No. 20-443

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DZHOKHAR A. TSARNAEV

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent asserts that his "shocking crime"—a brutal terrorist attack in which he personally placed and detonated a homemade shrapnel bomb behind a group of children, murdering an eight-year-old child and a college student, and severely wounding many others—"puts law to its severest test." Br. 1 (citation omitted). The district court's fair and careful management of respondent's trial passed that test, resulting in an impartial jury that delivered a nuanced verdict recommending capital punishment only for the murders that respondent personally committed. Respondent's criticisms of two out of the hundreds of separate judgment calls required from the court over the course of this complex case are unwarranted. The district court acted well within its discretion in assessing the possibility of publicity-based bias for each prospective juror primarily through individualized voir dire, rather than rote repetition of questions that would have produced

unhelpful or unmanageable answers—and could even have been counterproductive. The court likewise acted well within its discretion in declining to sidetrack the penalty phase with an investigation into irredeemably unreliable evidence about the role that respondent's brother might have played in a dissimilar crime two years earlier—evidence that had little if any bearing on respondent's own culpability for the Boston Marathon bombing. This Court should reverse.

I. THE COURT OF APPEALS ERRED IN APPLYING AN INFLEXIBLE VOIR-DIRE RULE TO INVALIDATE THE JURY'S PENALTY VERDICT

Only at the end of his brief (Br. 38-53) does respondent defend the court of appeals' primary rationale for undoing the years of effort that went into this case—namely, the court's disapproval of the district court's conscientious jury-selection process. See, *e.g.*, Pet. App. 64a. The "key" to that disapproval, *id.* at 49a, was the court of appeals' half-century-old decision in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969), which it read for the first time as setting forth a wooden supervisory rule that mandated additional questions to each prospective juror about the content of the pretrial publicity that he or she had seen. See Gov't Br. 34. Respondent asserts (Br. 39) that the "*Patriarca* rule" is "eminently reasonable." But "reasonableness" is not a valid basis for a supervisory rule that would displace this Court's precedent identifying the trial court as the principal manager of jury selection. And even if it were, the inflexible *Patriarca* rule is not reasonable. The experienced district judge assigned to this case went to extraordinary lengths—including a 21-day voir dire that the court of appeals found laudable at the time—to enable selection

of an impartial jury, which included no members who had formed an opinion on the appropriate punishment and which returned a discerning penalty verdict. That verdict should stand.

A. The Court Of Appeals' Inflexible Voir-Dire Rule Is Legally Unfounded

Respondent recognizes (Br. 49) that district courts are entitled to especially broad latitude over voir dire "[w]hen pretrial publicity is at issue." *Skilling* v. *United States*, 561 U.S. 358, 386 (2010); see Gov't Br. 22-24. And he acknowledges (Br. 42) that questions "about the specific contents of the news reports to which [prospective jurors] had been exposed" are not constitutionally required, even in highly publicized cases. *Mu'Min* v. *Virginia*, 500 U.S. 415, 417 (1991); see Gov't Br. 23-24. Neither respondent's nor the court of appeals' view that invariantly asking such questions is nevertheless "reasonable" (Br. 39) is a permissible ground for dispensing with the legal system's "'primary reliance on the judgment of the trial court'" to determine the "measures necessary to ensure [juror] impartiality" in the circumstances of a particular case. *Skilling*, 561 U.S. at 386-387 (quoting *Mu'Min*, 500 U.S. at 427).

The supervisory power does not entitle federal courts to make rules with the freedom of legislatures. Instead, this Court has stressed the need for "restrained application of the supervisory power." *United States* v. *Payner*, 447 U.S. 727, 735 (1980). Such restraint is particularly warranted when courts invoke the supervisory power not merely "to control their *own* procedures," *United States* v. *Williams*, 504 U.S. 36, 45 (1992), but to dictate requirements to other courts. See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 246 (1993); *Bank of Nova Scotia* v. *United States*, 487 U.S.

