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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )

Petitioner, )

v. ) No. 20-443

DZHOKHAR A. TSARNAEV, )

Respondent. )

- - - - -

Washington, D.C.

Wednesday, October 13, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

ERIC J. FEIGIN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

GINGER D. ANDERS, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-443, Tsarnaev versus -- United States versus Tsarnaev.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN  
ON BEHALF OF THE PETITIONER

MR. FEIGIN: Thank you, Mr. Chief Justice, and may it please the Court:

After watching video of Respondent by himself personally placing a shrapnel bomb behind a group of children at the Boston Marathon, the jury in this case returned a nuanced verdict unanimously recommending capital punishment for that specific deliberate act.

The court of appeals should have let that verdict stand. Instead, it unearthed a previously unmentioned supervisory rule to invalidate a careful and lengthy jury selection process that a prior panel had praised.

That process reasonably favored individualized voir dire over focusing every prospective juror on pretrial publicity through

1 rote content questioning that would have been  
2 unhelpful.

3           The court of appeals then again  
4 usurped the district court's discretion by  
5 insisting that the jury had to hear unreliable  
6 hearsay accusations against Respondent's brother  
7 by a dead man with a powerful motive to lie.

8           We'll never know how or why three drug  
9 dealers were killed in Waltham in 2011, and none  
10 of Respondent's evolving theories justifies  
11 inserting that separate crime into the penalty  
12 phase proceedings for Respondent's own  
13 individual participation in the 2013 Marathon  
14 bombing.

15           And even if the court of appeals had  
16 identified a misstep in one of the hundreds of  
17 judgment calls that this complex trial required,  
18 any error here was harmless. The experienced  
19 district judge empaneled an impartial jury which  
20 heard overwhelming evidence about Respondent's  
21 own actions and motivations and rendered a sound  
22 judgment against a motivated terrorist who  
23 willingly maimed and murdered innocents,  
24 including an eight-year-old boy, in furtherance  
25 of jihad.

1                   One point I --

2                   JUSTICE THOMAS: Mr. Feigin, one  
3 question before you get too deep into your  
4 argument. What test should we use? The -- the  
5 First Circuit said that it was exercising its  
6 supervisory authority. What test would --  
7 should we use to review that exercise of  
8 authority or to limit that authority?

9                   MR. FEIGIN: Well, I think there are  
10 two separate questions there, Justice Thomas,  
11 that the Court would need to consider, and  
12 deciding either one of them in our favor or  
13 deciding that the application of the rule was  
14 harmless error would result in a judgment in the  
15 government's favor here.

16                   But the first question, reviewing the  
17 supervisory rule, is whether the court of  
18 appeals had the power to enact the rule at all,  
19 and the second is whether this Court, exercising  
20 its own supervisory power, would find that rule  
21 reasonable.

22                   As to the first question, I think the  
23 fundamental problem with this rule is that it  
24 divests district courts of discretion that this  
25 Court has repeatedly insisted that they have

1 over jury selection.

2           If you look at, for example, page 424  
3 of the Court's decision in *Mu'Min* against  
4 Virginia, the Court emphasizes that not only in  
5 constitutional review but also in exercising  
6 supervisory power over the federal courts, it  
7 has given district courts wide discretion over  
8 jury selection because they're there and they  
9 can see the jurors as they're individually  
10 questioned and are familiar -- also familiar  
11 with local conditions.

12           As to the -- the second inquiry, I  
13 think the main point here would be that although  
14 such questions can be helpful in some cases,  
15 they're not invariably helpful, and the district  
16 court had sound reasons for thinking that they  
17 would be unhelpful here.

18           I'd also note that on the third point  
19 I made, Justice Thomas, that the court of  
20 appeals, in devising this rule, clearly has a  
21 prejudice inquiry built into it. That's clear  
22 from page 60a of the Petition Appendix. That's  
23 consistent with the one supervisory rule that  
24 this Court has made in this context in --  
25 adopted by a plurality of the Court in

1 Rosales-Lopez. It's why the court of appeals  
2 left the guilt verdict in place here.

3 And I think the same analysis ought to  
4 apply to the penalty phase verdict. You had a  
5 two-year gap between the events and the trial.  
6 Most of the publicity, as the court of appeals  
7 acknowledged, was factual. Most of it related  
8 to guilt, which Respondent, in fact, conceded.  
9 The jury was repute -- repeatedly admonished to  
10 disregard pretrial publicity. There were  
11 questions on the hundred-page questionnaire that  
12 went to any potential bias from pretrial  
13 publicity, as well as the sources and the amount  
14 of pretrial publicity that each prospective  
15 juror had seen.

16 There was follow-up questioning in the  
17 individualized voir dire about that particular  
18 question, Question 77, with virtually every  
19 prospective juror and all the seated jurors.  
20 None of the seated jurors expressed a  
21 predisposition to impose a capital sentence --

22 JUSTICE THOMAS: I don't mean to --

23 MR. FEIGIN: -- which is the only  
24 thing at issue.

25 JUSTICE THOMAS: All that makes sense,



1 but I'm looking more for the standard that you  
2 would apply. What would be your rule? Assuming  
3 you accept to some extent the supervisory  
4 authority of the First Circuit, what would be  
5 your rule for reviewing the exercise of that  
6 authority?

7 MR. FEIGIN: Your Honor, I think, if  
8 the -- if the Court accepts that the court of  
9 appeals can dictate to district courts how to do  
10 this, I -- I think this Court ought to just be  
11 reviewing the rule to see whether that was a  
12 sound and reasonable exercise of the rule,  
13 bearing in mind that it is an exercise of  
14 supervisory power that the court of appeals is  
15 imposing in a context where district courts have  
16 the utmost discretion.

17 JUSTICE THOMAS: Do you think --

18 MR. FEIGIN: And --

19 JUSTICE THOMAS: -- would we review it  
20 as an -- the First Circuit exceeding its  
21 supervisory authority in the sense that normally  
22 that authority is exercised, say, on local  
23 procedures or something like that? Or are you  
24 saying that we should review it in this area for  
25 something like reasonableness?

1                   MR. FEIGIN: Well, Your Honor, I -- I  
2 think you could do, frankly, either. I think,  
3 at the threshold, the Court ought to ask whether  
4 the court of appeals exceeded its authority in  
5 even enacting such a rule.

6                   If you look at the Court's decision in  
7 Payner, it -- it is a clear expression by this  
8 Court that courts of appeals shouldn't invoke  
9 their supervisory power as an end-around to the  
10 reasoning of this Court, which is, I think, what  
11 the court of appeals had -- has done here.

12                   The second way you could look at it,  
13 Justice Thomas, is more of a whether assuming it  
14 actually had the authority to do this, should it  
15 have done so. And I think, if you look at this  
16 Court's other supervisory rule decisions where,  
17 even accepting the court of appeals might have  
18 had the authority to enact some rules in this  
19 area, enacting a hard-and-fast rule like this  
20 that would at least be rigid enough to divest  
21 the experienced district judge in this case of  
22 his sound discretion to determine that these  
23 questions wouldn't be a helpful addition to the  
24 mix of information already available to the  
25 parties and that it could be addressed through

1 individualized voir dire and that the questions  
2 might even be counterproductive by focusing the  
3 prospective jurors on something that the judge  
4 was at the same time instructing them that they  
5 should disregard, to the extent the rule is that  
6 wooden and that rigid, it is an unreasonable  
7 supervisory rule, Justice Thomas.

8 JUSTICE ALITO: Well, to go back to  
9 the beginning of your answer to Justice Thomas,  
10 do you dispute the authority of the courts of  
11 appeals to issue some requirements under its  
12 super -- under their supervisory power?

13 MR. FEIGIN: Not as a -- certainly not  
14 as a general matter, Your Honor. I think it's a  
15 little bit more circumscribed when it comes to  
16 jury selection procedures because of this  
17 Court's repeated emphasis on the discretion that  
18 district courts necessarily have to have.

19 JUSTICE BARRETT: Where does that  
20 authority come from?

21 MR. FEIGIN: Your Honor, we're  
22 following this Court's cases, which appear to  
23 presume that this Court has some supervisory  
24 power and have an especially --

25 JUSTICE BARRETT: Well, our

1 supervisory power would be different than the  
2 court of appeals supervisory power over district  
3 courts, right? Are you just, because we've  
4 assumed in some cases that courts of appeals  
5 have it, relying on our precedents?

