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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that respondent's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard, or seen about respondent's case.

2. Whether the district court committed reversible error at the penalty phase of respondent's trial by excluding evidence that respondent's older brother was allegedly involved in different crimes two years before the offenses for which respondent was convicted.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement:
A. Respondent's crimes 2
B. Pretrial proceedings 6
1. Venue challenges and jury selection 7
2. Dispute over Waltham evidence 11
C. Trial and sentencing 13
D. Court of appeals' decision 15
Summary of argument 16
Argument:
I. The court of appeals erred in applying an inflexible voir dire rule to invalidate respondent's capital sentences 19
A. The district court's extensive jury-selection procedures appropriately and effectively ensured an impartial jury 20
1. A juror can be impartial even if he or she has seen, and formed opinions based on, pretrial publicity 21
2. The district court's voir dire procedures here were appropriately tailored to produce an impartial jury 24
B. The court of appeals erred in relying on a novel, inflexible, and unsupported voir dire rule to invalidate respondent's capital sentences 29
II. The court of appeals erred in alternatively vacating respondent's capital sentences based on his brother's alleged involvement in different unsolved crimes 38
A. The district court did not abuse its discretion in declining to admit the Waltham evidence 39

Table of Contents—Continued: Page

B. Any error in the district court's handling of the Waltham issue was harmless beyond a reasonable doubt 45
Conclusion 48
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Aldridge v. *United States,* 283 U.S. 308 (1931) 33
Beck v. *Washington*, 369 U.S. 541 (1962) 36
Brady v. *Maryland*, 373 U.S. 83 (1963) 38
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 39
Franks v. *Delaware*, 438 U.S. 154 (1978) 44
Irvin v. *Dowd*, 366 U.S. 717 (1961) 21, 22
Jones v. *United States*, 527 U.S. 373 (1999) 31
McNabb v. *United States*, 318 U.S. 332 (1943) 29
Mu'Min v. *Virginia*, 500 U.S. 415 (1991) ..... *passim*
Patriarca v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969) 15, 29, 34
Patton v. *Yount*, 467 U.S. 1025 (1984) 35
Pena-Rodriguez v. *Colorado*, 137 S. Ct. 855 (2017) 23, 33
Rideau v. *Louisiana*, 373 U.S. 723 (1963) 35
Rosales-Lopez v. *United States*, 451 U.S. 182 (1981) 22, 23, 33, 36
Reynolds v. *United States*, 98 U.S. 145 (1879) 21
Shannon v. *United States*, 512 U.S. 573 (1994) 36
Skilling v. *United States*, 561 U.S. 358 (2010) ..... *passim*
Skipper v. *South Carolina*, 476 U.S. 1 (1986) 45

Cases—Continued: Page

Sprint/United Mgmt. Co. v. *Mendelsohn*, 552 U.S. 379 (2008) 40
Turner v. *Murray*, 476 U.S. 28 (1986) 23
United States v. *Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) 21
United States v. *Hasting*, 461 U.S. 499 (1983) 31
United States v. *Lujan*, 603 F.3d 850 (10th Cir. 2010), cert. denied, 562 U.S. 1303 (2011) 39
United States v. *Mechanik*, 475 U.S. 66 (1986) 37
United States v. *Mitchell*, 502 F.3d 931 (9th Cir. 2007), cert. denied, 553 U.S. 1094 (2008) 40
United States v. *Payner*, 447 U.S. 727 (1980) 31, 32
United States v. *Sampson*, 486 F.3d 13 (1st Cir. 2007), cert. denied, 553 U.S. 1035 (2008) 39, 40
United States v. *Umaña*, 750 F.3d 320 (4th Cir. 2014), cert. denied, 576 U.S. 1035 (2015) 40
United States v. *Wood*, 299 U.S. 123 (1936) 32

Constitution, statutes, and rule:

U.S. Const. Amend. VI 21
Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.* 39
18 U.S.C. 3593(c) 16, 39, 43, 44
18 U.S.C. 3595(c)(2) 45
18 U.S.C. 844(i) 7
18 U.S.C. 924(c) (2012) 7, 15
18 U.S.C. 924(j) (2012) 7
18 U.S.C. 2332a 6
18 U.S.C. 2332f 6
Fed. R. Evid. 403 39

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-188a) is reported at 968 F.3d 24. The court's order denying respondent's first petition for a writ of mandamus (Pet. App. 216a-220a) is reported at 775 F.3d 457. The court's order denying respondent's second petition for a writ of mandamus (Pet. App. 230a-302a) is reported at 780 F.3d 14. The order of the district court denying respondent's motion for a new trial or judgment of acquittal (Pet. App. 303a-349a) is reported at 157 F. Supp. 3d 57. The court's orders granting the government's motion in limine (J.A. 649-651) and denying respondent's requests for production of evidence (J.A. 652-654, 656-659) are unreported. The court's orders denying respondent's motions for a change of venue (Pet. App. 190a-201a, 202a-215a, 221a-229a) are not published in the Federal Supplement but are available

at 2015 WL 505776, 2015 WL 45879, and 2014 WL 4823882.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2020. The petition for a writ of certiorari was filed on October 6, 2020, and granted on March 22, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, respondent was convicted of 30 offenses for the 2013 bombing of the Boston Marathon—"one of the worst" acts of terrorism on United States soil since September 11, 2001. Pet. App. 1a. On the jury's recommendation, the district court imposed capital sentences for six counts and imposed life-imprisonment sentences for multiple additional counts. *Id.* at 18a. The court of appeals affirmed 27 of respondent's convictions, reversed three convictions, vacated his capital sentences, and remanded for a new penalty proceeding. *Id.* at 1a-188a.

A. Respondent's Crimes

1. Respondent is a "[r]adical jihadist[] bent on killing Americans." Pet. App. 1a; see J.A. 168-170, 230-234. In late 2012 and early 2013, he told a friend that he wanted to "bring justice for [his] people" and attain the "[h]ighest level of Jannah [paradise]," which his friend understood to mean that respondent wanted to wage jihad. J.A. 117-120. He expressed the same desire to followers on Twitter, whom he encouraged to view al Qaeda lectures, and he publicly prayed for "victory over

kufr [infidels]." J.A. 121-123. The preceding year, while in college in Massachusetts, respondent had accessed radical propaganda including an electronic copy of an al Qaeda publication with exhortations from al Qaeda leaders to commit terrorist attacks in "the West" and instructions for making bombs to "damage[] the enemy." J.A. 109, 892; see J.A. 99-112, 880-899.

On April 15, 2013, respondent and his brother Tamerlan—a fellow jihadist—walked to the crowded finish-line area of the Boston Marathon with backpacks containing homemade pressure-cooker shrapnel bombs filled with BBs and nails. J.A. 162; see J.A. 97-98 (photos). They separated, and each of them found a spot packed with spectators to place his bomb. J.A. 162-163. Respondent selected the sidewalk near the crowded outdoor patio at the Forum restaurant, just behind several children watching the race. J.A. 163; see J.A. 124 (photo of respondent in backward white hat taking position behind the children); Exhibit 22, at 0:01-7:15 (video).[1] The brothers spoke on the phone, and about 20 seconds later, Tamerlan's bomb exploded. J.A. 164. Respondent then moved away from his own bomb, which exploded a few seconds later. *Ibid.*; see Exhibit 22, at 6:45-7:55; Exhibit 1634C; Exhibit 5 (videos).

The bombs caused devastating injuries that left the street with "a ravaged, combat-zone look." Pet. App. 4a. "Blood and body parts were everywhere," littered among "BBs, nails, metal scraps, and glass fragments." *Id.* at 4a-5a. "The smell of smoke and burnt flesh filled the air," and "screams of panic and pain echoed throughout the site." *Id.* at 5a; see J.A. 207-212; J.A.

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[1] Pertinent video exhibits in the record are available on a multimedia drive that the government has submitted to the Clerk's Office. Some of the cited photos and videos contain graphic content.

125-142 (photos); Exhibits 11C and 14 (videos of aftermath of first bomb); Exhibit 23, at 6:30 (video of aftermath of respondent's bomb).

The first bomb "completely mutilated" the legs of race spectator Krystle Campbell, causing her to bleed to death on the sidewalk while her friend attempted to comfort her. Pet. App. 5a (brackets omitted). Respondent's bomb "filleted" the leg of Boston University student Lingzi Lu "open down to the bone." *Ibid.* People nearby worked frantically to save Lu's life and pleaded with her to "[s]tay strong," but she died within minutes. *Id.* at 5a-6a. Respondent's bomb "also sent BBs and nails tearing through" the body of eight-year-old Martin Richard, "cutting his spinal cord, pancreas, liver, kidney, spleen, large intestine, and abdominal aorta, and nearly severing his left arm." *Id.* at 6a. The boy "bled to death on the sidewalk—with his mother leaning over him, trying to will him to live." *Ibid.*

The bombs also "consigned hundreds of others to a lifetime of unimaginable suffering." Pet. App. 6a. Among many other severe injuries, victims lost limbs, their sight, or their hearing. *Ibid.*; see Gov't C.A. Br. 21-25. Respondent's bomb alone caused eight people—including Martin Richard's six-year-old sister—to lose their legs. Gov't C.A. Br. 22. His bomb also gashed the stomach of Lingzi Lu's friend so severely that she had "to hold her insides in." Pet. App. 5a.