250, 264 (1988) (Scalia, J., concurring). This Court has also shown particular skepticism toward supervisory rules that supplant the traditional exercise of judicial discretion with bright-line mandates. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 383 (1999); *Shannon* v. *United States*, 512 U.S. 573, 584-587 (1994). And few matters are as "'particularly within the province of the trial judge,'" and as resistant to appellate "second-guessing," as jury selection in high-profile (and other) cases. *Skilling*, 561 U.S. at 386 (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 594-595 (1976)).

The *Patriarca* rule also transgresses the prohibition made clear in *United States* v. *Payner* against crafting supervisory rules that are out of step with this Court's own reasoning on an analogous constitutional issue. See 447 U.S. at 731; Gov't Br. 31-32. In both *Mu'min* v. *Virginia*, which rejected a constitutional rule of the sort that the *Patriarca* rule imposes, and other decisions, this Court has made clear that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*"—especially in addressing pretrial publicity. *Skilling*, 561 U.S. at 386; see *Mu'Min*, 500 U.S. at 417, 427. Respondent nevertheless suggests (Br. 42) that *Mu'Min*, in noting some circuits' reliance on the supervisory power to address jury selection in high-profile cases, "left the door open" for supervisory rules like the *Patriarca* rule. But that suggestion fails to account for *Mu'Min*'s recognition that even circuits that had required publicity-content questions in high-profile cases had done so only "in some circumstances"; *Mu'Min*'s observation that other circuits had eschewed that approach; and—most importantly—*Mu'Min*'s own superseding logic. 500 U.S. at 426. In particular, *Mu'Min*'s explanation that this Court's "own cases" have

"stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity," *id.* at 427; see *Skilling*, 561 U.S. at 386-387 (similar), is fundamentally inconsistent with the rigid *Patriarca* rule.

Respondent tries (Br. 48) to salvage the *Patriarca* rule on the theory that *Payner*'s admonishment against back-door supervisory rules is limited to the evidence-suppression context. But he identifies nothing in this Court's jurisprudence that would allow courts of appeals to freely substitute their own views for this Court's—and district courts'—in the context of publicity questioning. Respondent's only putative basis for distinguishing *Payner* consists of decisions in which this Court has *itself* invoked the supervisory power to require an inquiry into prospective jurors' racial prejudice in certain cases where the Constitution would not require one. But those decisions cannot support a supervisory-power end-around by a court of appeals.

Moreover, those decisions address only whether a potential source of impermissible bias must be explored *at all*. The Court has remained "careful not to specify the particulars by which" courts would address potential racial bias, *Mu'Min*, 500 U.S. at 431 (citation omitted), and its precedents suggest that a single generalized question may suffice, see, *e.g.*, *Aldridge* v. *United States*, 283 U.S. 308, 311-314 & nn.1, 3 (1931). Here, in contrast, the issue is not *whether* to ask about potential bias from pretrial publicity, but instead the appropriate form and scope of such questioning in a specific case. The inflexible *Patriarca* rule fails to accord the "respect due to district-court determinations" on that subsidiary matter of case management. *Skilling*, 561 U.S. at 387. Instead, as with the constitutional rule rejected in

Mu'Min, the *Patriarca* rule would require "more in the way of *voir dire* with respect to pretrial publicity than" this Court has required, even in the supervisory context, "with respect to racial or ethnic prejudice." 500 U.S. at 424.

Respondent notes (Br. 43) that the district court in *Skilling* v. *United States* asked a question similar to the one the court of appeals required here. But nothing in this Court's passing mention of that fact, 561 U.S. at 374, suggested that such a question is invariably required. And such a requirement would be difficult to square with the first major pretrial-publicity case to come before this Court, *Reynolds* v. *United States*, 98 U.S. 145 (1879), in which the Court upheld a conviction where prospective jurors had simply been asked, subject to follow up, whether they had "formed or expressed an opinion as to the guilt or innocence" of the defendant based on exposure to information before trial. *Id.* at 146-147; see *id.* at 155-157. The district court's process here was significantly more extensive and well within its case-specific discretion.

B. The Court Of Appeals' Inflexible Voir-Dire Rule Is Practically Unsound

Even if the supervisory power allowed courts of appeals to enact "reasonable" blanket rules to superintend district courts' management of voir dire (Resp. Br. 39), the *Patriarca* rule would not be such a rule.