6 MR. FEIGIN: Yeah. Your Honor, we --  
7 we haven't questioned whether courts of appeals  
8 generally have supervisory power. I suppose one  
9 other way to decide this case in the  
10 government's favor would be to take issue with  
11 that, but we haven't questioned that  
12 specifically.

13 JUSTICE SOTOMAYOR: Mr. Feigin, if we  
14 took question with that, it would upend a whole  
15 bunch of rules, some of which in Mu'Min itself  
16 we endorsed, but there are local rules about  
17 making sure that a pro se prisoner knows that he  
18 or -- he or she, what rights they're giving up  
19 if they're going to proceed pro se.

20 There are local rules on what you have  
21 to do if you're going to dismiss a complaint,  
22 letting pro se litigants have an opportunity to  
23 cure their deficiency. We have local rules on  
24 waivers of all kinds, including jury waivers.

25 There's a whole lot of local rules

1 that talk about what courts are thinking about  
2 as adequate process, and they're not changing  
3 outcomes. They're just saying to courts, before  
4 you exercise your discretion, make sure that  
5 these things have happened.

6 MR. FEIGIN: Well --

7 JUSTICE SOTOMAYOR: So are you taking  
8 -- are -- are you suggesting that we should take  
9 aim at those local rules?

10 MR. FEIGIN: No, Your Honor. Let me  
11 just emphasize two quick points. As I  
12 emphasized to Justice Barrett, we haven't  
13 questioned the court of appeals supervisory --

14 JUSTICE SOTOMAYOR: So why --

15 MR. FEIGIN: -- authority in this  
16 case.

17 JUSTICE SOTOMAYOR: -- in Mu'Min -- it  
18 -- Mu'Min I think it's said -- did we spend, I  
19 think, two or three paragraphs talking about  
20 local rules?

21 MR. FEIGIN: Well, Your Honor, the --  
22 the other point I was going to make in -- in  
23 response to your original question before I -- I  
24 get to that specifically is we're also not  
25 questioning -- I didn't take Justice Barrett's

1 question to get at the separate issue of, for  
2 example, local rules that district courts enact  
3 for themselves.

4           However, in Mu'Min, the Court did note  
5 the existence of some supervisory rules in this  
6 context. There might be a question as to how  
7 far each of those rules at the time of Mu'Min  
8 would have extended --

9           JUSTICE SOTOMAYOR: May --

10          MR. FEIGIN: -- and whether they --

11          JUSTICE SOTOMAYOR: -- may I change --

12          MR. FEIGIN: -- would have covered  
13 this case. But I think the reasoning of Mu'Min  
14 -- again, I'd point the Court back to page 424  
15 of that decision -- makes clear that in  
16 exercising its own supervisory power, this Court  
17 has not dictated specific forms of questioning,  
18 even in the most sensitive context of race with  
19 its -- the supervisory rule adopted by the  
20 plurality in Rosales-Lopez. I think it was  
21 inappropriate for the court of appeals here to  
22 have a rigid, wooden rule that dictates specific  
23 --

24          JUSTICE SOTOMAYOR: It wasn't --

25          MR. FEIGIN: -- questioning on

1 pretrial --

2 JUSTICE SOTOMAYOR: -- all that rigid.  
3 The rule was very simply stated in -- in  
4 Patriarca, which was, ask them questions about  
5 the kind and degree of publicity that's out  
6 there, and the Court permitted degree, it  
7 permitted people to tell how much they had read,  
8 a little, a lot, or a moderate amount.

9 But it didn't permit questioning as to  
10 what kind of publicity, because there was a  
11 whole lot of different publicity here. There  
12 was publicity on the day of the event. There  
13 was publicity the days after. There was  
14 publicity about what major politicians and  
15 others were suggesting the punishment should be.  
16 There were interviews of victims. There was a  
17 whole lot of different kinds of publicity. And  
18 the district court -- and the government  
19 objected when counsel attempted to elicit that  
20 kind of information.

21 That seems like an extreme control  
22 over trying to figure out what someone --  
23 whether someone could have been influenced by  
24 that publicity.

25 MR. FEIGIN: Well, a -- a few points,

1 Justice Sotomayor. First of all, the government  
2 did not always object, and if you look at pages  
3 733 to 735 of the court of appeals appendix in  
4 this case, you'll see the district court  
5 emphasizing that these questions would be  
6 allowable on a juror-specific basis depending on  
7 the kinds of answers the juror had previously  
8 given.

9 As to the different kinds of  
10 publicity, Justice Sotomayor, they didn't  
11 request any questions asking whether jurors had  
12 seen specific types of publicity. And I think  
13 the reason they didn't do that is because they  
14 didn't want to focus the jurors on those kinds  
15 of things, like what opinions people might have  
16 expressed about the death penalty --

17 JUSTICE SOTOMAYOR: So what was --

18 MR. FEIGIN: -- in this case.

19 JUSTICE SOTOMAYOR: -- wrong with the  
20 one question they wanted to ask, what stands out  
21 in your mind about all that publicity? It seems  
22 to me that that's not asking for details of  
23 everything you've read but what has influenced  
24 you or affected you enough for you to remember  
25 it.



1 MR. FEIGIN: Well, I think, as --

2 JUSTICE SOTOMAYOR: That seems like a  
3 totally appropriate question to me.

4 MR. FEIGIN: I think, as Respondent's  
5 own counsel pointed out -- and this is at page  
6 480 of the joint appendix -- a question like  
7 that is unlikely to be particularly useful in a  
8 case like this because everyone saw the same  
9 coverage, so they were all going to say the same  
10 things: the carnage at the finish line, the  
11 chase in Watertown, the killing of Officer  
12 Collier, the boat manifesto --

13 JUSTICE SOTOMAYOR: Well, doesn't it  
14 --

15 MR. FEIGIN: -- that Respondent wrote.

16 JUSTICE SOTOMAYOR: -- tell you  
17 something someone who says something else?

18 MR. FEIGIN: Well --

19 JUSTICE SOTOMAYOR: How about if a  
20 juror -- if you ask a juror that and the juror  
21 says, I listened to Victim X and that has  
22 haunted me, that certainly would be information  
23 relevant to a defense attorney and even to the  
24 prosecution.

25 MR. FEIGIN: Well, Your Honor, I -- I

1 think I'd -- I'd push back a little bit on  
2 whether there -- on the idea that there wasn't  
3 questioning that got at the kinds of publicity  
4 that the jurors had seen.

5 Many of the jurors volunteered such  
6 information. There were occasions when  
7 Respondent's counsel was able to ask that  
8 question, or there was some other revelation of  
9 media coverage that some particular juror had  
10 seen.

11 The jurors were extensively questioned  
12 on their views on the death penalty in  
13 particular, and if the jurors were biased on  
14 that by something, that might have itself come  
15 out in the course of that question.

16 JUSTICE SOTOMAYOR: Mr. Feigin --

17 CHIEF JUSTICE ROBERTS: Counsel,  
18 the -- we call this or it's been called a  
19 supervisory rule. Now, if I'm going to argue a  
20 case in a circuit court of appeal, you look at  
21 the rules. There's usually a little pamphlet  
22 tell you these are the circuit rules. They --  
23 they may be supplemental to the court of appeals  
24 rules.

25 What -- what makes this a rule? It

1 seems to me that it's really nothing more or  
2 less than a -- a precedent. I mean, is there a  
3 collection of these supervisory rules somewhere?  
4 This is Rule 22? What?

5 MR. FEIGIN: Well, Your Honor, I --  
6 I -- I don't think I'm going to really dispute  
7 what you just said. I think everyone was  
8 actually taken by surprise that there even was  
9 such a thing as the Patriarca rule given that no  
10 one had cited it in the district court,  
11 including the court of appeals itself when it  
12 was reviewing jury selection procedures in a  
13 mandamus petition about venue, it praised the  
14 jury selection procedures and never once  
15 mentioned --

16 CHIEF JUSTICE ROBERTS: Is there --  
17 should we consider this requirement in any way  
18 different from the way we consider any precedent  
19 because it's labeled a supervisory rule?

20 MR. FEIGIN: If anything, Your Honor,  
21 I would give it less weight because it was  
22 dictum in Patriarca itself, which simply  
23 affirmed the denial of -- of a venue change.

24 So I really don't think --

25 CHIEF JUSTICE ROBERTS: You know, if

1 -- if -- if we issue an opinion and we write it  
2 and it has a particular holding, I think the  
3 author would probably be very happy to say: You  
4 know, our rule going forward is this. But  
5 that's just saying it's -- it's a precedent. I  
6 don't know attaching a label to it.