2. Back at college the next day, respondent again accessed the electronic al Qaeda magazine with bomb-making instructions. J.A. 103. That evening, he worked out at the gym with a friend and tweeted, "I'm a stress free kind of guy." J.A. 145; see Exhibits 1181-1183 (videos).

Three days later, the Federal Bureau of Investigation (FBI) released surveillance-camera images of the bombing suspects and asked the public to help find them. Pet. App. 7a. When a friend recognized respondent as one of the bombers and messaged him, he replied, "Better not text me my friend" and "Lol [laughing out loud]." J.A. 146.

That night, respondent met up with Tamerlan again and they loaded pipe bombs, a handgun, and another shrapnel bomb into Tamerlan's car. Pet. App. 7a. The brothers drove past the Massachusetts Institute of Technology, where they saw a campus police squad car. *Ibid.* They approached together from behind and shot Officer Sean Collier in the head at point-blank range using respondent's pistol. *Ibid.*; Exhibits 723-724 (videos). They tried to steal Officer Collier's firearm, but could not remove it. Pet. App. 7a-8a. After that, the brothers carjacked graduate student Dun Meng at gunpoint, stole $800 from Meng's bank account at an ATM, and drove to a gas station. *Id.* at 8a; Exhibit 756 (video). While respondent shopped for snacks, Meng made a desperate escape, and the brothers made off in Meng's SUV. Pet. App. 8a; Exhibits 748, 752 (videos).

Using the tracking system in the SUV, police located the brothers in Watertown, Massachusetts. Pet. App. 9a. When officers started following them along a residential street, the brothers exited the SUV and attacked the officers. *Ibid.* Tamerlan began shooting while respondent threw bombs—some of which exploded. *Ibid.* When Tamerlan's gun stopped firing, he charged at the officers, who wrestled him to the ground. *Ibid.* Meanwhile, respondent got back into Meng's SUV and sped toward the officers and Tamerlan. J.A. 180; J.A. 147-149 (photos). The officers managed to get

themselves, but not Tamerlan, out of respondent's path. J.A. 180. Respondent ran over Tamerlan, who died a few hours later. *Ibid.* The shootout caused life-threatening injuries to one of the officers. J.A. 180-181.

Respondent abandoned the SUV about two blocks away, then fled a short distance on foot and hid in a covered boat behind a home. Pet. App. 9a; see J.A. 150 (photo). While inside the boat, respondent carved the words "Stop killing our innocent people, and we will stop." J.A. 168; see J.A. 151 (photo). He also used a pencil to write out a manifesto to "shed some light on [his] actions." J.A. 203; see J.A. 152-154 (photos). He stated that while "killing innocent people" is "forbidden in Islam" and he did not "like" it, "due to said [obscured] it is allowed." J.A. 159. He accused "[t]he U.S. government [of] killing our innocent civilians" and stated that he could not "stand to see such evil go unpunished." J.A. 204. He warned that "the [M]ujahideen" "ha[d] awoken," and that "you are fighting men who look into the barrel of your gun and see heaven." *Ibid.* He also wrote that he was "jealous" of Tamerlan's martyrdom and "ask[ed] Allah to make [him] a" martyr as well. J.A. 203-204.

The homeowner discovered respondent the next day. Pet. App. 10a. Respondent ignored law-enforcement officers' "repeated requests to surrender," but was eventually forced out of the boat and captured. *Ibid.*

B. Pretrial Proceedings

In June 2013, a federal grand jury in the District of Massachusetts indicted respondent on 30 counts, including using a weapon of mass destruction resulting in death, in violation of 18 U.S.C. 2332a; bombing a place of public use resulting in death, in violation of 18 U.S.C. 2332f; malicious destruction of property resulting in

death, in violation of 18 U.S.C. 844(i); and using a firearm during and in relation to a crime of violence resulting in murder, in violation of 18 U.S.C. 924(c) and (j) (2012). Pet. App. 12a-15a; see *id.* at 12a n.9 (detailing all charges). At the direction of then-Attorney General Eric Holder, the United States sought capital sentences on the 17 capital counts. *Id.* at 15a.

1. Venue challenges and jury selection

a. One year into pretrial proceedings, respondent filed a motion for a change of venue based on pretrial publicity. Pet. App. 190a-205a. The district court denied the motion. *Id.* at 190a-201a. The court recognized that "[m]edia coverage of this case * * * has been extensive," but emphasized that "prominence does not necessarily produce prejudice, and juror *impartiality* does not require *ignorance*." *Id.* at 193a (quoting *Skilling* v. *United States*, 561 U.S. 358, 360-361 (2010)). After reviewing the media coverage in detail, along with expert reports on the bias that it would allegedly create, the court determined that the coverage did not contain the kind of "blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore." *Id.* at 194a.

Respondent renewed his venue-change motion a few months later, and the district court again denied it. Pet. App. 205a. The court observed, *inter alia*, that the upcoming jury-selection process was "designed to screen out jurors who would be unable to conscientiously perform [an] impartial and fair assessment of the evidence at trial," including those who "have been affected in the ways in which [respondent] is concerned." *Id.* at 213a.

Respondent then sought venue transfer by asking the court of appeals for a writ of mandamus. Pet. App. 216a-217a. After "a careful and painstaking review,"

the court found that respondent had "fall[en] far short of meeting the requirements for" that relief. *Id.* at 217a.

b. Jury selection began in early January 2015. Pet. App. 27a. The district court summoned an expanded pool of more than 1300 prospective jurors and directed them to complete a 100-question questionnaire, developed in conjunction with the parties, soliciting information about their backgrounds, exposure to pretrial publicity, views on the death penalty, and opinions (if any) about the case. *Id.* at 27a-28a, 213a; see *id.* at 350a-383a (questionnaire).

Among other things, prospective jurors were required to list their "primary source[s] of news," with follow-up questions about print, radio, television, and internet sources. Pet. App. 371a. They also disclosed whether they had seen a "little," a "moderate amount," or "[a] lot" of publicity about the case. *Id.* at 372a. Question 77 specifically asked prospective jurors whether, "[a]s a result of what [they] ha[d] seen or read in the news media," they had "formed an opinion" that respondent was "guilty" or "not guilty" and "should" or "should not" receive the death penalty. *Id.* at 373a. Question 77 also asked whether, if prospective jurors had formed such an opinion, they could "set aside [that] opinion and base [their] decision about guilt and punishment solely on the evidence that will be presented * * * in court." *Ibid.*

The district court declined respondent's request to include a question inviting every prospective juror to narrate "what * * * [he or she] kn[e]w about the facts of th[e] case." J.A. 475. The court explained that such a question would be "unfocused" and produce "unmanageable data." J.A. 480-481; see J.A. 485-486. The court also emphasized that each juror who made it through

the initial screen of the questionnaire would be subject to further examination. J.A. 480-483.

c. After reviewing the completed questionnaires, the district court excused many prospective jurors on the agreement of the parties or for hardship, and called back 256 prospective jurors from the first half of the jury pool for individual voir dire. Pet. App. 30a; see C.A. App. 3866, 3894. The voir dire occupied 21 court days over the ensuing month and a half. Pet. App. 30a. In "face-to-face, give-and-take" exchanges with each prospective juror, the court and the parties followed up on the questionnaire responses, including by questioning prospective jurors about their ability to "put a prior opinion aside" and "decide the case only on the trial evidence." *Id.* at 226a-227a; see C.A. App. 260-3920 (full voir dire transcript); J.A. 284-471 (voir dire transcripts for each seated juror).

The district court declined requests by respondent, which he renewed multiple times during the voir dire, for scripted questions asking each prospective juror whether he or she had "heard or read * * * anything [about] this case" and "[w]hat st[ood] out in [his or her] mind from everything" he or she might have "heard, read or seen about the Boston Marathon bombing and the events that followed it." J.A. 489; see J.A. 491-494, 496-498, 500-503. The court emphasized the importance of an individualized approach to questioning, explaining that invariantly asking such questions to all jurors could "be counter-productive," because "[e]very juror is different" and "has to be * * * questioned in a way that is appropriate to the juror's * * * answers." J.A. 498. In addition, the court assessed the initial sessions of voir dire, which had been conducted without such scripted questioning, to have been "successful," and decided that

it should maintain "the course we've been following * * * subject to adjustment as necessary for each witness." J.A. 502-503.