1. While content questioning in accord with that rule may be helpful in some cases involving substantial pretrial publicity, a fair and just verdict does not necessarily require it. Courts can conduct an effective voir dire in high-profile trials without asking for an accounting of what each prospective juror has seen. See *United States* v. *Haldeman*, 559 F.2d 31, 67-68 (D.C. Cir. 1976)

(en banc) (per curiam) (explaining that such questions "would have been unreasonable in the circumstances" of a Watergate-related trial).

The mandatory questioning imposed by the court of appeals has been found unnecessary or unproductive not only for trials involving modern political scandals, see *Haldeman*, 559 F.2d at 65-70, but also one of the oldest high-profile cases on record. Although respondent notes (Br. 40-42) a couple of Chief Justice Marshall's general observations in the high-profile treason trial of former Vice President Aaron Burr, those observations did not lead the Chief Justice to ask the sort of specific content questions that respondent demands here. For the grand jurors, Chief Justice Marshall instead asked, subject to follow-up questions, "have you made up your mind on the case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise?" *United States* v. *Burr*, 25 F. Cas. 55, 58 (C.C.D. Va. 1807); see *United States* v. *Burr*, 25 F. Cas. 49, 52 (C.C.D. Va. 1807) (Marshall, C.J.) (explaining that a similar question was asked to petit jurors); see also 1 David Robertson, *Trial of Aaron Burr for Treason* 404-482 (1875) (report of jury selection).

2. Neither Chief Justice Marshall's approach nor the district judge's similar approach here should be rejected as legal error based on a supervisory rule like the one that the court of appeals imposed. Respondent insists (Br. 44) that the "circumstances of this case underscore" the "wisdom" of the *Patriarca* rule, but he identifies no sound reason why that is so, let alone why a completely new penalty proceeding should be required.

Both respondent and the court of appeals recognized the impropriety of a voir-dire rule so unyielding that it would require vacatur of the guilt-phase verdict

here. Instead, both acknowledged that, in light of respondent's "trial concession * * * that he had done what the government accused him of doing," the *Patriarca* rule should not disturb his convictions. Pet. App. 60a; see *id.* at 61a n.33. But the court of appeals showed no similar context-sensitivity when it vacated the penalty-phase verdict. The jury's nuanced assessment that capital punishment was warranted on exactly 6 of 17 possible counts shows a conscientious jury, with an open mind about the evidence and arguments bearing on the penalty, rather than a jury predisposed to recommend a death sentence.

Respondent fails to show that the district court abused its considerable case-management discretion, see *Skilling*, 561 U.S. at 386-387, in crafting and implementing tailored jury-selection procedures to identify penalty-phase bias. This case unquestionably involved extensive pretrial publicity. But respondent's assertion that the pretrial coverage of his crimes "was not largely accurate or factual," Br. 44, contradicts the court of appeals' own determination that the coverage was "largely factual and [that] the untrue stuff was no more inflammatory than the evidence presented at trial." Pet. App. 47a. Respondent's efforts (Br. 7, 44-46, 51) to convey a different impression, by highlighting publications that he deems particularly prejudicial, are misguided. Many of the articles that he mentions (*e.g.*, those discussing his immigration status or the funding of the attack) have at best a tenuous connection to the appropriate penalty. And while the media reported that some members of the community supported a capital sentence (including the Boston mayor and the mother of one bombing victim), see Resp. Br. 7, the media also reported that many did not. See Gov't Br. 37 (Archbishop of Boston,

Boston Globe editorial board, and 57% of Massachusetts residents); C.A. App. 11,047-11,048 (Boston Bar Association, American Civil Liberties Union of Massachusetts, and volunteer who treated the wounded at the marathon); D. Ct. Doc. 461-3, at 1653-1655 (Aug. 7, 2014) (Massachusetts state legislators).