7 I mean, Justice Sotomayor is right,  
8 there are -- are circuit rules governing a lot  
9 of things, and from minor, you know, file your  
10 application on 8-and-a-half-by-11 paper, to --  
11 to more significant things. But this is a rule  
12 of law. I don't see what's gained by calling it  
13 a rule --

14 MR. FEIGIN: Yeah.

15 CHIEF JUSTICE ROBERTS: -- a  
16 supervisory rule.

17 MR. FEIGIN: I -- I agree with that,  
18 Your Honor. And I think the reason for labeling  
19 it such and the reason certain things are  
20 labeled supervisory rules is they're advisories  
21 going forward to district -- in this instance,  
22 district courts to tell them that if they do not  
23 do something in the future, they will be  
24 reversed for --

25 CHIEF JUSTICE ROBERTS: Well, we --

1 MR. FEIGIN: -- not doing it.

2 CHIEF JUSTICE ROBERTS: -- tell them  
3 that too, that if they don't follow this  
4 particular rule of law in the future, they'll be  
5 reversed. I don't know that every one of our  
6 cases governing district court practice is a  
7 supervisory rule.

8 MR. FEIGIN: Yeah, I think it is  
9 particularly geared toward areas like case  
10 management, where they're just trying to put  
11 district courts on notice.

12 I think that is a -- actually a fairly  
13 poor characterization of Patriarca itself,  
14 which, as I said, kind of renders this as  
15 something of an advisory note at the end of  
16 deciding something else. So I'm not even sure  
17 --

18 JUSTICE ALITO: Well, isn't the --  
19 isn't the distinction that it's not based on the  
20 Constitution and it's not based on a statute or  
21 a regulation? It is a prophylactic rule that is  
22 adopted by the court for the purpose of  
23 protecting a constitutional right, but it isn't  
24 -- there is no -- there's no -- the proposition  
25 is not that this is required by the

1 Constitution. Is that the distinction?

2 MR. FEIGIN: Well, it's not -- I think  
3 that is one distinction. It's not required by  
4 the Constitution. The Court's drawn that  
5 distinction in this particular line of cases  
6 where it's been somewhat stricter in reviewing  
7 federal courts than it has been in reviewing  
8 state courts. That's quite clear from -- from,  
9 for example, Mu'Min.

10 And if one accepts that courts of  
11 appeals can impose their own supervisory rules  
12 in this context, I think what they're labeling a  
13 supervisory rule is just -- as I was telling the  
14 Chief Justice, just an advisement to district  
15 courts that this is how you should do it.

16 But I think it definitely exceeds his  
17 -- a court of appeals' authority to impose such  
18 a rule that contradicts the way that this Court  
19 has handled similar situations.

20 JUSTICE KAGAN: Mr. Feigin, can I turn  
21 to the evidentiary question in this case? I've  
22 been having a little bit of a difficult time  
23 teasing apart your various arguments about why  
24 it is that the district court acted within its  
25 discretion in refusing to admit the evidence

1 about Tamerlan's participation in the Waltham  
2 murderers.

3           So I just thought I'd give you a  
4 little bit of a hypothetical -- or maybe it's  
5 not a hypothetical, maybe it's just asking you  
6 to assume something that you contest -- which is  
7 assume for me that the evidence was very strong  
8 that Tamerlan participated in and indeed had a  
9 leading role in the Waltham murders, all right?  
10 So assume that the evidence is strong with  
11 respect to that.

12           In that case, would the court have  
13 committed reversible error by refusing to  
14 participate -- to admit that evidence?

15           MR. FEIGIN: Your Honor, I think that  
16 would be a much more difficult case for us.

17           JUSTICE KAGAN: Yes. I'm just asking,  
18 in that difficult case, would the court have  
19 committed reversible error?

20           MR. FEIGIN: Well, Your Honor,  
21 assuming -- and I -- one point I want to  
22 emphasize is that in district court here, they  
23 did not assert -- this is pages 668 --

24           JUSTICE KAGAN: Mr. Feigin --

25           MR. FEIGIN: -- to 669 --

1 JUSTICE KAGAN: -- could you just --

2 MR. FEIGIN: Okay.

3 JUSTICE KAGAN: -- answer the  
4 question?

5 MR. FEIGIN: Your Honor, one point I'm  
6 trying to make is it would depend whether there  
7 was some assertion that Respondent was aware of  
8 it, which is an assertion they did not make in  
9 district court. But --

10 JUSTICE BREYER: I'm sorry, I thought  
11 they -- I thought they did, but it was earlier  
12 in the case.

13 JUSTICE KAGAN: Let's just assume --  
14 yes, I'm saying, you know, the -- the defendant  
15 was aware of it. Now answer the question.

16 MR. FEIGIN: If the defendant was  
17 aware of it and there was strong evidence of it,  
18 I think the district court should have let it  
19 in.

20 JUSTICE KAGAN: Okay. And -- and --

21 MR. FEIGIN: Neither of those was true  
22 here.

23 JUSTICE GORSUCH: Then why --

24 JUSTICE KAGAN: -- and I assume that  
25 you say that because the evidence -- assuming it



1 was strong, the evidence clearly is -- you know,  
2 goes to a mitigating factor. The entire point  
3 of the defendant's mitigation case was that he  
4 was, you know, dominated by, unduly influenced  
5 by his older brother, and that would have gone  
6 to exactly that point. Is -- is that right?

7 MR. FEIGIN: Your Honor, if you had  
8 the knowledge combined with the strong evidence,  
9 I think that might have -- might well have done  
10 it, particularly if it could have been done in a  
11 streamlined fashion. But if you look at --

12 JUSTICE KAGAN: Okay. So --

13 MR. FEIGIN: -- pages 668 --

14 JUSTICE KAGAN: -- if that's true --

15 MR. FEIGIN: -- to 669 --

16 JUSTICE KAGAN: -- Mr. Feigin -- if  
17 that's true, Mr. Feigin --

18 MR. FEIGIN: Yeah.

19 JUSTICE KAGAN: -- then your entire  
20 case rests on the notion that this evidence just  
21 wasn't strong enough, that it was too -- I don't  
22 know what else to call it -- it was -- it didn't  
23 establish that Tamerlan had played a leading  
24 role in the Waltham murders. That's what your  
25 case is.

1                   But how is that the job of a district  
2 court to evaluate, much less decide, that  
3 question? I would have thought that once the  
4 district court says this is obviously related to  
5 his sentencing defense, in other words, it goes  
6 to his own culpability, it essentially confirms,  
7 if it were true, the mitigating factor that he  
8 was unduly influenced by his brother, at that  
9 point, it's the job of the jury, isn't it, to  
10 decide on the reliability of the evidence, to  
11 decide whether it's strong evidence or weak  
12 evidence that Tamerlan, in fact, played a  
13 leading role in those other gruesome murders?

14                   MR. FEIGIN: Well, Your Honor, just a  
15 very quick threshold point. Again, there is the  
16 knowledge issue here. And if you look at pages  
17 668 to --

18                   JUSTICE KAGAN: I'm just --

19                   MR. FEIGIN: -- 669, you'll see they  
20 didn't assert --

21                   JUSTICE KAGAN: -- I'm assuming the  
22 knowledge issue.

23                   MR. FEIGIN: -- knowledge in the  
24 district court. Assuming knowledge, then --

25                   JUSTICE KAGAN: I mean, I --

1 MR. FEIGIN: -- I think we --

2 JUSTICE KAGAN: -- I don't even know  
3 that knowledge is all that important because,  
4 even if he didn't know, the fact that his  
5 brother was the kind of person who played this  
6 leading role in these gruesome murders tells you  
7 something about this -- the role he might have  
8 played in this murder, irrespective of  
9 knowledge.

10 But, at any rate, let's just assume  
11 that he had knowledge.

12 MR. FEIGIN: So let me just say a  
13 couple things directly responsive to your  
14 question. One is everyone agrees that  
15 reliability is an important consideration here.  
16 If you look at pages 16 to 17 of their brief,  
17 page 30 of their brief, they agree with that.

18 Then you have to balance that against  
19 the probative value of this evidence. And I  
20 don't think the evidence really would have added  
21 much to the mix of information we already had  
22 about, for example, who planned the Boston  
23 Marathon bombing --

24 JUSTICE KAGAN: I mean, think about --

25 MR. FEIGIN: -- which was --

1 JUSTICE KAGAN: -- what you're just  
2 saying, Mr. Feigin. This court let in evidence  
3 about Tamerlan poking somebody in the chest,  
4 this court let in evidence about Tamerlan  
5 shouting at people, this court let in evidence  
6 about Tamerlan assaulting a former student -- a  
7 -- a -- a fellow student, all because that  
8 showed what kind of person Tamerlan was and what  
9 kind of influence he might have had over his  
10 brother.