In the individualized questioning, the district court allowed the defense to ask numerous prospective jurors—including several ultimately seated on the jury—the proposed questions, or similar questions, about what they had seen or heard and what stood out in their minds. See, *e.g.*, J.A. 331; C.A. App. 674-676, 729, 942, 1044, 1385, 1502, 1520, 1810-1811, 2559; see also J.A. 374, 410. Over the course of the voir dire, the court dismissed numerous prospective jurors for cause, either sua sponte or at a party's request. See Pet. App. 35a. None of those for-cause dismissals was specifically premised on a prospective juror's responses to the pretrial-publicity questions that respondent had proposed to ask as a blanket matter.

d. Three weeks into jury selection, respondent filed a third venue-change motion, which the district court found to have "even less" merit than the previous ones. Pet. App. 221a, 223a. The court observed that prospective jurors' responses to the questionnaire showed them to be "substantially" *less* unfavorably disposed than people surveyed in respondent's proposed alternative venues. *Id.* at 225a n.4. And the court explained that "the careful inquiry that [it] and counsel are making into the suitability of prospective jurors" through voir dire was "successfully identifying [those] capable of serving as fair and impartial jurors." *Id.* at 223a.

Respondent filed a second mandamus petition seeking a venue change, which the court of appeals denied. Pet. App. 230a. The court acknowledged the "significant media attention" that respondent and the bombing had received, but emphasized that prospective jurors'

"[k]nowledge" of underlying events "does not equate to disqualifying prejudice." *Id.* at 231a. The court noted that the coverage consisted mostly of "factual news media accounts" and that respondent's "own statistics reveal that hundreds of members of the venire have not formed an opinion that he is guilty." *Id.* at 242a-243a.

After "review[ing] the entire voir dire," the court of appeals found it "thorough and appropriately calibrated to expose bias, ignorance, and prevarication." Pet. App. 250a. The court emphasized that the district court had "taken 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." *Id.* at 253a. And the court of appeals found that the district court had identified a slate of "provisionally qualified" jurors "capable of providing [respondent] with a fair trial." *Id.* at 240a.

e. The district court completed jury selection by allowing the parties to each exercise 23 peremptory challenges to the provisionally qualified jurors, resulting in a 12-member jury with six alternates. Pet. App. 41a. All of the jurors affirmed "that they could adjudicate on the evidence as opposed to personal biases or preconceived notions." *Ibid.*

2. Dispute over Waltham evidence

Before trial, respondent sought to compel discovery about an unsolved triple murder that had occurred in Waltham, Massachusetts, on September 11, 2011. Pet. App. 64a-66a. Investigators came to suspect Tamerlan's friend Ibragim Todashev, whom they had interviewed during the marathon-bombing investigation, of involvement in those separate murders. *Id.* at 64a-65a.

Todashev initially denied involvement, but when agents challenged his story, he eventually offered to provide information "if he could get a deal for cooperating." Pet. App. 65a; see J.A. 900-918 (FBI "302" report on final Todashev interview); J.A. 919-967 (interview transcript). Todashev then admitted to participating in the Waltham crime, but qualified his admission by blaming Tamerlan for the murders. Pet. App. 65a-66a.

Todashev claimed that he had agreed to help Tamerlan rob drug dealers and had participated in holding them at gunpoint and binding them. J.A. 912-914. According to Todashev, however, it was Tamerlan who made a spur-of-the-moment decision to kill the victims to avoid leaving any witnesses. See J.A. 911-916, 939-941, 947. Todashev claimed that he had objected to the killing and that had Tamerlan allowed him to wait outside while Tamerlan alone slit the victims' throats. J.A. 915-916, 945-949. Todashev began writing out a confession, but then suddenly attacked the agents, who shot and killed him. J.A. 918.

The government informed defense counsel of "the fact and general substance of Todashev's statements." J.A. 658. The government also disclosed a proffer by respondent's friend Dias Kadyrbavev (through his attorney) that respondent had told Kadyrbavev that Tamerlan had been involved in the Waltham murders, and that respondent had described those murders as "jihad." Pet. App. 67a; see J.A. 583-585. The government declined, however, to turn over the FBI "302" reports and recordings from Todashev's interviews, citing the law-enforcement privilege. Pet. App. 66a-67a. After inspecting some of those materials in camera, the district court denied respondent's motions to compel production. J.A. 652-654, 655-659. The court also granted the

government's motion in limine to exclude evidence about the Waltham murders from the penalty phase of the trial. J.A. 649-651. The court found "insufficient evidence to describe what participation Tamerlan may have had" in the Waltham murders, observing that the evidence made it just as plausible "that Todashev was the bad guy and Tamerlan was the minor actor." J.A. 650. The court explained that, because the jury would have "no way of telling who played what role, if they played roles," the Waltham evidence "would be confusing to the jury and a waste of time * * * without any probative value." *Ibid.*

C. Trial And Sentencing

The guilt phase of respondent's trial began in March 2015 and lasted 17 days. J.A. 52-63. Defense counsel's opening statement acknowledged that respondent had committed virtually all of the acts charged and asserted that respondent would not "attempt to sidestep" his "responsibility for his actions." J.A. 191. The defense claimed, however, that respondent had "followed" his brother's "influence" in committing the crimes. J.A. 192-194. The government then presented "overwhelming evidence" of respondent's culpability, including 92 witnesses and more than 1200 exhibits. Pet. App. 324a; see *id.* at 17a; see also J.A. 161-188 (government's opening statement); J.A. 199-240 (government's closing statement). The jury "thoughtfully deliberated" for more than two days, asked several questions about certain charges, and found respondent guilty on all 30 counts. *Id.* at 327a.

A 12-day penalty-phase proceeding followed. See J.A. 65-75. The government called 17 witnesses, and respondent called 46. See Pet. App. 17a-18a. Victims' family members testified about the character of the

people that respondent had killed and the depth of their own grief. See, *e.g.*, J.A. 884-885 (Krystle Campbell's brother); J.A. 888 (Lingzi Lu's aunt). Several surviving victims recounted their trauma in detail, including their "reactions to facing death," terror at the "uncertainty [of] what had happened to other family members," "feelings of helplessness watching [an] injured child or partner suffer," and "the long-term implications of becoming an amputee." Pet. App. 99a-100a (brackets omitted); see J.A. 795-820 (government's penalty-phase closing statement).

After deliberating, the jury determined that capital punishment was appropriate for six of the 17 capital counts, corresponding to respondent's murder of Martin Richard and Lingzi Lu with his own bomb. Pet. App. 18a. The district court imposed the death penalty on those six counts. *Ibid.* The jury recommended, and the court imposed, life imprisonment on the other capital counts, which included charges based on the murders of Krystle Campbell and Sean Collier. *Ibid.* The court imposed a number of concurrent and consecutive terms on the remaining counts. *Ibid.*

The district court denied a post-trial motion for acquittal or a new trial. Pet. App. 303a-349a. Addressing a renewed venue argument, the court explained that the jury's conduct "suggest[s] patient and careful deliberation," "not [] a jury inflamed by prejudice, eager to return a verdict adverse to the defendant, even when the defendant had effectively conceded" his guilt. *Id.* at 328a (emphasis omitted). The court also observed that the "discriminating nature of the" penalty-phase verdict, in which the jury "distinguished [respondent] from his brother," provided "convincing evidence that 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." *Id.* at 329a.

D. Court of Appeals' Decision

The court of appeals affirmed respondent's convictions, with the exception of three for using a firearm during a crime of violence under 18 U.S.C. 924(c) (2012), which the court viewed as legally deficient. Pet. App. 134a-152a. But the court vacated respondent's capital sentences and remanded for a new sentencing proceeding. *Id.* at 44a-60a, 64a-87a, 152a.

Although it did not conclusively resolve the issue, the court of appeals stated that it would "likely find" that venue was proper, notwithstanding pretrial publicity. Pet. App. 48a. The court nevertheless deemed the district court to have abused its discretion by denying respondent's request to ask every prospective juror more specific questions about the precise content of the pretrial publicity he or she had come across. *Id.* at 44a-60a.

The court of appeals recognized this Court's holding in *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991), that the Constitution does not require trial courts to ask prospective jurors "about the specific contents of the news reports to which they ha[ve] been exposed." *Id.* at 417; see Pet. App. 57a-59a. But the court described its 1968 opinion in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir.), cert. denied, 393 U.S. 1022 (1969)—which neither the defense nor the court of appeals itself had mentioned during the pretrial proceedings—as imposing a blanket supervisory rule that requires such an inquiry at counsel's request in cases of substantial publicity. Pet. App. 49a-60a. The court found the perceived error harmless as to respondent's convictions, because he had conceded

his guilt, but concluded that vacatur of his capital sentences was required. *Id.* at 60a, 61a n.33.

The court of appeals also concluded that the district court had abused its discretion by excluding evidence about the Waltham murders. Pet. App. 64a-87a; see *id.* at 87a n.51 (noting Judge Kayatta's more-limited conclusion). The court of appeals viewed the Waltham evidence as "highly probative of Tamerlan's ability to influence" or intimidate respondent into bombing the Boston Marathon. *Id.* at 76a. The court refused to defer to the district court's assessment that the Waltham evidence's "probative value [was] outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury," 18 U.S.C. 3593(c), and it deemed the exclusion prejudicial. Pet. App. 80a-84a. The court of appeals further concluded, in light of its view that Todashev's statements were unprivileged and highly probative, that the district court should have ordered the government to produce those statements so that respondent could introduce them as mitigating evidence and pursue any investigatory leads. See *id.* at 85a-87a.