Respondent also inappropriately discounts the extensive measures that the district court took to address concerns about pretrial publicity. Contrary to his assertion that prospective jurors were unaware that pretrial publicity "should be disregarded," Br. 47, the court expressly told each panel of prospective jurors that they must "base a decision on the evidence presented in court" and "not * * * anything [they had] seen, heard, read or experienced outside the courtroom[,] including anything [they thought they had] previously learned from, say, reports in the media." J.A. 283. The court then reminded each prospective juror of that responsibility during individual voir dire, *e.g.*, J.A. 285, 296, 306, and repeated the admonition throughout the proceedings, *e.g.*, C.A. App. 6977 ("As I've said on many occasions, you must completely disregard any reports you may have read in the press, seen on television, heard on the radio or viewed online."); *id.* at 8696 ("[Y]ou are not to be influenced by speculation concerning what sentence you think anyone else, including victims' families, might wish to see imposed on the defendant.").

The district court also questioned prospective jurors at length about pretrial publicity during the 21-day voir dire, asking virtually all of them (including all seated jurors) to expand on their answers to the questionnaire inquiry about media exposure—and allowing counsel for both parties to do the same. See Gov't Br. 26-28; J.A. 284-471. Although respondent briefly disputes (Br.

52 n.14) that his counsel had "latitude" to ask follow-up questions about pretrial publicity, that was his own counsel's characterization during voir dire. J.A. 501; C.A. App. 1143. And the court's tailored approach, which prompted it to strike multiple prospective jurors for cause, allowed selection of a jury that contained no members who had formed an opinion about the appropriate punishment. See Gov't Br. 27; C.A. App. 1887, 2271, 2703. Indeed, the court of appeals observed at the time that the "thorough" voir dire had produced provisionally qualified jurors "capable of providing [respondent] with a fair trial." Pet. App. 240a. That observation remained just as true post-trial, when it had been confirmed by the jury's careful verdict.

3. Respondent asserts (Br. 38) that asking his proposed question to all prospective jurors would have been "costless." But as the district court explained—and as the government recognized after initially agreeing to standardized content questioning—asking all prospective jurors an "unfocused" question about what they had "read or heard" about the Boston Marathon bombing would produce "unmanageable data." J.A. 473, 480-481, 489. That would be particularly so if, as respondent now appears to suppose (Br. 46, 53), the question would have also required expounding on the content of any social media. Whatever the possible benefits of such a question in cases where different jurors might have been exposed to significantly different segments of coverage, cf. *Skilling*, 561 U.S. at 391 & n.28, the district court could reasonably decide that it was not warranted in this case, where the main sources of publicity were common to nearly everyone in the jury pool (and nearly every informed citizen in the Nation). See Gov't Br. 35.

In addition, the district court reasonably determined that making prospective jurors revisit the details of media coverage from years earlier would "be counterproductive actually rather than helpful," because it "places the wrong emphasis" and "misdirects" jurors to the very subject that the law compels them to avoid. J.A. 498, 502. That problem would perhaps be even more acute if the question asked only for the "most memorable things" that the prospective juror had seen or heard. Resp. Br. 50 (citation omitted). As respondent's own counsel recognized, J.A. 480, most prospective jurors would likely have identified the same things—*e.g.*, the bombing aftermath at the marathon site, the manhunt, and respondent's capture—and the district court could reasonably determine that discussing them was far more likely to be prejudicial than probative. Experience bears that out: of the prospective jurors who were asked questions that would apparently satisfy respondent (Br. 52 n.14), one (a seated juror) mentioned only the image of the finish line and did not even recall respondent's name, J.A. 331-332; others similarly mentioned undisputed basic facts, such as the boat capture, J.A. 506, 512, 529; and others recalled no particular media coverage at all, J.A. 507, 515, 518, 523-524.

4. Selecting a fair and impartial jury for the trial of the most notorious domestic terrorist in recent American history was uniquely challenging. As the court of appeals recognized during that process, the district court took "ample time to carefully differentiate between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those who have developed an opinion they cannot put aside." Pet. App. 253a; see *id.* at 250a (describing "the entire voir dire conducted to this point" as "thorough

and appropriately calibrated to expose bias, ignorance, and prevarication"). Perhaps another judge might have added weeks to the 21-day voir dire by attempting a detailed excavation of the content of each prospective juror's individual media consumption. But even if so, that does not entitle a court of appeals to second-guess this district judge's reasonable judgment calls. See *Skilling*, 561 U.S. at 386-387.