11 And yet, this court kept out evidence  
12 that Tamerlan led a -- a -- a crime that -- that  
13 resulted in three murders?

14 MR. FEIGIN: May I respond, Mr. Chief  
15 Justice?

16 CHIEF JUSTICE ROBERTS: Certainly.

17 MR. FEIGIN: Your Honor, I think the  
18 one thing to bear in mind is these crimes are  
19 extremely different. They have -- the Waltham  
20 crime, everyone agrees, did not involve  
21 Respondent. It was very differently motivated.  
22 It was -- even if you accept everything Todashev  
23 said, it was a financial crime where the murder  
24 was committed by knife in order to cover up who  
25 had committed the robbery of three drug dealers.

1                   That is a far cry from a sophisticated  
2 public spectacle that required reading  
3 directions in a jihadist magazine on how to  
4 build and construct bombs and deliberately  
5 placing them --

6                   JUSTICE KAGAN: I mean, it's different  
7 --

8                   MR. FEIGIN: -- at the finish line of  
9 the Boston Marathon.

10                  JUSTICE KAGAN: -- it's different that  
11 Tamerlan yelled in a mosque, and it's different  
12 that Tamerlan assaulted a fellow student, and  
13 it's different that Tamerlan yelled at people,  
14 but all of this was admitted to show what kind  
15 of person Tamerlan was and what kind of  
16 influence he had over his brother.

17                  And yet, the court, again, you know,  
18 refuses to admit evidence of a gruesome  
19 murderous crime in which, according to the  
20 evidence that was kept out, Tamerlan had  
21 extraordinary influence over a co-felon in  
22 getting him to -- you know, to murder three  
23 people.

24                  MR. FEIGIN: Your Honor, Todashev  
25 denied murdering. He says he was out by the CRV

1 when all of this happened. And this is very  
2 unreliable evidence because Todashev had every  
3 incentive to pin this entire thing on Tamerlan,  
4 who at that point was already dead and they knew  
5 they were looking for him. I'd encourage the  
6 Court to read the transcript of the interview.

7           According to Todashev -- and I think  
8 this is page 947 of the joint appendix --  
9 Tamerlan says to him, okay, if you will not kill  
10 them, I will do it.

11           JUSTICE KAGAN: Isn't that exactly the  
12 kind of thing that the -- that the prosecutor  
13 would have said to the jury about why they  
14 shouldn't believe that evidence? But isn't this  
15 a classic case in which the evidence understood  
16 one way is highly relevant to a mitigation  
17 defense and the evidence understood in the way  
18 you just suggested, you know, just says that's  
19 -- that -- you know, that's -- that's crazy, it  
20 didn't happen that way? But that's what a jury  
21 is supposed to do, isn't it?

22           MR. FEIGIN: Your Honor, unlike the  
23 other evidence that you have cited, there was  
24 going to be no cross-examination here. The only  
25 people who might have known what happened in

1 Waltham were Todashev, who admitted to some  
2 participation, and possibly Tamerlan, and both  
3 of them were dead.

4 This investigation had hit the end of  
5 the road. There was no -- there was no way to  
6 figure out what happened. The district court  
7 reasonably determined that. We're here on abuse  
8 of discretion review.

9 And, moreover, I think everyone agrees  
10 that this is subject to harmless error analysis.  
11 And if you look at all the other details that  
12 the jury heard -- and I'm happy to list them all  
13 --

14 JUSTICE SOTOMAYOR: Mr. Feigin, how --

15 CHIEF JUSTICE ROBERTS: Mr. Feigin --

16 MR. FEIGIN: Yeah.

17 CHIEF JUSTICE ROBERTS: -- along the  
18 same lines, the -- you say on page 39 of your  
19 brief that under the Federal Death Penalty Act,  
20 the countervailing interests that would justify  
21 excluding evidence, you can do that if they  
22 outweigh the information's probative value.

23 And you note that, on the other hand,  
24 under the Federal Rule of Evidence, if the  
25 countervailing interests substantially outweigh,

1 do you really think that's a difference in  
2 practice?

3 I thought that we err the other way,  
4 that under the Federal Death Penalty Act, we  
5 want the countervailing evidence that would  
6 affect the sentence to come in more easily than  
7 we would with respect to general Rules of  
8 Evidence?

9 MR. FEIGIN: If I -- if I could, two  
10 -- two points in response to that, Your Honor.

11 First, I actually think it does make a  
12 difference because Rule 403, which has the word  
13 "substantially" in it, exists as a backstop to  
14 bolster other Rules of Evidence that already  
15 ensure reliability, like the hearsay rule and  
16 the best evidence rule, Whereas Section 3593(c)  
17 substantially lowers the bar for the admission  
18 of evidence in the penalty phase of a capital  
19 trial but nevertheless leaves the district court  
20 with some tools to ensure fundamental  
21 reliability and ensuring that the -- the  
22 evidence is going to be appropriate for the  
23 case.

24 And the second point I would -- I  
25 would make is just what negative effect, I



1 think, introducing the evidence here would have  
2 had. It would have sidetracked the proceedings  
3 and consumed a disproportionate amount of it  
4 focusing on Tamerlan, not Respondent.

5 And everyone agrees -- and, again,  
6 this is at page 668 of the joint appendix, which  
7 is their response to the government's motion in  
8 limine to seek to exclude this -- that there  
9 isn't -- this isn't just a comparison game where  
10 the jury's invited to decide whether Tamerlan or  
11 Respondent is a worse person and decide that  
12 capital punishment is only appropriate for that  
13 person.

14 CHIEF JUSTICE ROBERTS: Thank you.  
15 Thank you, counsel.

16 MR. FEIGIN: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Thomas, anything further?

19 JUSTICE THOMAS: Nothing.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 JUSTICE BREYER: Consider everything  
23 Justice Kagan asked, a -- a question. This was  
24 their defense. They had no other defense. They  
25 agreed he was guilty. Their only claim was,

1 don't give me the death penalty because it's my  
2 brother who was the moving force.

3           And isn't there a -- one, I think  
4 she's pointed out a certain difference between  
5 evidence that was introduced about the brother,  
6 i.e., he shouted at the barber or the butcher, I  
7 think it was the butcher, et cetera, and this  
8 evidence, which happens to be an affidavit which  
9 says he murdered three people, including one of  
10 his closest friends, by slitting their throats.  
11 Okay?

12           Now it seems to me there's a  
13 difference. Does the government think there's a  
14 difference? Well, the government took  
15 Todashev's affidavit and used it to show  
16 probable cause to search a car.

17           Now, if the government thinks it  
18 stands up enough to show probable cause at  
19 least, isn't it enough to get into a death case?  
20 When was the last time there was an execution in  
21 Massachusetts?

22           I mean, and as far as his knowing  
23 about it, the lawyer, what's his name,  
24 Kadyrbayev, all right, that's a complicated  
25 name, but it's a simple point. There was

1 evidence in this trial, though introduced  
2 before, where he said that -- that is, he was  
3 the friend, and the lawyer said, Kadyrbayev, the  
4 friend, says that he did know about it. Nobody  
5 denied that he knew about it.

6 All right. So -- so those, I think,  
7 were the points that Justice Kagan was trying to  
8 make. And unless there's a much tougher rule of  
9 mitigating evidence in a death case than there  
10 is to show probable cause to search a car, why  
11 doesn't this come in?

12 MR. FEIGIN: Well, Your Honor, there  
13 were a couple of questions packed in there. Let  
14 me respond to the warrant affidavit question and  
15 also the Kadyrbayev proffer question.

16 On the warrant affidavit question, if  
17 you look at page 996 of the joint appendix,  
18 which is the warrant affidavit, the agent  
19 doesn't endorse any of the details of Todashev's  
20 story. He says that he believes there's  
21 probable cause to believe that Tamerlan and  
22 Todashev planned and committed the Waltham crime  
23 but without saying that Tamerlan necessarily  
24 played a lead role.

25 And this Court made clear in Franks

1 that simply quoting a third-party's statements  
2 doesn't necessarily endorse them in the context  
3 of an affidavit, and, moreover, as a more  
4 general matter, a warrant affidavit is a very  
5 different inquiry into a very different thing.