Because the court of appeals vacated respondent's death sentences on those rationales, it did not definitively resolve certain other claims. Pet. App. 48a-49a, 61a-63a, 102a. Judge Torruella wrote a separate partial concurrence asserting that a change of venue should have been granted. *Id.* at 153a-188a.

SUMMARY OF ARGUMENT

The court of appeals improperly vacated the capital sentences recommended by the jury in one of the most important terrorism prosecutions in our Nation's history. This Court should reverse the decision below and put this case back on track toward a just conclusion.

I. As this Court has long recognized, a prospective juror's exposure to pretrial publicity does not mean that he or she is unable to decide a case impartially. The fair determination of guilt and punishment for a ubiquitously publicized crime is neither impossible nor the peculiar province of the ignorant. Instead, thoughtful and informed citizens—the ideal jurors—may serve on a jury so long as they "can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." *Skilling* v. *United States*, 561 U.S. 358, 398-399 (2010) (brackets and citation omitted).

Identifying impartial prospective jurors is "particularly within the province of the trial judge," who "sits in the locale where the publicity is said to have had its effect," observes prospective jurors up close, and can adopt tailored measures to detect and eliminate bias. *Skilling*, 561 U.S. at 386 (citations omitted). And as the court of appeals in this case recognized at the time, the district judge "carefully differentiate[d] 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. The district court summoned an expanded jury pool, screened it with a lengthy questionnaire that included multiple questions about pretrial publicity, and then conducted a 21-day voir dire—with follow-up questions from the parties—probing jurors on their exposure to publicity and many other topics. The result was a set of "provisionally qualified" jurors "capable of providing [respondent] with a fair trial." *Id.* at 240a.

The court of appeals' later invalidation of that process is unsustainable. The court improperly invoked its "supervisory power" to impose an inflexible mandate

that this Court has previously rejected as a constitutional prerequisite for selecting an impartial jury—namely, a requirement to question all prospective jurors "about the specific contents of the news reports to which they ha[ve] been exposed." *Mu'Min* v. *Virginia*, 500 U.S. 415, 417 (1991). In doing so, the court of appeals deviated sharply from this Court's precedents reviewing federal jury-selection procedures and gave short shrift to the superior perspective and conscientious efforts of the district judge to address pretrial-publicity concerns through individualized interviews rather than inflexible scripts. The decision below also disregarded the practical realities of a jury pool unlikely to have comprehensive recall of specific news items, a defendant who conceded the facts to which the media coverage primarily related, and a deliberative jury that ultimately rejected the death penalty for many of respondent's capital crimes.

II. The court of appeals' alternative rationale for vacating respondent's capital sentences—that the district court abused its discretion by excluding evidence pertaining to the unsolved Waltham deaths—was likewise an unwarranted usurpation of the district judge's sound discretion. Any minimal probative value of Tamerlan's possible involvement in a different crime (robbery and murder of drug dealers), with a different accomplice (Todashev), and an apparently different object (money and the elimination of witnesses), was outweighed by the confusion and distraction of the minitrial that would have been required for respondent to ask his own jury to discern the relevance—if any—of that separate unsolved crime. Such a minitrial was exceedingly unlikely to be productive, as everyone allegedly involved in the Waltham crime was dead and the

credibility of Todashev's self-serving statement blaming Tamerlan, right before his own suicidal attack on law enforcement, was specious at best. And even if Todashev's story were believable in all of its particulars, it showed at most that Tamerlan had committed murder on the spur of the moment and allowed Todashev to *opt out*—not that Tamerlan intimidated respondent into researching, building, and using homemade shrapnel bombs to kill innocent people at the Boston Marathon.

Indeed, any error in the district court's handling of the Waltham evidence was harmless beyond a reasonable doubt. The record definitively demonstrates that respondent was eager to commit his crimes, was untroubled at having ended two lives and devastated many others, and remained proud of his actions even after he had run Tamerlan over and was hiding out alone. The jury that watched a video of respondent place and denotate a shrapnel bomb just behind a group of children would not have changed its sentencing recommendation based on Tamerlan's supposed involvement in unrelated crimes two years earlier. The court of appeals lacked any sound basis for concluding otherwise and undoing the work of the jurors to whom the issue of capital punishment was properly entrusted.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING AN INFLEXIBLE VOIR DIRE RULE TO INVALIDATE RESPONDENT'S CAPITAL SENTENCES

In recognition of the high profile of this case, the district court oversaw a meticulous 21-day jury-selection process that was carefully calibrated to identify juror bias. Reviewing the voir dire at the time, the court of appeals praised it as thorough and effective. Pet. App.

250a. The jury's "nuance[d]" verdict, which recommended capital sentences for only six of the 17 capital offenses that respondent had admitted, *id.* at 48a, confirmed the correctness of that evaluation.

A different panel of the court of appeals nonetheless undid the district court's and the jury's work after the fact, based on a previously unmentioned "supervisory rule" requiring a district court to ask every potential juror to try to recall specific news items related to the case that he or she may have encountered years earlier. Such questioning, however, is not a prerequisite for an unbiased jury, and the court of appeals' rigid mandate is a sharp, unwarranted, and impractical departure from this Court's own deferential and case-specific approach to reviewing voir dire. This Court should make clear that the court of appeals erred in imposing such questioning as an inflexible rule.

A. The District Court's Extensive Jury-Selection Procedures Appropriately And Effectively Ensured An Impartial Jury

As this Court has emphasized, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling* v. *United States*, 561 U.S. 358, 384 (2010) (citation omitted). Jurors "need not enter the box with empty heads in order to determine the facts impartially"; instead, it "'is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.'" *Id.* at 398-399 (brackets and citation omitted). To ensure that jurors meet that standard, the judicial system places "primary reliance on the judgment of the trial court," with its local knowledge and firsthand observations, to craft appropriate jury-selection procedures. *Id.* at 386 (citation omitted); see *id.* at 385-388 &

n.21, 399 n.34. The district court's careful procedures here provide no basis for disregarding "the respect due to [its] determinations," *id.* at 387, in its management of jury selection in this complex and sensitive case.

1. A juror can be impartial even if he or she has seen, and formed opinions based on, pretrial publicity

a. "It is not required * * * that the jurors be totally ignorant of the facts and issues involved" for a defendant to receive a fair trial. *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). Instead, the Sixth Amendment requires an "impartial jury." And "juror *impartiality* * * * does not require *ignorance*." *Skilling*, 561 U.S. at 381.

For well over a century, the Court has recognized that "every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity," such that "scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds* v. *United States*, 98 U.S. 145, 155-156 (1879); see *Irvin*, 366 U.S. at 721 (similar). The "widespread and diverse methods of communication" that make that so, *Irvin*, 366 U.S. at 722, have multiplied immeasurably in recent years, increasing the potential depth and breadth of media coverage in a high-profile case.

In light of those realities, to "hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, [is] sufficient to" disqualify a juror would "establish an impossible standard." *Irvin*, 366 U.S. at 723. It would also have the harmful effect of "exclud[ing] intelligent and observing" people capable of reaching a verdict "according to the testimony," *United States* v. *Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J.)—the very people

"best qualified to serve as jurors," *Irvin*, 366 U.S. at 722. The critical question for jury selection thus is not whether jurors *lack* preexisting impressions or opinions, but instead whether "jurors *can lay aside* their impressions or opinions and render a verdict based on the evidence presented in court." *Skilling*, 561 U.S. at 398-399 (emphasis added; brackets and citation omitted).

b. With one exception not presented here—pretrial publicity so "extreme" as to create a "presumption of prejudice"—the central mechanism to gauge juror impartiality is voir dire examination. *Skilling*, 561 U.S. at 381. That, in turn, is "particularly within the province of the trial judge." *Id.* at 386 (citation omitted).

The trial judge is ideally situated to manage voir dire in a heavily publicized case, because the judge "'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" *Skilling*, 561 U.S. at 386 (citation omitted). And the judge's personal involvement in an "in-the-moment *voir dire* affords * * * a[n] intimate and immediate basis for assessing a venire member's fitness for jury service." *Id.* at 386-387. Indeed, the "function" of the trial judge in conducting voir dire "is not unlike that of jurors later on in the trial"; "[b]oth must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (plurality opinion).

The trial judge therefore has broad latitude in "determinations of juror impartiality and of the measures necessary to ensure that impartiality." *Skilling*, 561 U.S. at 387. As the Court summarized in *Skilling* v.

United States, "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*." *Id.* at 386. This Court has instead "stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias." *Mu'Min* v. *Virginia*, 500 U.S. 415, 427 (1991).

c. This Court has required a particular line of inquiry only in very limited contexts. For example, the Court has required trial courts to cover the subject of racial or ethnic prejudice, which can raise "unique historical, constitutional, and institutional concerns" in certain cases. *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017); see *Mu'Min*, 500 U.S. at 422-424 (reviewing constitutional and supervisory-rule precedents). And even then, "the trial judge retains discretion as to the form and number of questions on the subject." *Turner* v. *Murray*, 476 U.S. 28, 37 (1986); see *Mu'Min*, 500 U.S. at 424 (emphasizing that both state and federal trial judges have "great latitude in deciding what questions should be asked on *voir dire*"); *Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring in the judgment) (relying, in controlling opinion, on "the trial court's discretion" in determining whether to ask voir dire questions regarding racial and ethnic prejudice).