Any suggestion that such additional questioning—itself potentially prejudicial—would increase confidence in the impartiality of the penalty-phase verdict is speculative at best. As the district court aptly summarized, "this was not a jury impelled by gross prejudice or even reductive simplicity, but rather a group of intelligent, conscientious citizens doing their solemn duty, however reluctantly." Pet. App. 329a. Its efforts, and the efforts of the district court to select it, should not be set aside based on an inflexible and unsupported appellate dictate about the conduct of voir dire.

II. THE COURT OF APPEALS ERRED IN DEEMING THE DISTRICT COURT'S HANDLING OF THE PENALTY-PHASE EVIDENCE TO BE A BASIS FOR VACATUR

The court of appeals' secondary rationale for invalidating the penalty verdict, which respondent relies on as his primary argument (Br. 14-38), is no more justifiable. The district court did not abuse its discretion by declining to allow respondent to divert the penalty phase of his trial—which "concern[ed] *his* character, record, and offense," Resp. Br. 17 (emphasis added); see *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982)—into an unresolvable investigation of his brother Tamerlan's role in a dissimilar crime two years earlier. See Gov't Br. 39-45. And even if the district court had allowed a minitrial on that subject, it would not have changed the

jury's recommendation of capital punishment for the murders that respondent personally committed. *Id.* at 45-47. None of respondent's arguments shows otherwise.

A. The District Court Did Not Abuse Its Discretion In Precluding Inquiry Into The Unsolved Waltham Crime

The Federal Death Penalty Act generally dispenses with the rules of evidence for the penalty phase of a federal capital trial, "except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. 3593(c). The district court reasonably relied on that provision to keep respondent's penalty-phase proceeding focused on his own culpability for the Boston Marathon bombing, as opposed to whether or how Tamerlan might have been involved in the robbery and murder of three drug dealers two years before. Respondent recognizes (Br. 16) that the statute "implements th[e] constitutional requirements" for the admission of mitigating evidence. He does not question the deferential standard of review for a district court's evidentiary rulings. And he does not come close to showing that the district court's assessment of the statutory factors here was so "plainly incorrect" as to constitute an "abuse of discretion." *United States* v. *Sampson*, 486 F.3d 13, 42 (1st Cir. 2007), cert. denied, 553 U.S. 1035 (2008). To the contrary, respondent's brief in this Court relies heavily on mitigation theories different from the ones at issue below.

1. As an initial matter, the district court reasonably found that evidence about Tamerlan's possible participation in the Waltham crime would have added little, if anything, to the jury's consideration of the appropriateness of capital punishment for respondent's own murders in the marathon bombing. See Gov't Br. 40-42.

To the extent respondent suggests (Br. 25, 31) that a co-defendant's criminal history is always admissible, he fails to show that the sole fact of partnership with someone whose prior history is even more reprehensible is an appropriate ground for mitigation. Indeed, inviting such an inappropriate general comparison, through a digression into a co-defendant's different potential crime, is itself the sort of unwarranted issue-confusion that the Act properly allows a district court to avoid. Cf. *Cauthern* v. *Colson*, 736 F.3d 465, 488 (6th Cir. 2013) (finding that "a reasonable juror would not have concluded" that evidence that co-defendant was suspected of an unrelated and unsolved rape and murder "had any bearing on [the defendant's] relative culpability"); *Fuller* v. *Dretke*, 161 Fed. Appx. 413, 415-416 (5th Cir.) (recognizing that evidence of co-defendant's "propensity to violence" had "little, if any, relevance to [defendant's] character and background"), cert. denied, 548 U.S. 936 (2006).

Respondent contends (Br. 21-23) that he could have used the Waltham evidence to support his assertions that Tamerlan "radicalized first" and that respondent was "susceptible to Tamerlan's influence" because of their "deep filial ties." But the government did not dispute that Tamerlan radicalized first, see J.A. 873-874, and any marginal relevance of the Waltham evidence to show the circumstances of respondent's own radicalization, or his loyalty to Tamerlan, was negligible at best. The centerpiece of the evidence that respondent sought to introduce—Ibragim Todashev's story of a financially motivated crime, committed by two people who were not relatives—would have shed no meaningful light on either subject. Nor would respondent's putative state-

ment to his friend Dias Kadyrbayev that Tamerlan committed "jihad" in Waltham. J.A. 583-584. Respondent's apparent expression of admiration for jihad simply illustrated his own radicalization by that time. It would not support the daunting inferential leaps through which respondent seeks (Br. 22-23) to characterize the Waltham crime as a *reason why* he became radicalized or felt particularly loyal to his brother.

