules' preference for admissibility by allowing exclusion of relevant evidence only when the danger of unfair prejudice, confusion, or other considerations "*substantially* outweigh[s]" probative value (italics added). As the government invites, then, § 3593(c) could be read to strike a balance less favoring admission of relevant information than the Federal Rules of Evidence do.

Especially given the broad structure of § 3593, that reading would create concerns. Sentencing is outside the rules of evidence, traditionally and today, for the very purpose of allowing more, not less, reliable information. *See Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976) (judgment of the Court and opinion of Stewart, J.) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."); *see again* FED. R. EVID. 1101(d)(3) (excluding sentencing from Federal Rules of Evidence). The due process clauses of the Fifth and Fourteenth Amendments clearly tolerate that, in this Court's longstanding view, including when a longer sentence or even death is a result. For example, recall that in the oft-cited *Williams v. New York*, the sentencing judge overrode a jury recommendation of life and imposed a death sentence. 337 U.S. at 242. This Court let stand the sentence that rested in part there on evidence that would have been inadmissible under common law rules of evidence that then applied. And as to mitigating evidence, the Eighth Amendment requires expansive admission in capital cases, notwithstanding rules of evidence other than relevance.

A. Perhaps cautiously, though, the court of appeals below seems to have assumed that § 3593(c) should be read to leave the balance in equipoise: it proceeded on the assumption that if unfair prejudice, confusion, or misleading the jury merely outweighs

probative value, however slightly, a trial judge's discretionary exclusion of relevant mitigation (or, presumably, relevant rebuttal of mitigation) will stand. Cert. Pet. 75a. Even on that assumed standard, less generously allowing probative information relevant to mitigation or aggravation in a capital sentencing hearing than Rule 403 would, the First Circuit held that the trial court abused its discretion in refusing respondent's information about Tamerlan's role in the triple murder. Giving no special favor to the admission of relevant mitigation, it found the trial court's error not harmless beyond a reasonable doubt.[3]

B. Although this Court never has considered the proper reading of the balancing test under § 3593(c), five circuits considering aggravating evidence specifically have read that section as requiring exclusion if offsetting concerns simply outweigh probative value of penalty-phase evidence. *United States v. Sampson*, 486 F.3d 13, 42-43 (1st Cir. 2007) (unlike Rule 403, § 3593(c) "directs that exclusion may result if the scales tip, even slightly, in favor of unfair prejudice"); *United States v. Fell*, 360 F.3d 135, 145 (2d Cir. 2004) ("is, in fact, more stringent than its counterpart," Rule 403); *United States v. Pepin*, 514 F.3d 193, 203-07 (6th Cir. 2008) (recognizing that § 3593(c) balancing test "is,

[3] Some signatories of this brief, Prof. Richard D. Friedman principal among them, believe that this Court should affirm largely for the First Circuit's reasons, because even on the standard that the court below assumed, the district court clearly abused its discretion. Those signatories take no stand on the statutory construction argument that follows and believe the Court need not either.

in fact, more stringent" than Rule 403; *Pepin* cites and quotes *Fell* for this proposition); *United States v. Hall*, 945 F.3d 1035, 1042-47 (8th Cir. 2019) (comparing Rule 403 to § 3593(c) and noting that the latter gives the trial court "more gatekeeping power, in other words, even though a greater range of evidence can potentially pass through the door"; applying that looser gatekeeping standard to approve both admission of government aggravating evidence and exclusion of defense mitigating evidence); *United States v. Lujan*, 603 F.3d 850, 858-60 (10th Cir. 2010) (in capital prosecution, district court abused discretion under § 3593(c) in excluding all evidence of an earlier double homicide that the government sought to offer to support a non-statutory aggravating factor of future dangerousness); *see also Lujan*, 603 F.3d at 862 (Henry, C.J., dissenting) (noting difference between § 3593(c) standard and Rule 403, which means that a trial court "has even greater discretion than usual" in excluding relevant aggravating evidence at the penalty phase).