The Court has, in particular, made clear that a district court can select an "impartial jury" in a heavily publicized case even *without* questioning prospective jurors "about the specific contents of the news reports to which they ha[ve] been exposed." *Mu'Min*, 500 U.S. at 417. In *Mu'Min* v. *Virginia*, the Court rejected a state capital defendant's claim that the Constitution requires that procedure, noting that such a rule would create a more demanding standard for questioning about

pretrial publicity than the Court had required about racial or ethnic bias. *Id.* at 424, 431. The Court explained that "[w]hether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case?" *Id.* at 425. And the Court held that the trial judge had impaneled a constitutionally impartial jury even though he had "refused to ask any of [the defendant's] proposed questions relating to the content of news items that potential jurors might have read or seen." *Id.* at 419; see *id.* at 420-421, 431-432 (recounting the trial court's more limited inquiry).

2. The district court's voir dire procedures here were appropriately tailored to produce an impartial jury

The district judge in this case was likewise able to assess each juror's potential bias, and seat an impartial jury, without asking such intricate questions of every prospective juror. By any fair measure, the court acted well within its broad discretion to devise "measures necessary to ensure" juror impartiality. *Skilling*, 561 U.S. at 387. The court conducted a thorough voir dire spanning 21 court days and nearly 4000 transcript pages. It asked virtually all prospective jurors about the influence of pretrial publicity, excused for cause numerous prospective jurors who could not be impartial, and seated a jury that was not biased against respondent on the critical question of the appropriate sentence—as evidenced by the nuanced penalty-phase verdict. See Pet. App. 47a-48a, 329a-330a.

a. As the court of appeals observed at the time, the district court's process for identifying a 70-person slate of "provisionally qualified" jurors was "thorough and

appropriately calibrated to expose bias, ignorance, and prevarication." Pet. App. 240a, 250a (denial of second mandamus petition). The district court "t[ook] 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." *Id.* at 253a. The result was a set of prospective jurors "capable of providing [respondent] with a fair trial." *Id.* at 240a.

The district court began by summoning an "expanded jury pool," with 1373 citizens reporting for jury selection. Pet. App. 223a n.2; see *id.* at 27a. The court directed each of them to complete under oath "a long and detailed one-hundred-question questionnaire" that had been "jointly developed" with the parties. *Id.* at 223a n.2, 249a; see *id.* at 350a-383a. The questionnaire required prospective jurors to list their "primary source[s] of news," with specific follow-ups about print, television, radio, and internet sources. *Id.* at 371a. It then asked how prospective jurors would "describe the amount of media coverage [they] have seen about this case," whether a "lot," a "moderate" amount, a "little," or "[n]one." *Id.* at 372a. And Question 77 asked each prospective juror (1) whether "[a]s a result of what [he or she] ha[d] seen or read in the news media," he or she had "formed an opinion" that respondent was "guilty" or "not guilty," or "should" or "should not" "receive the death penalty," and (2) if so, whether he or she would be "able or unable to set aside [that] opinion and base [his or her] decision about guilt and punishment solely on the evidence that will be presented * * * in court." *Id.* at 373a.

The questionnaire enabled the district court, in consultation with the parties, to conduct an initial screen of

the first half of the jury pool and excuse nearly two-thirds (441 of 697) of those prospective jurors. See Pet. App. 30a; C.A. App. 3866, 3894. That process provided a narrower, but still substantial, pool of 256 prospective jurors for individual voir dire for fitness to serve on the 12-person jury. Pet. App. 30a. The court and the parties then engaged in a "time-consuming" and tailored "face-to-face, give-and-take" with each of those individuals. *Id.* at 223a, 227a. As the court later emphasized, it refused to "accept[] at face value" the prospective jurors' questionnaire responses on the effect of pretrial publicity. *Id.* at 226a. Instead, the court asked virtually every prospective juror—including all those ultimately seated—to expand on his or her answer to Question 77. See J.A. 290, 299-300, 311-312, 326-328, 339, 360-361, 383-384, 399-401, 419-421, 434, 448-449, 459.

The district court also allowed the parties what respondent's counsel at the time called "considerable latitude" to ask follow-up questions—including on pretrial publicity. C.A. App. 1143; see, *e.g.*, J.A. 317-318, 331-332, 350, 371-372, 407-412, 455-456 (defense follow-up on pretrial publicity during voir dire of seated jurors). Based on the individualized questioning, the district court excused numerous prospective jurors for cause. See Pet. App. 35a. And each side was able to exercise 23 peremptory strikes. See *id.* at 224a, 235a & n.1.

b. "Inspection of the questionnaires and *voir dire* of the individuals who actually served as jurors," *Skilling*, 561 U.S. at 389, illustrates how the district court ensured their ability to be impartial. Nine of 12 jurors had seen only a little or a moderate amount of pretrial publicity. See C.A. App. 12,132 (table of jurors' questionnaire responses). All 12 stated both on their question-

naires and at voir dire that they had not formed an opinion regarding punishment—the only part of the verdict that respondent ultimately contested. See Pet. App. 60a; Gov't C.A. Br. 174 (table of jurors' responses). And all 12 indicated "that they could adjudicate [the case] on the evidence as opposed to personal biases or preconceived notions." Pet. App. 41a.

The jury-selection process in this case did exactly what it was supposed to do: identify potential bases for bias, and then explore whether they would actually prevent jurors from having an open mind once they were sworn in. For example, in response to the district court's request that he elaborate on his answer to Question 77, one juror acknowledged a preliminary impression that "obviously [respondent] was involved in something," but emphasized that he nevertheless viewed respondent as "innocent until proven guilty." J.A. 312 (Juror 83). The district court did not simply accept the juror's assurance but probed more deeply, asking "how would you handle whatever ideas you've had from before the trial?" J.A. 313. The juror answered that he would make his decision "based on the evidence presented" after "listening" to the witnesses "and what they say." J.A. 314. Defense counsel then followed up on the juror's statement that respondent was "involved in something." J.A 317. In response, the juror clarified that while he had viewed it as unlikely that respondent could show "a case of mistaken identity," he didn't know "exactly what" respondent had been "involved in" or "how." J.A. 318. And the juror recognized that he "d[id]n't know enough" to have a view on the appropriate penalty. J.A. 320.

For the other seated jurors as well, the individualized questioning likewise made clear that the pretrial

publicity had not produced any opinions about respondent that the jurors would be unable to set aside. See J.A. 290 (Juror 35 was not "drawing a conclusion without all the evidence presented"); J.A. 300 (Juror 41 had "seen some [coverage] in the media" but "d[id]n't really follow it"); J.A. 327 (Juror 102 "really d[id]n't know" what had happened); J.A. 350 (Juror 138 had seen only "bits and pieces" of media coverage); J.A. 372 (Juror 229 "suppose[d]" respondent "was involved," but didn't "always believe everything" she encountered in the media); J.A. 384 (Juror 286 did not "feel [she] knew enough of the facts to base a decision"); J.A. 400 (Juror 349 "realized" that she could not "know that he's guilty" because she didn't know "what the evidence is"); J.A. 420 (Juror 395 did not have "all the information" and could "change [her] mind" once she "had more information"); J.A. 434 (Juror 441 would "[n]eed to see more evidence" to form an opinion); J.A. 448 (Juror 480 would "need to sit and look at evidence" to "make [his] decision"); J.A. 459-460 (Juror 487 could "put * * * aside" the impression that "it seemed" respondent had "played a role in" the crime and "see what the real evidence really is").

The jurors' deliberations and penalty verdict reinforce the effectiveness of the selection process. See *Skilling*, 561 U.S. at 395 (noting that split verdict "suggests the court's [impartiality] assessments were accurate"). Notwithstanding that respondent "had effectively conceded" his guilt, the jury during guilt-phase deliberations sent two notes inquiring about accomplice liability, "suggest[ing] patient and careful deliberation," not "a jury inflamed by prejudice, eager to return a verdict adverse to" him. Pet. App. 328a (emphasis omitted). Then at the penalty phase, the jury recommended capital sentences for only six of the 17 capital

offenses—those corresponding to the bomb placed by respondent personally. As the district court observed, the "discriminating nature of the" penalty verdict provides "convincing evidence that this was not a jury impelled by gross prejudice or even reductive simplicity, but rather a group of intelligent, conscientious citizens." *Id.* at 329a; see *id.* at 48a (court of appeals acknowledging that the jurors' "nuance" supported viewing them "as intent on following the law and the facts").