Respondent also asserts that he could have used the Waltham evidence to support his theory that "Tamerlan was the leader" of the marathon bombings, because Tamerlan "had previously committed violent jihad." Br. 23-24 (emphasis omitted). As just noted, however, Todashev's account portrayed the Waltham crime as financially, not religiously, motivated. See J.A. 941. And even to the extent that a single article on Tamerlan's computer (see Resp. Br. 21) or Kadyrbayev's possible hearsay testimony about respondent's unexplained assertion (see Br. 20-21) might have indicated otherwise, the crimes remained extremely dissimilar. Even if the robbery was to support jihad (Br. 21), the robbers were careful to cover their tracks—indeed, that was the asserted reason for the murders. See J.A. 947. Participation in such a crime, behind closed doors, would not meaningfully indicate that Tamerlan alone masterminded the ambitious public spectacle of constructing and detonating homemade bombs to kill and injure innocent people at the finish line of the Boston Marathon.

2. Whatever slight probative value the Waltham-related evidence might have had was diminished further by its fundamental unreliability, which likewise underpinned the district court's reasonable determination that any probativeness was outweighed by the risk of confusion, misdirection, or unfair prejudice. This was

not like evidence of a defendant's *own* past crimes (Resp. Br. 32), which is probative because it bears directly on the defendant's individual history and character. Nor was it like evidence of Tamerlan's general aggressive nature (Resp. Br. 18) that, probative or not, could be introduced through relatively simple live-witness testimony to which the government did not object. Instead, the proposed Waltham evidence would have invited the jury down a rabbit hole to examine the details of Todashev's claims, all of which had little, if any, legitimate utility to its consideration of respondent's own history, character, and culpability for killing and injuring marathon spectators with a homemade shrapnel bomb.

Respondent acknowledges (Br. 16-17, 30) that he was not entitled to introduce the Waltham-related evidence unless it was sufficiently "reliable." See *Green* v. *Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (requiring admission of hearsay mitigating evidence under Due Process Clause only where "substantial reasons existed to assume its reliability" and it "was highly relevant to a critical issue in the punishment phase"); see also *Sears* v. *Upton*, 561 U.S. 945, 950 n.6 (2010) (per curiam) (citing *Green*). But Todashev's self-serving tale, with no possibility of direct or cross examination, and Kadyrbayev's proffer fell far short of that threshold. The district court did not find "any evidence that would permit a neutral finder of fact" to determine "what participation Tamerlan may have had" in the Waltham crime. J.A. 650. Todashev had an obvious incentive to lie; his conduct following the Waltham crime was far more suspicious than Tamerlan's; and he suicidally attacked officers in the midst of documenting his story, see Gov't Br. 41-42, all of which made it impossible—as the dis-

trict court found, J.A. 650—to determine who might have done what. And testimony from Kadyrbayev about respondent's Waltham-related statement would not have made sense to the jury without the Todashev evidence (indeed, respondent has never sought to introduce the Kadyrbayev statement by itself); did not align with Todashev's account of the crime's motivation; and did not provide any way to explore a crime whose alleged perpetrators and victims were all deceased.