While most of these decisions and more district court decisions concern the government's efforts to offer information supporting aggravating factors, some also concern defense mitigating evidence. Certainly, Congress did not intend to allow aggravating information more freely than mitigating information. No court appears to have considered squarely, though, whether easier exclusion of probative mitigating information under § 3593(c) than of trial evidence controlled by Rule 403 would present a conflict with the

Eighth Amendment imperative, as this Court has interpreted it in death penalty cases.

C. Reading § 3593(c) literally (and as the government does) could present a serious constitutional issue and, in any event, would be inconsistent with the overall structure of 18 U.S.C. §§ 3591-3599. That chapter on death sentences reflects throughout procedures and special precautions *in favorem vitae*. If one subsection, § 3593(c), really did allow exclusion of defense mitigating information from the penalty phase of a capital trial unbound by the Federal Rules of Evidence, when such mitigating information could not be excluded if Rule 403 applied, it arguably would offend the Eighth Amendment and could not stand. For if that amendment today means anything in capital sentencing, it is that the defendant who asks a jury to spare his life must have more leeway in offering relevant information than the rules of evidence otherwise would allow—not less. Forty-five years of this Court's consistent rulings support that idea. Read literally and out of constitutional and statutory context, § 3593(c) could afford a defendant less leeway in the penalty phase when his life is at stake than Rule 403 affords a defendant during a federal misdemeanor trial.

The Court responsibly can avoid that constitutional question here, though. A saving construction of § 3593(c) to allow exclusion of relevant mitigating information from the penalty phase of a capital trial only when unfair prejudice or another statutory consideration *substantially* outweighs probative value would avoid a potential conflict with the Eighth Amendment.

Ordinarily, too, *amici* suggest that the Court safely could read § 3593(c) the same way as to relevant government information that rebuts defense mitigation, and as to relevant aggravating information that the government seeks to offer.

This Court regularly prefers to avoid constitutional questions, as a prudential matter, where a case can be decided fairly on non-constitutional grounds. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

True, this doctrine applies only when there are two plausible interpretations of a statute and "has no application in the absence of . . . ambiguity," *Warger v. Shauers*, 574 U.S. 40, 50 (2014); *Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1978-79 (2020). But the doctrine can and should apply here. Contrary to the government's implicit argument, what exactly Congress intended with the balancing test of § 3593(c) is unclear and ambiguous.

The section at issue, § 3593, was one procedural section of the Federal Death Penalty Act, which itself was one small part of the omnibus Violent Crime Control and Law Enforcement Act of 1994. That massive

act included new capital crimes, the Violence Against Women Act, funding for 100,000 more police officers, new juvenile-justice policies, gun control measures, changes to FED. R. EVID. 412 and addition of FED. R. EVID. 413 through 415, and dozens of other provisions. Within the title on the death penalty, the § 3593(c) balancing test was part of one of 26 sections. And that death penalty title was just one of 33 titles in the Act.

This one subsection's balancing test in the procedure for penalty phases of capital trials seems to have gotten little attention. *Amici* have found in the vast legislative history of the Violent Crime Control and Law Enforcement Act not one reference to the balancing test that § 3593(c) set out. Not one, in the voluminous legislative history compiled by the Government Accountability Office dating back to 1978, sixteen years before the law's enactment. Yes, silence in legislative history alone is a poor basis on which to divine intent. Still, had Congress meant here to enter the house and alter the balance in admissibility of penalty-phase information, with the constitutional implications that could have carried, this was an occasion on which the dog did not bark. None of them did.

In any event, with legislative history silent on the point, this section of the larger 1994 crime bill did create an important ambiguity. The Federal Death Penalty Act of 1994, Pub. L. 103-322, § 60002 (Sept. 13, 1994), 108 Stat. 1959, which is the part of the larger act that included § 3593, did not amend or repeal the separate subsections that then controlled the death penalty procedure for the crime of continuing criminal

enterprise (CCE). That CCE statute used—and continued to use for another eleven-plus years—"substantially outweighs" in its balancing test for exclusion of information at the penalty phase. 21 U.S.C. § 848(j) (1995) (repealed Pub. L. 109-177, tit. II, § 221(2), March 9, 2006). Noting the difference between § 3593(c) and § 848(j), and possible confusion, one thorough commentator wrote that, "The absence of the word 'substantially' from the 1994 statute could prove extremely significant if it led to the exclusion of more evidence." Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 396 (1999). Writing seven years before the repeal of § 848(j), Professor Little urged federal judges to continue using that statute's "substantially outweighs" standard in CCE death cases. *Id*.