B. The Court Of Appeals Erred In Relying On A Novel, Inflexible, And Unsupported Voir Dire Rule To Invalidate Respondent's Capital Sentences

In invalidating respondent's capital sentences, the court of appeals did not conclude that any particular juror had been biased by pretrial publicity or unable to render a decision based on the trial evidence. The court instead took the view that its half-century-old decision in *Patriarca* v. *United States*, 402 F.2d 314 (1968), cert. denied, 393 U.S. 1022 (1969)—which was not cited by anyone until the post-trial appeal—mandates that a district court must *always* grant a request by counsel to ask every prospective juror in a "high-profile case" what he or she had "'read and heard about the case.'" Pet. App. 53a-54a (citation omitted). This Court—"the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases," *McNabb* v. *United States*, 318 U.S. 332, 347 (1943)—should reverse the application of such an inflexible and unsound rule.

1. In considering the "adequacy of jury selection," this Court has been "attentive to the respect" that appellate courts owe "to district-court determinations of juror impartiality and of the measures necessary to en-

sure that impartiality." *Skilling*, 561 U.S. at 387. Appellate courts are generally more remote from the specific "'news stories that might influence a juror'" and "lack the on-the-spot comprehension of the situation possessed by trial judges," *id.* at 386 (citation omitted), that informs the procedures necessary to identify prospective jurors biased by pretrial publicity. "In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service," *id.* at 386-387, as well as the ability to evaluate and modify the procedures as they are implemented.

The district court did precisely that here when it determined that tailored, individualized questioning worked better than respondent's proposal for formulaic, blanket, open-ended questions, which might well be counterproductive. In particular, the court found the open-ended narrative question that respondent wanted for the questionnaire—"What did you know about the facts of this case before you came to court today (if anything)?"—to be an "unfocused" invitation for "unmanageable data" that was unnecessary in light of the existing questions and the ability to later individually examine each prospective juror. J.A. 475, 480-481; see J.A. 485-486. Similarly, the court reasonably determined that "try[ing] to stick with a repeatable formula" by requiring scripted questions on pretrial publicity during each individual voir dire could "be counter-productive actually rather than helpful." J.A. 498; see J.A. 489 (respondent's request that the court ask each juror during voir dire, "Before coming here today, have you heard or read about anything this case?" and, "What stands out in your mind from everything you have heard, read or

seen about the Boston Marathon bombing and the events that followed it?"). As the court explained, "detailed questioning about what the juror thinks he or she knows about the events and the sources places the wrong emphasis for the juror" and "misdirects things a little bit." J.A. 502.

In sound reliance on its assessment that the individualized voir dire enabled determinations of the credibility of each prospective juror's assurance that he or she could be impartial, the district court determined that the best course was the one it had "been following * * * subject to adjustment as necessary for each witness." J.A. 502-503. The court understood that "[e]very juror is different" and should be "questioned in a way that is appropriate to the juror's questionnaire answers and then to the preceding voir dire answers." J.A. 498. It accordingly recognized that "sometimes we do have to get more specific because of what the juror says," J.A. 503, and allowed respondent to ask many prospective jurors questions like the ones that he had proposed asking all prospective jurors, see p. 10, *supra*.

2. The court of appeals erred not only by wresting control of the jury-selection process from the decisionmaker best situated to manage it, but also by warping the process from case-specific to invariant. The court's invocation of its "supervisory power," Pet. App. 56a-57a (citation omitted), does not justify such an approach. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 383 (1999) (rejecting supervisory rule requiring deadlock instruction in every capital case); see also, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 505 (1983).

As this Court explained in *United States* v. *Payner*, 447 U.S. 727 (1980), a federal court may not use its "supervisory power" to impose a rule that this Court has

specifically rejected after weighing the same interests. *Id.* at 731. In particular, *Payner* observed that "the supervisory power does not authorize" a suppression rule where the Court's own "Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence." *Id.* at 735. The Court emphasized that the "values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment." *Id.* at 736. Under either framework, "the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same." *Ibid.*

Payner's analysis undermines the supervisory rule adopted by the court of appeals here. As noted above, this Court specifically held in *Mu'Min* that questions "about the specific contents of the news reports to which [prospective jurors] had been exposed" are not a constitutional prerequisite for selecting impartial jurors. 500 U.S. at 417; accord *Skilling*, 561 U.S. at 386 ("No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*."); *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936) (explaining that, because impartiality "is a state of mind" rather than a "technical conception," the Constitution "lays down no particular tests and procedure is not chained to any ancient and artificial formula" for "ascertainment of this mental attitude"). The court of appeals accordingly erred in superseding *Mu'Min* with a supervisory rule based on its "individual judgment." *Payner*, 447 U.S. at 737.

Although *Mu'Min* noted that a handful of circuits (not including the court below) had issued pre-*Mu'Min* decisions requiring publicity-content questions "in

some circumstances," 500 U.S. at 426, the Court did not approve a wooden rule of the sort that the court of appeals in this case laid down. And whatever the permissibility of such a rule before *Mu'Min*, one is insupportable now. The Court in *Mu'Min* reviewed *both* constitutional *and* supervisory-power precedents, and while the Court recognized "more latitude * * * under [its] supervisory power," its ultimate rejection of the proposed rule relied on the "parallel themes" of "both sets of cases." *Id.* at 424; see *id.* at 422-424. One of those themes was that "the trial court retains great latitude in deciding what questions should be asked on *voir dire*," *id.* at 424—the very principle that the decision below derogates.

Even where this Court has required inquiry into a particular subject—for example, certain cases involving possible racial bias—it has remained "careful not to specify the particulars by which" courts must address that subject. *Mu'Min*, 500 U.S. at 431. Whether it was reviewing a state decision or a federal one, the Court "did not, for instance, require questioning of individual jurors about facts or experiences that might have led to racial bias"—the equivalent of the granular questions about the content of pretrial publicity the court of appeals required here. *Ibid.* (describing *Aldridge* v. *United States*, 283 U.S. 308 (1931)); see *Rosales-Lopez* 451 U.S. at 194-195 (Rehnquist, J., concurring in the judgment) (rejecting a "*per se* rule" governing questioning on racial and ethnic prejudice in favor of an approach that leaves "more to the trial court's discretion"). If even the "unique * * * concerns" of racial bias, *Pena-Rodriguez*, 137 S. Ct. at 868, do not require such questions, it follows that they are not invariably

necessary in the context of pretrial publicity, and that the court of appeals erred in inflexibly mandating them.

3. The court of appeals purported to unearth its wooden rule from *Patriarca*—a circuit decision that predates *Mu'Min* by decades, did not explicitly invoke supervisory powers, and involved (and affirmed) only the denial of a venue transfer, not review of voir dire. See Pet. App. 49a-60a; see also *Patriarca*, 402 F.2d at 317-318. To the extent that *Patriarca* set forth a mechanical requirement for every voir dire in a case with substantial pretrial publicity, such a one-size-fits-all rule lacks justification.

The *Patriarca* panel did not have the benefit of *Mu'Min* and looked to jury-selection procedures proposed by the American Bar Association as a model for its approach. See *Patriarca*, 402 F.2d at 318 (citing 1966 draft standards). But *Mu'Min* rejected reliance on a later version of those same standards. 500 U.S. at 430-431 (citing 1980 standards). The decision below, in turn, ascribed *Patriarca*'s "rationale" to a concern that the judge have an adequate basis for the evaluation of impartiality, which it feared might otherwise rest on a prospective juror's own assurances. Pet. App. 51a, 56a-57a. But assessments of juror impartiality *necessarily* rely on such assurances to a significant degree; that is precisely why reviewing courts defer to trial courts' ability to gauge a "prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling*, 561 U.S. at 386. And while "[q]uestions about the content of the publicity to which jurors have been exposed might be helpful" in some cases as part of the broader informational package,

Mu'Min, 500 U.S. at 425, such questions are not so universally necessary that inflexibly requiring them is an appropriate prophylactic.

The court of appeals believed that the amount of publicity in this case demanded that content questions be asked of all prospective jurors, see, *e.g.*, Pet. App. 59a, but the district court could reasonably determine that the degree of publicity in fact cuts the opposite way. This is not a case in which impartiality may have been unduly influenced by some key piece of pretrial publicity that only some people saw. Cf. *Rideau* v. *Louisiana*, 373 U.S. 723, 724 (1963). Instead, it is a case with a massive volume of "largely factual" local and nationwide pretrial coverage to which virtually every engaged U.S. citizen was exposed. Pet. App. 47a, 53a. Only four of the 1373 prospective jurors—three of whom had difficulty comprehending English or the questionnaire—responded "none" to the question of how much media coverage they had seen. See Gov't C.A. Supp. App. 138, 150, 157, 169; Resp. C.A. Special App. 11,932-11,954, 26,129-26,130, 35,678-35,700. By necessity, jury selection for any trial of respondent anywhere would have had to focus on "impartiality" rather than "ignorance." *Skilling*, 561 U.S. at 381 (emphasis omitted).