6           The Court has emphasized, for example,  
7 in Illinois against Gates, that there's a  
8 qualitative difference between probable cause  
9 and proof by a preponderance -- even by a  
10 preponderance of the evidence. And we're just  
11 looking at reliability in that context for  
12 reliability to investigate further, not  
13 reliability to prove anything at trial.

14           On the Kadyrbayev proffer, I think  
15 there's a very artificial aspect to the way that  
16 this inquiry is -- is coming in at the appellate  
17 stage because, at trial, I think the reason they  
18 didn't focus on the Kadyrbayev proffer, which  
19 they mentioned in the course of their discovery  
20 motions but not as a reason to admit this  
21 evidence, not as a basis for opposing the  
22 government's motion in limine, is because they  
23 never wanted Kadyrbayev on the stand probably  
24 because, to the extent anything in the  
25 Kadyrbayev proffer was true, Kadyrbayev was

1 offering it to the government, so who knows how  
2 it would have come in.

3 And if you look a couple bullet points  
4 down on JA 584, you will see that Kadyrbayev  
5 also offered to testify that one month before  
6 the bombing he had a conversation with  
7 Respondent in which Respondent admitted that  
8 he'd learned how to make bombs and was speaking  
9 glowingly of martyrdom.

10 CHIEF JUSTICE ROBERTS: Justice Alito,  
11 anything further?

12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: I do. Counsel,  
14 this is a constitutional right to present  
15 mitigating evidence. It seems to me that I'm  
16 not sure how we would ever have an abuse of  
17 discretion review of a -- solely on a district  
18 court's decision not to permit a defendant to  
19 put on a defense. It -- it has to be something  
20 else because I don't know of any other situation  
21 where you can deny a defendant a constitutional  
22 right on a simple weighing.

23 But putting that aside, I'm also  
24 unsure what the reliability of this information  
25 is about when -- although you're saying that

1 they wouldn't have put in the evidence that the  
2 defendant knew about this killing, there were  
3 multiple people who they proffer to us now who  
4 could have testified to the fact that this  
5 defendant knew his brother had committed these  
6 killings as jihad, which would have meant the  
7 truthfulness of the confidential informant was  
8 irrelevant because it doesn't really matter who  
9 took the lead in the killing or even if the  
10 brother participated in the killing.

11           The only issue would have been, what  
12 did defendant think? And so I'm not sure  
13 whether the relevancy issue that the district  
14 court ruled on made any sense to me, but please  
15 explain to me how we -- what would -- what  
16 should be the standard of review, assuming a  
17 constitutional right to present mitigating  
18 evidence and assuming, as Justice Kagan showed,  
19 this evidence was relevant to -- to how this  
20 young brother might have reacted to the  
21 entreaties of an older brother who had already  
22 committed jihad?

23           MR. FEIGIN: Well, Your Honor, the  
24 court of appeals expressly found that abuse of  
25 discretion review was the appropriate standard

1 of review, and Respondent hasn't taken issue  
2 with that in this Court.

3 And as to the point about knowledge,  
4 if you look at page 976 of the joint appendix,  
5 you will see that the government's motion in  
6 limine said that Respondent had not asserted  
7 that he knew about the Waltham crime. And we  
8 acknowledged it would be a different story if he  
9 had.

10 In response, on page 669 of the joint  
11 appendix, he says that the evidence should come  
12 in even assuming arguendo he didn't know about  
13 it. And that's the basis on which the district  
14 court decided to exclude the evidence. At page  
15 650 of the joint appendix, the district court  
16 says, I'm not letting this evidence in because  
17 we fundamentally cannot tell what happened.

18 The district court did not understand  
19 this to be a knowledge -- a question of  
20 Respondent's knowledge, and I think that's one  
21 reason to review this with some deference to the  
22 district court's rulings because, to require an  
23 entire new penalty phase in this case, force all  
24 the victims to come back and testify, and have  
25 to reassess the -- the same sentence is, I -- I

1 think --

2 JUSTICE SOTOMAYOR: Mr. Feigin, part

3 --

4 MR. FEIGIN: -- a less reasonable --

5 JUSTICE SOTOMAYOR: -- part of the  
6 problem is that the district court withheld  
7 information, and so the defense attorney could  
8 not proffer everything at once because it didn't  
9 have full knowledge of what was there.

10 Now that they do, they can show us, A,  
11 how pertinent that information was and, B, how  
12 it could have dovetailed easily with what they  
13 already had.

14 MR. FEIGIN: Well, Your Honor --

15 JUSTICE SOTOMAYOR: You can't put the  
16 --

17 MR. FEIGIN: -- first of all --

18 JUSTICE SOTOMAYOR: -- you can't put  
19 the cart before the horse here. And the cart  
20 before the horse was the denial of discovery.

21 MR. FEIGIN: Well, first of all, Your  
22 Honor, I don't think that Respondent is alleging  
23 that the government didn't disclose something  
24 related to Respondent's own knowledge.

25 Second, to the extent that they want



1 to pursue further discovery, I think it just  
2 emphasizes how this is really going to sidetrack  
3 the proceedings into investigation of a  
4 different crime.

5 And, third, I don't -- that crime is  
6 not particularly related to the Boston bombing  
7 in which Respondent personally participated and  
8 there was substantial evidence about the roles  
9 of the brothers in planning that crime.

10 Some of that evidence was disputed,  
11 but I think what is quite clear and what we put  
12 into the record is that Respondent -- there was  
13 evidence that Respondent told a friend he was  
14 planning something with Tamerlan, there was  
15 evidence that Respondent had sent messages and  
16 tweets touting jihad, there was evidence that he  
17 bought the gun from his drug dealer, there was  
18 evidence he went to a firing range to practice  
19 something -- excuse me, I -- I -- I meant to say  
20 he told a friend he was doing something with  
21 Tamerlan, not necessarily planning something  
22 with Tamerlan.

23 CHIEF JUSTICE ROBERTS: Justice Kagan,  
24 anything further?

25 JUSTICE KAGAN: I do. I mean, here

1 are the mitigating factors that the court itself  
2 put to the jury. The court was very well aware  
3 of, as Justice Breyer said, the only argument  
4 that the defendant was making in this case,  
5 which was an argument about undue influence and  
6 an argument that although he did it and he was  
7 guilty, that he should not get the death penalty  
8 because he was unduly influenced by his brother.

9           And so the court put the following to  
10 the jury: Here are the mitigating factors. The  
11 defendant acted under the influence of his older  
12 brother. Whether because of the brother's age,  
13 size, aggressiveness, domineering personality,  
14 traditional authority as the eldest brother or  
15 other reasons, the defendant was particularly  
16 susceptible to his older brother's influence.  
17 The defendant's brother planned, led, and  
18 directed the bombing. The defendant wouldn't  
19 have committed the crimes but for his older  
20 brother.

21           Now all of those -- that was the  
22 entire case. Were those mitigating factors  
23 sufficient to give him life in prison rather  
24 than the death penalty? And yet, the court  
25 keeps out evidence that the older brother

1 committed three murders in the way that Justice  
2 Breyer explained?

3 MR. FEIGIN: Well, Your Honor, I -- I  
4 think I've already gone through the way this  
5 came into the district court, but the other  
6 thing I'd emphasize is I don't think their  
7 theory on probative value is particularly  
8 strong.

9 I think, if this jury heard that  
10 Respondent was aware or thought that Tamerlan  
11 had committed a murderous act of jihad, it would  
12 have expected him to be horrified, not to view  
13 that as an affirmative reason to not only follow  
14 him in jihad but to take an even more murderous  
15 act by planting a bomb --

16 JUSTICE KAGAN: Mr. Feigin, as your --

17 MR. FEIGIN: -- at the Boston  
18 Marathon.

19 JUSTICE KAGAN: -- as your brief says  
20 multiple times in the voir dire context, this  
21 jury actually produced a very nuanced verdict.  
22 It said anything in any -- as to any acts that  
23 the two brothers were together, that there --  
24 there were mitigating factors and death was not  
25 the appropriate sentence. It was only the acts

1 where the older brother was not on the scene in  
2 which death was appropriate.

3 Now do you think it's possible -- and  
4 that's all that has to be shown in such a case  
5 -- that if all of this evidence about these  
6 murders were produced, a jury that was obviously  
7 sensitive to the issue of the relationship  
8 between the two brothers and how that  
9 relationship affected the defendant's actions,  
10 do you -- do you think it's possible that that  
11 jury would have said, you know, even when  
12 Tamerlan was off the scene, the older brother,  
13 he continued to exert an enormous influence,  
14 because this is a guy who walks into places and  
15 murders three people?