For present purposes, a Congress that intended to alter the balancing test in the penalty phase of federal capital cases would have amended or repealed § 848(j) when it enacted § 3593(c). It did not. Surely Congress also did not intend different penalty-phase procedures dependent on the underlying federal capital crime. Given that conflict in the wording of the balancing tests in the penalty phase of federal capital prosecutions for CCE and for all other death-eligible crimes, there is at least ambiguity in what Congress intended. The 2006 act that repealed 21 U.S.C. § 848(j), a reauthorization and amendment of the USA Patriot Act, simply repealed subsections (g) through (p) of § 848 without explanation. Pub. L. 109-177, tit. II, § 221(2),

120 Stat. 231. In all, the unexplained omission in 1994 of one word—"substantially"—from the balancing test for almost all federal capital offenses, with the simultaneous failure to reconcile the balancing test for a CCE capital offense, is a wispy basis for concluding, as the government apparently does, that Congress spoke unambiguously on the balance between probative value and unfair prejudice (and other interests) that it meant to strike in § 3593(c).

The Court can avoid potential serious conflict between § 3593(c) and the Eighth Amendment by construing the statute to allow exclusion of relevant mitigating information only when risks of unfair prejudice, confusing issues, or misleading a jury substantially outweigh the probative value of that information. At least ordinarily, the same balance can be struck as to relevant aggravating information or relevant rebuttal of mitigating information. As to relevant mitigating information at least, it cannot be that § 3593(c) throttles the penalty phase more tightly than Rule 403 would if the Federal Rules of Evidence applied.

IV. Not Harmless Error.

If the Court properly views the judgment below as finding abuse of discretion under a standard more favorable to the government than should have applied, then the district court's error is even clearer under the proper balancing test. The government's burden of proving the error harmless beyond a reasonable doubt correspondingly increases, too. And here, the

government's entire harmlessness argument rests on factors—being "a willing participant in terrorism, not a reluctant accessory" or having "a life and mind independent of" his brother's—that go to guilt in the first instance, or at most to eligibility for the death penalty, not to the proper punishment in the end. *See* Brief of the United States at 45-47. If respondent had acted *un*willingly or without any independent agency in the charged crimes, he would not have been eligible for the death penalty. 18 U.S.C. § 3591(a)(2)(A)-(D) (for death eligibility, requiring intent to kill, intent to cause serious bodily injury, intentional participation in an act involving lethal force, or intentional participation in an act knowing it created a grave risk of death such that participation required a reckless disregard of life).

In short, proving that respondent acted willingly was the cover charge the government paid to get into the penalty phase. The same showing cannot then win the government a death sentence at that penalty phase. Guilt's consequence is not death under this statutory and constitutional scheme; guilt's consequence is the subsequent sorting of a penalty phase.

Because every capital defendant whose case proceeds to a penalty phase necessarily fits the government's description of respondent, that does little or nothing to assist in the later sorting of those who will get death from those who will get a life sentence. One or more jurors who heard about Tamerlan's prior triple murder of a childhood friend and two others, in the name of jihad, and with sufficient menace to persuade a mixed-martial arts fighter to help, well might have

concluded that, guilt aside, respondent's relative culpability was sufficiently lower than his older brother's to warrant sparing his life.

The government has not established that exclusion of the triple murders was harmless beyond a reasonable doubt. Indeed, it has offered no more than threshold eligibility for a possible death sentence in trying to make that showing.

CONCLUSION

Amici curiae support affirming the judgment of the United States Court of Appeals for the First Circuit as to the triple murder evidence excluded at the penalty phase. The second question presented addresses that issue.

Dated at Madison, Wisconsin, August 25, 2021.

Respectfully submitted,

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