The ultimate inquiry of impartiality turns not on categorizing prospective jurors based on which specific pieces of the unavoidable coverage they might have seen, but instead on determining their mindsets heading into a trial. See *Mu'Min*, 500 U.S. at 425; cf. *Patton* v. *Yount*, 467 U.S. 1025, 1035 (1984) ("The relevant question is not whether the community remembered the case, but whether the jurors * * * had such fixed opinions that they could not judge impartially the guilt of

the defendant."). Moreover, as the district court recognized, it is doubtful that prospective jurors, two years after the fact, could have produced a "reliable" list of what they might specifically have seen and heard. J.A. 494. Thus, unless the court was prepared to disqualify everyone whose recall seemed deficient, the parties and the court would inevitably have had to evaluate prospective jurors without a complete—or, in many cases, even close to complete—record of their media exposure. And as the district court recognized, attempting to jog or highlight memories about specific types of exposure—*e.g.*, newspaper columns expressing views on the death penalty, Pet. App. 55a—would actually do more harm than good by dredging up and emphasizing any prejudicial effect that the exposure might have had at the time, see J.A. 494, 502-503. Cf. *Shannon* v. *United States*, 512 U.S. 573, 586 (1994) (rejecting a supervisory rule that would "draw the jury's attention toward the very thing * * * it should ignore"); *Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring in the judgment) (rejecting a mandatory-questioning rule where such questioning could "exacerbate whatever prejudice might exist without substantially aiding in exposing it").

4. This particular case was an especially inappropriate candidate for after-the-fact invalidation of the jury-selection procedures. Even if the district court had gleaned a supervisory rule from *Patriarca*, applying that rule would have had little benefit. As the court of appeals recognized, most of the publicity about this case was either "true" and thus (among other things) subsumed within respondent's admission of guilt, or else "trivial" and thus not likely to bias jurors. Pet. App. 46a-47a; see *id.* at 60a, 61a n.33; cf. *Beck* v. *Washington*, 369 U.S. 541, 556 (1962) (distinguishing "straight news

stories" from "invidious articles which would tend to arouse ill will and vindictiveness").

In particular, the court of appeals pointed to little, if anything, likely to have specifically biased the jury on the penalty—the only portion of the verdict that the court invalidated. Media coverage of "the opinions of public officials" that capital punishment was appropriate, Pet. App. 53a, would largely have been duplicative of the jury's inherent awareness that federal officials were seeking that penalty. And media coverage of opinions on the appropriate penalty included the views of the Archbishop of Boston, the *Boston Globe*'s editorial board, and 57% of Massachusetts residents that the death penalty was *not* warranted. Resp. C.A. Special App. 10,834, 11,047, 11,051. Moreover, as noted above (p. 10, *supra*), respondent in fact asked his content questions to numerous prospective jurors, none of whom recalled seeing coverage relating to the death penalty.

Whatever supervisory power the court of appeals may have to retroactively declare jury-selection procedures invalid, it abused that power in this case. All that the court's remand accomplishes here is to vitiate a valid penalty that an impartial jury carefully recommended as to some counts but not others. Respondent's trial was lengthy and, for many victims of his crimes, painful. The penalty-phase proceeding required many victims to testify about the terror that respondent inflicted on them and the ways that their lives continue to be permanently altered by his brutality. See pp. 13-14, *supra*. Another penalty trial would come at the significant cost of requiring those victims to return to court to "relive their disturbing experiences." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). And it would entail selecting a new jury through an unnecessarily onerous

process that promises to be even longer and more burdensome—but no more effective—than the original. Nothing justifies that result.

II. THE COURT OF APPEALS ERRED IN ALTERNATIVELY VACATING RESPONDENT'S CAPITAL SENTENCES BASED ON HIS BROTHER'S ALLEGED INVOLVEMENT IN DIFFERENT UNSOLVED CRIMES

The court of appeals' alternative rationale for vacating respondent's capital sentences—that the district court abused its discretion by excluding evidence pertaining to the different and unsolved Waltham crimes—was likewise flawed. The district court correctly determined, after viewing the key material in camera and assessing it in relation to the evidence as a whole, that any minimal probative value of the Waltham evidence was outweighed by the danger of confusing or distracting the jury. And in any event, the record demonstrates beyond a reasonable doubt that any error on that issue was harmless. Even if jurors had found Todashev's Waltham story credible, Tamerlan's alleged involvement in independent crimes almost two years before the Boston Marathon bombing had no reasonable prospect of altering the jury's recommendation that respondent should receive the death penalty for his own acts of terrorism.[2]

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[2] Respondent has contended (Br. in Opp. 10) that the court of appeals' conclusion that *Brady* v. *Maryland*, 373 U.S. 83 (1963), required disclosure of Todashev's statements to investigators supplied another "independent ground[]" for the court's judgment. As the government has previously explained (Cert. Reply Br. 8-10), that contention is incorrect. Both respondent and the court of appeals treated his *Brady* argument as intertwined with his argument for introducing the Waltham evidence as mitigation. See, *e.g.*, Pet. App. 72a (describing respondent's *Brady* argument that Todashev's

A. The District Court Did Not Abuse Its Discretion In Declining To Admit The Waltham Evidence

1. The Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.*, supplies specialized standards for the admission of evidence in capital-sentencing proceedings. It safeguards a defendant's constitutional right to introduce mitigating evidence by allowing him to offer "any information relevant to a mitigating factor" at the penalty-phase proceeding, "regardless of its admissibility under" other evidentiary rules. 18 U.S.C. 3593(c); see *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982). At the same time, the statute enables district courts to keep the penalty phase properly focused by placing special emphasis on courts' traditional discretion to exclude evidence "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).

In requiring "only that the countervailing interests 'outweigh' the information's probative value" for exclusion, Section 3593(c) differs from Federal Rule of Evidence 403, which requires that "the countervailing interests 'substantially outweigh[] the evidence's probative value.'" *United States* v. *Lujan*, 603 F.3d 850, 854 (10th Cir. 2010), cert. denied, 562 U.S. 1303 (2011). And an appellate court reviews a district court's application of that permissive standard only "for abuse of discretion." *United States* v. *Sampson*, 486 F.3d 13, 42 (1st Cir. 2007), cert. denied, 553 U.S. 1035 (2008); see Pet.

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statements, "'if presented,' would have" been mitigating). If this Court agrees with the government either that all the Waltham evidence was properly excluded under 18 U.S.C. 3593(c) or that excluding it did not affect the outcome of the penalty proceeding, then it necessarily follows that respondent was not prejudiced by any withholding.

App. 72a-73a & n.40. Such review recognizes the district court's "familiarity with the details of the case and * * * greater experience in evidentiary matters," *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008), and requires "great deference to the trier's first-hand knowledge," *Sampson*, 486 F.3d at 42. Reversal is warranted only if the district court's "judgment is plainly incorrect." *Ibid.*

2. The district court did not abuse its discretion in declining to allow respondent to inject the disputed Waltham issue into the penalty phase of his trial for bombing the Boston Marathon. Instead, the court reasonably determined that any attenuated relevance of the Waltham murders did not warrant inviting a complicated minitrial about that unsolved crime. See, *e.g.*, *United States* v. *Umaña*, 750 F.3d 320, 350-351 (4th Cir. 2014) (finding no abuse of discretion in denial of capital defendant's request to admit evidence of separate murders where "the process would amount to mini-trials that would take days and distract the jury"), cert. denied, 576 U.S. 1035 (2015); *United States* v. *Mitchell*, 502 F.3d 931, 991-992 (9th Cir. 2007) (finding no abuse of discretion where "more information" about "separate murders would confuse the issues and mislead the jury"), cert. denied, 553 U.S. 1094 (2008).

Even if Todashev's story were to be believed, the Waltham crime's participants, manner, and motivation all differ markedly from the Boston Marathon bombing. Todashev's claim was that Tamerlan had recruited Todashev to participate in a robbery for money and then decided on the spur of the moment to kill the victims—by himself—to eliminate any witnesses. Pet. App. 65a-66a. The marathon bombing, in contrast, was a preplanned terrorist attack in which respondent personally

murdered multiple "innocent people" in furtherance of his own expressly declared jihadist aspirations. J.A. 204; see, *e.g.*, J.A. 118 (seeking the "[h]ighest level of Jannah [paradise]"); J.A. 117 ("I wanna bring justice for my people."); J.A. 203-204 ("I ask Allah to make me a shahied [martyr].").

Respondent's attempt to link the Waltham murders to his culpability for the marathon bombing involved multiple complicated and contested steps that would have required jurors to evaluate the credibility of Todashev's allegations not only that Tamerlan committed the Waltham murders, but also that Tamerlan did so in the particular way that Todashev claimed. Such an assessment would have been extremely difficult given that "the only identified suspects—Tamerlan and Todashev—were both dead." Pet. App. 87a. The district court thus correctly observed, after reviewing in camera the FBI report describing Todashev's interview in detail, that the Waltham evidence gave the jury no way to sort out the truth. J.A. 650.

As the district court pointed out, the evidence made it just as likely that "Todashev was the bad guy and Tamerlan was the minor actor." J.A. 650. Following the murders, Todashev threw out his cell phone and left Massachusetts under a false name. J.A. 963-964. Tamerlan, in contrast, remained in town and even socialized with the younger brother of one of the Waltham victims. See J.A. 969. When investigators challenged Todashev's denial of involvement in the Waltham crime, Todashev had every reason to deflect blame for the murders by minimizing his own role and exaggerating Tamerlan's, especially because Tamerlan was dead and could not rebut Todashev's account. Todashev's violent attack on the armed investigators shortly thereafter,

while writing out a confession, casts even further doubt on his veracity. See J.A. 918; J.A. 575-579 (report finding officer-involved shooting of Todashev justified).