16 MR. FEIGIN: Your Honor, there was no  
17 evidence that Tamerlan physically intimidated  
18 Respondent into doing anything. He -- he was,  
19 in fact, physically separate when he planted his  
20 bomb.

21 And as for the influence evidence, as  
22 I've just said, I think the jury is much more  
23 likely to have found this weighed against  
24 Respondent, not as a mitigating factor in his  
25 favor.

1                   And let's bear in mind that this is a  
2 jury who heard evidence about the boat manifesto  
3 that Respondent wrote after he ran over Tamerlan  
4 in which he justified his actions on the basis  
5 of jihad and showed how proud he was of them,  
6 and that's after he needn't worry about Tamerlan  
7 at all. In fact, he thought he was dying.

8                   JUSTICE KAGAN: Thank you, Mr. Feigin.

9                   CHIEF JUSTICE ROBERTS: Justice Alito?

10                  JUSTICE ALITO: Mr. Feigin, there's  
11 really an interesting sort of evidentiary  
12 question here, and I'd like your explanation of  
13 the standard that applies.

14                  This evidence is inadmissible many  
15 times over in a regular trial, where we have  
16 Rules of Evidence, but at the mitigation phase  
17 of a penalty of a capital case, maybe the rule  
18 is anything goes.

19                  And if that is the case -- well,  
20 that's what I want to know. Is it really  
21 anything goes? So suppose you -- there -- what  
22 we had in this case was quintuple hearsay about  
23 something that Tamerlan supposedly did years ago  
24 in Russia. One person in Russia told another  
25 person in Russia, who told another person in

1 Russia, down the line, that he did certain  
2 things. And that is admitted.

3 Then what can you do in response? Can  
4 you then introduce evidence to show that it  
5 actually didn't happen? Or can you introduce  
6 evidence to impeach the credibility of some of  
7 these hearsay declarants? What -- what is --  
8 how is all this to be handled?

9 MR. FEIGIN: Well, Your Honor, I think  
10 those would be options. I -- I think one way to  
11 look at this is, if you look at, for example,  
12 the Court's decision in Green against Georgia,  
13 that -- Georgia there maintained its hearsay  
14 rules in the penalty phase of a capital trial.  
15 And it had imposed the hearsay rule, and this  
16 Court found that it had violated the defendant's  
17 Eighth Amendment right in doing so. But, before  
18 it was -- before it was able to reach that  
19 conclusion, it assured itself that the evidence  
20 was reliable.

21 And I think that is a -- at least a  
22 minimum floor that even the Eighth Amendment  
23 would require. And at some point, some sort of  
24 quadruple hearsay hypothetical that presumably  
25 requires some translation from the original

1 Russian would -- might well exceed reliability.

2 And, here, what you had was evidence  
3 that nobody who is still alive would have been  
4 able to attest to, unlike the other evidence  
5 that was heard in this case.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch.

8 JUSTICE GORSUCH: So, Mr. Feigin, on  
9 -- on the Waltham murders, we have to review the  
10 district court's decision, maybe for abuse of  
11 discretion, maybe for something else. And he  
12 had to weigh, though, in his mind, on the one  
13 hand, the relevance and, on the other hand, the  
14 potential for confusion under the statute.

15 And if you could just, putting all --  
16 aside all the hypotheticals, actually give me  
17 the government's best argument on why it wasn't  
18 relevant on the one hand and why it would have  
19 caused confusion on the other?

20 MR. FEIGIN: Certainly, Justice  
21 Gorsuch. I think there are -- now it has boiled  
22 down to a couple of theories of relevance.  
23 One -- and I'll try and be as succinct as I can.

24 One is that it made it more likely  
25 that Tamerlan planned the crime. And as I said

1 earlier -- and I'm happy to expand on this if  
2 you want me to --

3 JUSTICE GORSUCH: I understand their  
4 theory.

5 MR. FEIGIN: Yeah.

6 JUSTICE GORSUCH: I just want to know  
7 --

8 MR. FEIGIN: Okay.

9 JUSTICE GORSUCH: -- your best  
10 arguments on why it wasn't that relevant and why  
11 it would have caused confusion. Those are the  
12 two things you have to show.

13 MR. FEIGIN: Sure. I -- I -- I think  
14 our theory on why it wasn't relevant necessarily  
15 responds to their theories of why it was, which  
16 is why I'm identifying their theory.

17 JUSTICE GORSUCH: Let's spot them  
18 that. Just --

19 MR. FEIGIN: Yeah.

20 JUSTICE GORSUCH: -- as succinctly as  
21 you can.

22 MR. FEIGIN: So we -- we don't think  
23 it -- the -- even if Tamerlan had participated  
24 in a separate crime, that, you know, assuming we  
25 had some reliable evidence of that, that it



1 really shows that he is more likely to have  
2 planned this different crime.

3           And as for influence, it really  
4 doesn't show any physical influence because, of  
5 course, Todashev opted out. And it, I don't  
6 think, shows psychological influence because, in  
7 order to conclude that, the jury would have to  
8 infer that Tamerlan was actually involved, that  
9 he did so as an act of jihad, which is not what  
10 Todashev said, that Respondent knew about it,  
11 that Respondent viewed that as essentially a  
12 plus factor for following Tamerlan, not as a  
13 significant detractor, finding out that his  
14 government -- his brother is a jihadist murderer  
15 and that that would lead him to take his own  
16 deliberate acts, of which there were many,  
17 separate, physically separate acts in carrying  
18 out the Boston Marathon.

19           As to confusion, I think unreliability  
20 of evidence is itself part baked into the -- the  
21 confusion inquiry, and I think the jury would --  
22 this would have consumed a disproportionate  
23 amount of the penalty phase proceeding, focusing  
24 on Tamerlan, and it's supposed to be a  
25 proceeding that focuses on the individual

1 culpability and history of this particular  
2 defendant.

3 And I think it really would invite  
4 precisely the kind of comparison game that  
5 everyone agrees would be inappropriate. The  
6 jury was supposed to be focused on Respondent,  
7 not on something Tamerlan might have done two  
8 years earlier that was a quite different crime.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Mr. Feigin, at the  
13 beginning of this entire line of questioning,  
14 you were asked to assume away something, and I'm  
15 confused because you were asked to assume away  
16 what I think was the district court's reasoning  
17 here, because the district court said, and I'm  
18 quoting, there was "insufficient evidence to  
19 describe what participation Tamerlan may have  
20 had in those events." And "it is as plausible  
21 that Todashev was the bad guy and Tamerlan was  
22 the minor actor. There's just no way of telling  
23 who played what role if they played roles."

24 Now what do we -- we review that  
25 analysis for abuse of discretion, correct?

1                   MR. FEIGIN: I -- I agree, Your Honor.  
2                   And I would just emphasize to the extent we're  
3                   looking at something different now, they've  
4                   suggested in their brief that maybe they wanted  
5                   to produce a more streamlined version of the  
6                   evidence where they just introduce knowledge and  
7                   the fact that Tamerlan was involved in some way,  
8                   that -- that itself is not what the district  
9                   court was --

10                  JUSTICE KAVANAUGH: But the district  
11                  court here --

12                  MR. FEIGIN: -- considering either.

13                  JUSTICE KAVANAUGH: -- the district  
14                  court here was presented with this theory, and  
15                  the district court said, we don't know what  
16                  happened. There's been insufficient evidence of  
17                  who did what. And, therefore, the theory that  
18                  Tamerlan was the lead player in that is entirely  
19                  -- well, is unreliable because we don't know,  
20                  and Todashev had all the motive in the world to  
21                  point the finger at the dead guy to say that he  
22                  was the ringleader of slitting the throats of  
23                  the three drug dealers, right?

24                  MR. FEIGIN: That's exactly right,  
25                  Your Honor. And one other thing I'd emphasize

1 is this wasn't even any sort of final confession  
2 from Todashev. This was basically interrupted  
3 midstream when Todashev, after having talked to  
4 the officers, went back into, I believe it was  
5 his kitchen, got a pole and tried to attack  
6 them, and that's why Todashev was killed.

7 So I think it's just inherently  
8 unreliable midpoint statement from someone who  
9 was at least clearly somewhat unhinged and had  
10 every reason to pin this on the person who had  
11 committed the Boston Marathon bombing, along  
12 with his brother, the Respondent here.

13 JUSTICE KAVANAUGH: Right. So that's  
14 the district court's theory. And then your  
15 answers to the line of questioning were even  
16 assuming that Tamerlan did play the lead role,  
17 which we don't have evidence of the district  
18 court concluded, even assuming that, that still  
19 gets into the comparison game that you said the  
20 district court could conclude that's not the  
21 right role -- the right analysis for the jury to  
22 take in a case like this?