Respondent errs in asserting (Br. 27) that the government effectively conceded that Todashev's story was fit for the jury by "vouch[ing] for the reliability of Todashev's statements" in seeking a search warrant for Tamerlan's car in furtherance of law enforcement's investigation into the Waltham crime. The FBI special agent's affidavit treated those statements as sufficient for "probable cause to believe that Todashev and [Tamerlan] planned and carried out the murder," J.A. 996, but did not purport to take any position on whether a juror could ultimately rely on Todashev's veracity to evaluate Tamerlan's actions or character—let alone respondent's. Respondent does not directly address this Court's commonsense recognition in *Franks* v. *Delaware*, 438 U.S. 154 (1978), that a warrant affiant is not representing "that every fact recited in the warrant affidavit is necessarily correct." *Id.* at 165. Although the "information put forth is believed or appropriately accepted by the affiant as true" for the purpose of assessing probable cause for a search, *ibid.*, respondent identifies no authority for imposing a form of estoppel on prosecutors in the very different context of a penalty-phase trial as the price of an agent pursuing an investigative lead.

In any event, while the affidavit summarized some of Todashev's self-serving assertions, J.A. 998-999, it did not endorse—let alone add any independent credibility to—any of the particulars of Todashev's story. The affidavit thus did nothing to ameliorate the insuperable reliability problems with any of the mitigation theories identified by the court of appeals—namely, that Tamerlan "had previously instigated, planned, and led brutal attacks" (which the affidavit did not itself claim); that Tamerlan had "justified [them] as jihad" (which Todashev did not claim); and that Tamerlan "had influenced a less culpable person (Todashev) to participate in murder" (which Todashev denied). Pet. App. 79a.

Respondent now argues (Br. 32) in this Court that the jury need not have considered "exactly who did what in the Waltham apartment," because he sought "to establish only that Tamerlan played a significant role in the murders and [respondent] knew about it." But that is a sharp departure from the theories in the lower courts, and the court of appeals' own rationale on this issue, which focused heavily on the particular details of Todashev's claims about the Waltham crime. See Pet. App. 67a-68a (describing "key details about the murders (as disclosed by Todashev)"); *id.* at 69a, 72a, 75a-79a (accepting as probative respondent's mitigation argument based on "Tamerlan's lead role in the Waltham killings"); J.A. 642, 668-669 (respondent seeking to introduce "[e]vidence that Tamerlan planned and committed the Waltham murders"); J.A. 650 (district court finding details of the Waltham crime unreliable).

3. Instead of respecting the district court's well-reasoned evidentiary determinations, the court of appeals required the admission of Waltham evidence on a rationale that would have involved "'sidetrack[ing] the

jury' into resolving tangential 'factual disputes'"—a concern that even respondent recognizes as a proper basis for exclusion. Br. 31 (quoting *United States* v. *McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999)). Respondent contends (Br. 31) that the district court could have addressed that concern "by regulating the manner of presentation." But like the court of appeals, respondent fails to describe a workable way for the district court to have done that.

Respondent asserts (Br. 32) that he "could have relied solely on" (1) "the Todashev statements [described] in the search warrant affidavit"; (2) "Kadyrbayev's testimony or proffer"; and (3) "corroborating documentary evidence." He did not, however, make that specific proposal to the district court. See J.A. 642-643. And even if he had, the government would have been entitled to introduce additional details that would undermine Todashev's story—such as Todashev's indication of a financial motivation for the Waltham crime, Todashev's claim that he was able to opt out of committing murder, and evidence that Todashev may well have committed the murders himself. See 18 U.S.C. 3593(c) ("The government and the defendant shall be permitted to rebut any information received at the [penalty-phase] hearing."). The district court thus reasonably found no hope that the jury could figure out what might (or might not) have occurred, and reasonably exercised its discretion in deciding not to divert the jury by sending it down such an uncertain and unproductive path.

B. The Waltham Evidence Would Not Have Changed The Jury's Penalty Verdict

Even assuming that the district court lacked the discretion to make that circumstance-specific judgment,

the exclusion of the Waltham evidence was harmless beyond a reasonable doubt. See Gov't Br. 45-47.