The district court was not required to sidetrack the penalty phase of respondent's trial for the Boston Marathon bombing by inviting jurors to determine what really happened during the Waltham crimes. If anything, Todashev's story tends to undercut, rather than support, respondent's suggestion that Tamerlan strongarmed him into participating in the marathon bombing. Todashev did not say that he was intimidated or influenced to commit an act of extreme cruelty in Waltham; instead, he told investigators that he *opted out* of murdering the drug dealers whom he had agreed to rob. J.A. 947-948; see J.A. 939-941. Thus, according to Todashev, Tamerlan was unable to persuade or coerce him into committing murder, even though Tamerlan was armed with a gun and argued that they needed to kill the victims to avoid leaving witnesses. See J.A. 947. And Todashev did not indicate that Tamerlan retaliated against him, or even threatened to do so, for declining to participate in the killings.

The Waltham evidence also undercut, or at least complicated, respondent's theory that his willingness to commit murder was solely the result of Tamerlan's influence. Respondent's friend Kadyrbavev's proffer that respondent had described Tamerlan as committing "jihad" in Waltham, J.A. 583-584, indicated that respondent *admired* Tamerlan's perceived religiously motivated murder, not that he saw Tamerlan's actions as intimidating. At a minimum, the sum of the Waltham evidence fails to offer meaningful support to the notion that respondent's own willingness to kill innocent peo-

ple was the unwanted end-product of religious indoctrination by Tamerlan. Respondent's asserted theory of relevance did not warrant inserting the trial of another crime, not involving respondent, into the penalty phase of his own trial.

3. Neither the court of appeals nor respondent has offered any sound basis for second-guessing the district court's Section 3593(c) determination and ordering a new sentencing proceeding that would include a mini-trial of the Waltham murders. The court of appeals focused heavily on Todashev's statement that he "did not have a way out," deeming it evidence that Todashev acceded to "commit[ing] acts of brutality" because he was afraid of Tamerlan. Pet. App. 75a-76a; see *id.* at 77a n.43, 78a. But context does not support that interpretation. Todashev clearly *did* think he had a "way out" of committing murder at Tamerlan's behest—he told investigators that he declined to do so. J.A. 945-949. The "no way out" statement instead reflects Todashev's claimed realization that once Tamerlan had killed the victims, "it was too late" for Todashev to avoid participating in the crime, which is why he "went back in and helped" Tamerlan wipe the scene of fingerprints. J.A. 948-949.

The court of appeals took the view that the Waltham evidence must have been substantially probative, because the district court admitted "other, lesser evidence of Tamerlan's belligerence—like his screaming at others for not conforming to his view of how a good Muslim should act." Pet. App. 77a. But whatever the probative weight of those other incidents, which the court of appeals viewed as evidence of Tamerlan's "domination," *ibid.*, they do not suggest that the district court was compelled to admit Todashev's unverified story, in

which Tamerlan allowed Todashev to opt out of committing murder. In any event, those incidents, unlike the Waltham murders, did not risk distracting the jurors by requiring them to sort through conflicting evidence in an attempt to discern the relevance, if any, of a separate unsolved crime.

Respondent and the court of appeals have suggested (Pet. App. 82a; Br. in. Opp. 20-21) that a new penalty proceeding would not require a minitrial, on the theory that the government essentially forfeited its right to contest Todashev's story when an FBI agent "swore out an affidavit" for a search warrant for Tamerlan's car "saying that there is probable cause to believe that Todashev and Tamerlan planned and carried out" the Waltham murders. Pet. App. 81a n.47; see J.A. 983-1003. The court of appeals believed that the district court was not aware of that affidavit when it found the Waltham evidence "unreliable." Pet. App. 68a; see Br. in Opp. 21. In fact, however, the district court knew about the search-warrant affidavit when it made its Section 3593(c) determination, which was based on a firsthand view of the evidence as a whole. See J.A. 552-553, 640, 970-971.

Contrary to the court of appeals' suggestion, the affidavit provided no basis for limiting the discussion of the Waltham evidence. In truthfully describing what Todashev had *claimed*, the affidavit simply represented that Todashev's story supported further investigation—not that it was necessarily accurate, let alone accurate in all of its particulars. See *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978) (explaining that a warrant affidavit need not be "'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct,

for probable cause may be founded upon hearsay and upon information received from informants").

Nor did the district court have any other apparent way to cabin the scope of a Waltham inquiry. Opening the door by admitting any reference to the separate Waltham crimes would have invited a lengthy discussion of Todashev's claims and the many problems with his credibility. The district court did not abuse its discretion by declining to send the jury on a long and convoluted detour to explore what was at most an ancillary matter.

B. Any Error In The District Court's Handling Of The Waltham Issue Was Harmless Beyond A Reasonable Doubt

Even assuming that the district court abused its broad discretion by excluding the Waltham evidence, the record definitively establishes that introducing that evidence would not have changed the outcome of respondent's penalty proceeding. Thus, any error would not entitle respondent to vacatur of his sentences. See 18 U.S.C. 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless * * * where the Government establishes beyond a reasonable doubt that the error was harmless."); *Skipper* v. *South Carolina*, 476 U.S. 1, 7-8 (1986) (reviewing the exclusion of mitigating evidence for harmless error).

The court of appeals' speculation that jurors might have concluded that respondent was intimidated by Tamerlan into committing the marathon bombing, Pet. App. 76a, was overwhelmingly refuted by the trial evidence, which confirmed that respondent had a life and mind independent of Tamerlan's. Respondent lived 60 miles away from Tamerlan, with his own car and his own

friends. See J.A. 690, 889. He used his own computer to read al Qaeda propaganda that encouraged terrorist attacks and gave instructions on making shrapnel bombs to "damage the enemy." See J.A. 99-112, 890-899. He texted a friend and tweeted about martyrdom and jihad. See J.A. 113 (saying "killing Muslims is the only promise" both 2012 presidential candidates "will fulfill"); J.A. 121 (praying for "victory over kufr [infidels]"); J.A. 118 (seeking "[h]ighest level of Jannah").

Additional evidence confirmed that respondent was a willing participant in terrorism, not a reluctant accessory. The jury watched a video of him separating from his brother and then selecting a crowded outdoor patio with children present as the target for his shrapnel bomb, designed and built to cause maximum suffering and death. See Exhibit 22, at 6:45-7:55; J.A. 124. After the bombing, respondent chose to meet back up with Tamerlan, and he returned to college where he showed no signs of remorse. He looked again at the al Qaeda magazine with the bomb-making instructions, J.A. 103; he went to the gym with a friend, Exhibits 1181-1183; and he tweeted "I'm a stress free kind of guy," J.A. 145. When a friend texted him about being a bombing suspect, respondent texted back "Lol [laughing out loud]." J.A. 146. A few days later, respondent again joined with Tamerlan in murdering Officer Collier, carjacking Dun Meng, and attempting to kill police officers during the Watertown shootout. See Pet. App. 7a-9a.

Respondent never offered a single piece of evidence to suggest that he attempted to get out from under his brother's purported influence or felt apprehension about his crimes. The jury instead saw compelling evidence—including video evidence—showing just the

opposite. While separated from Tamerlan at the marathon, respondent killed two people and mutilated several more with his own bomb. Exhibits 22, 23, 1634C. While holding Dun Meng a prisoner in his carjacked SUV, respondent casually shopped for snacks at a convenience store. Exhibit 748. When officers tracked him to Watertown, respondent threw explosives at them and tried to run them (and Tamerlan) over. J.A. 180. And when hiding alone in the boat, believing that Tamerlan had died, respondent wrote that he was "jealous" of Tamerlan's martyrdom, that he hoped for his own martyrdom, and that his terrorist actions were justified because of perceived wrongdoing by the American government. J.A. 203-204.

In the face of that evidence, no reasonable prospect exists that Todashev's Waltham story would have changed the jury's determination that respondent deserved the ultimate punishment for his horrific crimes. Respondent nevertheless contends that the jury was "receptive" to the argument that Tamerlan had influenced him, because it "rejected a death sentence for all counts based on acts for which Tamerlan was present." Br. in Opp. 22-23; see J.A. 619-621 (verdict form). But the jury's verdict in fact confirms the irrelevance of the Waltham issue by demonstrating that the jury carefully considered each of respondent's crimes and determined that capital punishment was warranted for the horrors that he *personally* inflicted—setting down a shrapnel bomb in a crowd and detonating it, killing a child and a promising young student, and consigning several others "to a lifetime of unimaginable suffering." Pet. App. 6a. That determination by 12 conscientious jurors deserves respect and reinstatement by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3593(c) provides:

Special hearing to determine whether a sentence of death is justified

(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials 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. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present

argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

2. 18 U.S.C. 3595(c) provides:

Review of a sentence of death

(c) DECISION AND DISPOSITION.—

(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592.

(2) Whenever the court of appeals finds that—

(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.