23 MR. FEIGIN: That's correct, Your  
24 Honor. I -- I -- I --

25 JUSTICE KAVANAUGH: I just want to

1 make sure the premise -- I mean, the premise --

2 MR. FEIGIN: Yes.

3 JUSTICE KAVANAUGH: -- was assumed  
4 away --

5 JUSTICE KAGAN: The premise was  
6 assumed away because that's the role of the  
7 jury.

8 JUSTICE KAVANAUGH: Well, I think it's  
9 important to discuss the district court's  
10 reasoning. And the district court said, we  
11 don't know what happened.

12 And the district court -- I mean,  
13 maybe to answer Justice Kagan's question, does  
14 the district court have a gatekeeping role here  
15 or not? And maybe that's Justice Alito's  
16 question too.

17 MR. FEIGIN: Well, just to be clear on  
18 -- on I think the couple points you've raised,  
19 I -- I don't concede the premise. I -- I agree  
20 with the way Your Honor, Justice Kavanaugh,  
21 has -- has analyzed it.

22 And I also do believe, as I was  
23 discussing most in depth probably with Justice  
24 Alito and a little bit with the Chief Justice  
25 with respect to the statutory requirements in

1 3593(c), the district court does have a very  
2 important gatekeeping role here.

3           And I -- I don't really think that's  
4 disputed. It's not really an anything goes  
5 regime, even in the penalty phase of a capital  
6 trial. It is a much, much lower evidentiary  
7 standard, everyone agrees, and the Eighth  
8 Amendment requires, but it's not -- it's not  
9 anything goes.

10           And the district court reasonably  
11 exercised its discretion here to keep out  
12 inherently unreliable evidence that wasn't  
13 especially probative and had a substantial risk  
14 of confusing the jurors, as I was just  
15 explaining to Justice Gorsuch.

16           CHIEF JUSTICE ROBERTS: Justice  
17 Barrett, anything further?

18           JUSTICE BARRETT: Mr. Feigin, I'm  
19 wondering what the government's end game is  
20 here? So the government has declared a  
21 moratorium on executions, but you're here  
22 defending his death sentences.

23           And if you win, presumably, that means  
24 that he is relegated to living under the threat  
25 of a death sentence that the government doesn't

1 plan to carry out. So I'm just having trouble  
2 following the point.

3 MR. FEIGIN: Well, Your Honor, the  
4 administration continues to believe the jury  
5 imposed a sound verdict and that the court of  
6 appeals was wrong to upset that verdict.

7 If the verdict were to be reinstated  
8 eventually, which will require some further  
9 proceedings on remand, there would then be a  
10 round of collateral review, some time for  
11 reviewing any clemency petitions.

12 Within that time, the Attorney General  
13 presumably can review the matters that are  
14 currently under review, such as the current  
15 execution protocol, and what we are asking here  
16 is that the sound judgment of 12 of Respondent's  
17 peers that he warrants capital punishment for  
18 his personal acts in murdering and maiming  
19 scores of innocents, and along with his brother,  
20 hundreds of innocents at the finish line of the  
21 Boston Marathon should be respected.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Ms. Anders?  
24  
25

1                   ORAL ARGUMENT OF GINGER D. ANDERS  
2                   ON BEHALF OF THE RESPONDENT  
3                   MS. ANDERS: Mr. Chief Justice, and  
4 may it please the Court:

5                   Under the Constitution, a death  
6 sentence is lawful only if it reflects a  
7 reliable and reasoned moral judgment to the  
8 offense and the defendant's culpability. That  
9 bedrock principle was violated in two ways here.

10                  First, the district court violated the  
11 First Circuit's longstanding voir dire  
12 supervisory rule by refusing to learn whether  
13 jurors had been exposed to inadmissible and  
14 inflammatory publicity that could prejudice  
15 their consideration of the death penalty.

16                  Second and more fundamentally, the  
17 district court violated the Eighth Amendment by  
18 categorically excluding evidence that Tamerlan  
19 robbed and murdered three people as an act of  
20 jihad. That evidence was central to the  
21 mitigation case.

22                  The -- the defense's entire argument  
23 was that Dzhokhar was less culpable because  
24 Tamerlan indoctrinated him and then led the  
25 bombings. Tamerlan's commission of the murders



1 supplied the key indoctrinating event by  
2 demonstrating to Dzhokhar that Tamerlan had  
3 irrevocably committed himself to violent jihad.  
4 That would have had a profound effect on  
5 Dzhokhar, who was already enthralled to his  
6 brother and therefore would have felt intense  
7 pressure to follow Tamerlan's chosen path and to  
8 accept extremist violence as justified, and  
9 Tamerlan's prior experience carrying out violent  
10 jihad made him more likely to have led the  
11 bombings.

12           The evidence's exclusion distorted the  
13 penalty phase here by enabling the government to  
14 present a deeply misleading account of the key  
15 issues of influence and leadership.

16           The government argued that Tamerlan  
17 was merely bossy. The Waltham evidence showed  
18 that wasn't true.

19           The government argued that Tamerlan  
20 did no more than send Dzhokhar a few extremist  
21 articles. The Waltham evidence showed that  
22 wasn't true.

23           The government argued that the  
24 brothers were equal partners because Tamerlan  
25 had not succeeded in jihad until Dzhokhar joined

1 him. The Waltham evidence showed that wasn't  
2 true either.

3 But the defense couldn't make any of  
4 those points. A sentencing proceeding where the  
5 defense is not permitted to make its fundamental  
6 mitigation argument and to rebut the  
7 government's aggravation arguments cannot result  
8 in a reliable and constitutional death sentence.

9 Now I'd just like to start where the  
10 Court left off with my friend, Mr. Feigin, with  
11 the government's acknowledgment that this  
12 evidence should have come in.

13 If -- if -- if Dzhokhar knew about it  
14 and if there was evidence that Tamerlan did it,  
15 I think that's exactly right. But the key point  
16 here is that the test for relevance is the  
17 permissible inferences that the jury can draw  
18 from this evidence.

19 And so I think the district court  
20 committed legal error here by saying that --  
21 that the evidence lacked any probative value at  
22 all, and I don't understand the government to  
23 defend that position.

24 I think the far stronger inference  
25 here from the evidence was that, in fact,

1 Tamerlan had a significant role in these  
2 murders. We know that because not only did  
3 Todashev say that, but there's ample  
4 corroborating evidence which we've gone through  
5 in our brief that starts with Dzhokhar's own  
6 statement to his friend that Tamerlan committed  
7 these murders and committed them as an act of  
8 jihad. He would not have said that if this had  
9 been a minor role.

10 We know that Tamerlan was the one to  
11 review just a few weeks before the murders the  
12 extremist teachings of Anwar al-Awlaki,  
13 advocating robbing non-believers as a form of  
14 jihad. That provided the extremist motivation  
15 for this offense.

16 We know that Tamerlan was the one who  
17 knew Brendan Mess, the primary victim here.  
18 There was no evidence that Todashev did. And,  
19 of course, Tamerlan's involvement is  
20 corroborated by a computer search history which  
21 shows that either Tamerlan or his wife within a  
22 few days of the murders searched for Tamerlan's  
23 name in connection with the murders.

24 I think there's ample corroborating  
25 evidence here that far more likely inference,

1 the far more plausible inference for a juror to  
2 draw would be Tamerlan was involved in these  
3 crimes, that he played a significant role, and  
4 that Dzhokhar knew about that. We know that  
5 from --

6 JUSTICE ALITO: Can a --

7 MS. ANDERS: -- Dzhokhar's post --

8 JUSTICE ALITO: Can a trial judge at  
9 the penalty phase of a capital trial ever  
10 exclude mitigating evidence that meets the very  
11 low standard of relevance on the ground that it  
12 is highly unreliable?

13 MS. ANDERS: Yes. I believe the  
14 Eighth Amendment would permit a district court  
15 to do that. I think the way -- the way the  
16 framework works, I think, is that once evidence  
17 is relevant and reliable, then the Eighth  
18 Amendment constrains the district court's  
19 discretion to exclude it on -- on other grounds.  
20 I think --

21 JUSTICE ALITO: So the judge can make  
22 a determination of reliability?

23 MS. ANDERS: Absolutely. And the test  
24 for reliability is minimal indicia of  
25 reliability. That's what all of the lower

1 courts have used in determining whether evidence  
2 should come in, in a capital sentencing.  
3 Minimal indicia of reliability.