1. Respondent asserts (Br. 33) that the Waltham evidence "was the difference between a compelling mitigation case and a weak one." But as his own brief demonstrates, the district court gave respondent wide latitude to present his mitigation arguments to the jury. Respondent argued at length about Tamerlan's influence on him, and he was able to introduce direct evidence of their relationship, including that respondent "had idolized Tamerlan since childhood"; that respondent sometimes followed Tamerlan "'like a puppy'"; that "Tamerlan was the only adult family member left in [respondent's] life" by 2012; that "kinship bonds and hierarchical respect ran deep" in respondent's "Chechen family"; and that Tamerlan was the one who "began indoctrinating" respondent. Resp. Br. 4, 33-34 (citation omitted); see J.A. 746, 749, 752, 825, 831-833, 836; C.A. App. 7745. Respondent likewise presented direct evidence that Tamerlan "was the leader in the bombings," Br. 34, including evidence that Tamerlan had "searched online for the Boston Marathon," J.A. 246, and purchased the pressure cookers, BBs, and radio transmitters for the bombs, *e.g.*, C.A. App. 6261-6263, 6277-6285.

All of that direct evidence would have been far more important to the jury for assessing the brothers' relative culpability for the bombing than any invitation to follow an extended chain of speculative inferences from an unsolved Waltham crime. Yet even such direct evidence of Tamerlan's influence and leadership did not persuade the jury to excuse respondent from culpability for the murders that he personally committed. Cf. *United States* v. *Runyon*, 994 F.3d 192, 210 (4th Cir. 2021) ("Given the willingness of the jury to recommend

death in the face of all of these mitigating factors, there is no reasonable probability that a more detailed understanding of [co-defendant's] criminal history would have made a difference.").

2. The jury's penalty verdict is not, as respondent suggests (Br. 34-36), the result of the government "misleading" the jury in the absence of Waltham-related evidence. It instead reflects the straightforward and fundamental point, which the Waltham evidence would not have meaningfully undercut, that no matter what Tamerlan did years earlier in Waltham, respondent's deliberate decision to bomb the Boston Marathon warranted capital punishment because his own personal acts were horrific, inexcusable, and the product of his own embrace of terrorist ideology—as described in his personal boat manifesto. See J.A. 871-874; see also Gov't Br. 6.

Respondent asserts (Br. 19) that the government "exploit[ed] the Waltham evidence's exclusion by arguing that Tamerlan was *incapable* of acting without" him. But the portion of the closing argument that he cites was not a discussion of Tamerlan's general capacity for jihad, but instead how he and respondent "committed *these* crimes"—the marathon bombing. J.A. 873 (emphasis added). The government acknowledged that Tamerlan "was ready to commit violent jihad" before respondent, but observed that Tamerlan had unsuccessfully looked elsewhere for a "partner" and was "able to go into action" once respondent "made the decision to become a terrorist." J.A. 873-874. As the government's immediately following discussion made clear, that "action" was the marathon bombing. The government explained that respondent played a critical role in that crime by, among other things, "obtain[ing] a gun and ammunition, a crucial ingredient in their plans," and

"cho[osing] on his own where to place his bomb for maximum effect" before "call[ing] Tamerlan to give him the go-ahead" to detonate. J.A. 874.

Todashev's story of Tamerlan's offer to split the proceeds of the Waltham robbery, followed by an unplanned murder that Todashev opted out of committing, did not suggest that respondent was intimidated or impelled to place and detonate that bomb. And Kadyrbayev's proffer of respondent's putative statement admiring a Waltham "jihad"—testimony that Kadyrbayev offered to the *prosecution*—would have made respondent appear even *more* incorrigible. See Gov't Br. 42. Nothing suggested that respondent feared physical injury (let alone fratricide) if he declined to bomb civilians, or that Tamerlan otherwise commanded his obeisance in carrying out the bombing. At the most basic level, respondent made the choice to commit a terrorist attack against children and other innocent spectators at the marathon, and the jury held him accountable for that choice.

3. Respondent observes (Br. 36-37) that some other defendants who committed grievous capital crimes have received life sentences. But nothing about the Waltham evidence would have meaningfully likened respondent to (for example) Terry Nichols, who aided a horrendous crime but did not himself personally carry it out. See *McVeigh*, 153 F.3d at 1177-1178. The substance of the jury's split verdict here was clear: whatever else might be said about Tamerlan's influence, role, or culpability, the jury found that respondent was himself responsible for killing two people and maiming many others with his own bomb, in service of his own jihadist beliefs. And the jury accordingly authorized a capital sentence for those exceptionally cruel and shocking acts. Its lawful verdict should not be disturbed.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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