4 And I think whether evidence satisfies  
5 that is a mixed question of law and fact. I  
6 think it turns on whether the evidence has  
7 corroboration or other indicia of reliability.  
8 And I think here the district court committed  
9 legal error by -- because the corroborating  
10 evidence, the government has not disputed,  
11 right -- these other -- these other evidence  
12 that we talk about in our brief, the government  
13 has not disputed the reliability of it. This --

14 JUSTICE ALITO: All right. Let --  
15 where the minimum evidence of reliability --  
16 minimum standard of reliability is met and what  
17 is at issue is a -- another crime, another  
18 event, different from the one that's on trial,  
19 to what degree can the prosecution then respond  
20 by introducing evidence that disputes the  
21 version of the other event that is -- that is  
22 proffered by the defense and to what degree can  
23 the prosecution respond by impeaching the  
24 reliability of the hearsay declarants who  
25 provide the mitigating evidence?

1           In other words, at a trial, you -- you  
2     don't have these mini-trials.  If -- if a  
3     person's on trial for murder X, you don't have a  
4     trial about murder Y and murder Z.  But to what  
5     degree can a -- a trial judge in -- in -- at the  
6     penalty phase say we're not going to do this  
7     because what would happen then is another trial  
8     within this trial about what happened at -- at  
9     Waltham?

10           MS. ANDERS:  Well, I guess I would  
11     push back against Your Honor's point that --  
12     that this sort of evidence of another crime  
13     never comes in.  And I think that will enable me  
14     to answer the rest of your question.  So I think  
15     it actually -- unadjudicated crimes evidence is  
16     a staple of capital sentencing proceedings and  
17     often comes in in aggravation.

18           JUSTICE ALITO:  No, well, I'm --

19           MS. ANDERS:  The prosecution offers it  
20     and at that point --

21           JUSTICE ALITO:  I'm just talking about  
22     a trial, where there -- where there are Rules of  
23     Evidence, this stuff doesn't come in.  And my  
24     question is to what degree, if any, do the  
25     considerations that keep it out at a trial,

1 where there are Rules of Evidence, also apply in  
2 a diminished form at the penalty phase or is it  
3 the case that if the defense puts in anything  
4 that's relevant and it has minimum evidence of  
5 reliability, then you -- you're off to the races  
6 and you have a mini-trial about this other  
7 event? Or is it one-sided, the defense gets to  
8 put in this minimally reliable evidence but the  
9 prosecution cannot respond?

10 MS. ANDERS: Well, two -- two points  
11 in response to that. I think the first would be  
12 if we were looking at this under the Rules of  
13 Evidence, so at trial, actually there would be  
14 no basis for categorical exclusion on  
15 reliability grounds. Todashev's statement would  
16 be treated as a statement against interest under  
17 the Federal Rules of Evidence, 804(b), and at  
18 least those statements in which Todashev  
19 implicated both himself and Tamerlan would come  
20 in under this Court's decision in Williamson.

21 So I think even looking at this under  
22 the Rules of Evidence, there would be no basis  
23 for categorical exclusion. I think that just  
24 points up the legal error in the district  
25 court's ruling here.

1           And I would say with respect to  
2 capital sentencing, what this Court has said  
3 over and over again, including in Gregg, is that  
4 more evidence should come in at the capital  
5 sentencing phase, not less. And that's because  
6 we think the jury will make a more reliable  
7 sentencing determination if the jury gets to see  
8 the evidence. The Fourth Circuit said this in  
9 Runyon -- it's cited in our brief -- that the  
10 jury not the judge is the primary arbiter of  
11 reliability at the sentencing phase. So while  
12 --

13           JUSTICE BARRETT: Ms. Anders, can I  
14 ask you a question that follows up on that? So  
15 the Federal Death Penalty Act, the first  
16 sentence says the defendant may present any  
17 information relevant to a mitigating factor.  
18 And that's consistent with our Eighth Amendment  
19 jurisprudence.

20           But it goes on to say information may  
21 be excluded if its probative value is outweighed  
22 by the danger of creating unfair prejudice,  
23 confusing the issues, or misleading the jury --  
24 jury -- the jury.

25           So I want to know if reliability is



1 the same as that? And just because something  
2 would be admitted under the Federal Rules of  
3 Evidence as a statement against interest or, I  
4 guess put differently, the hearsay rules  
5 wouldn't keep it out doesn't mean that the  
6 district court wouldn't have discretion under  
7 403, under a very similar standard as this, to  
8 keep it out.

9 So I think another way to think about  
10 Justice Alito's question is, is this part of the  
11 Federal Death Penalty Act inconsistent with the  
12 Eighth Amendment or do you think that that  
13 sentence in the Federal Death Penalty Act is a  
14 legitimate ground for excluding evidence?

15 MS. ANDERS: I don't think the two are  
16 inconsistent. And -- and I'll answer that  
17 directly, but first let me say that I think the  
18 way to think about reliability here is that the  
19 district court committed legal error by finding  
20 that the corroborating evidence here didn't rise  
21 to the level of the minimal indicia of  
22 reliability, the standard that applies.

23 And I do think the fact -- how this  
24 would be treated under the hearsay rules,  
25 actually, is -- is quite probative here because,

1 of course, the hearsay rules are designed to  
2 reflect what we think of as more reliable  
3 statements that should come in.

4 JUSTICE BARRETT: But regardless of  
5 reliability and -- and reliability under the  
6 hearsay rules, we still have 403 and, in -- and,  
7 in fact, you know, the court was weighing -- it  
8 was weighing, you know, the risk of prejudice,  
9 unfair prejudice, against its probative value,  
10 which the district court thought was nil.

11 So put aside reliability for a minute.  
12 And I want to know -- because this seems to be,  
13 you know, the -- the gravamen of Justice Alito's  
14 question and of what the district court did. It  
15 was saying this would spin off into a  
16 mini-trial. Its probative value was low. It  
17 would confuse the jury and it wouldn't add much.

18 Are those legitimate grounds for  
19 excluding the evidence under the Federal --  
20 Federal Death Penalty Act and the Eighth  
21 Amendment?

22 MS. ANDERS: Well, those are obviously  
23 the grounds that Federal Death Penalty Act  
24 allows district courts to -- to consider. But  
25 let me break down how I think that that works

1 here. So with respect to confusion, I think  
2 ordinarily one would have review a district  
3 court's conclusion that evidence might be  
4 confusing deferentially, but I don't think  
5 that's the case here. And the reason for that  
6 is that the court first said this evidence has  
7 no probative value; it is completely irrelevant.

8 So I think the confusion ruling that  
9 the district court reached is bound up, follows  
10 directly from, its relevance ruling. And so the  
11 -- you can't separate the two. And because of  
12 that, the district court never did any weighing  
13 here under the FDPA. It said the evidence is  
14 completely irrelevant. That -- that's all it  
15 really needed to find, right? There was no  
16 weighing of countervailing considerations.

17 JUSTICE KAVANAUGH: I -- I think there  
18 are two different theories here, though, for why  
19 it should come in that you have, and correct me  
20 if I'm wrong. One, emphasized more at trial,  
21 was that Tamerlan had played a lead role in the  
22 Waltham murders and, therefore, that was  
23 relevant to show a lead role here.

24 And the district court said, as I  
25 quoted earlier, there was insufficient evidence

1 to show or establish or be probative of that  
2 theory at all.

3 A second theory, which I think you're  
4 emphasizing more here, is the mere fact that  
5 Tamerlan committed another murder is itself  
6 relevant. So suppose Tamerlan had committed the  
7 Waltham murders by himself and it was  
8 undisputed. Would that be something that has to  
9 come in, in the death penalty trial here or the  
10 penalty phase of -- of his brother?

11 MS. ANDERS: I think it absolutely  
12 would be something --

13 JUSTICE KAVANAUGH: And --

14 MS. ANDERS: -- that would --

15 JUSTICE KAVANAUGH: -- and explain the  
16 relevance there, where the defendant is saying  
17 that he committed, he the defendant, committed  
18 these murders and maimed these people, but my  
19 co-defendant is a worse person because he  
20 previously committed some other murders. Is  
21 that the theory? Or -- or explain to me the  
22 theory because that's not registering completely  
23 with me.

24 MS. ANDERS: Sure. So that's not the  
25 -- the theory. The theory is that Tamerlan

1 influenced Dzhokhar -- Tamerlan indoctrinated  
2 Dzhokhar, and Dzhokhar radicalized because of  
3 Tamerlan, and Tamerlan was more likely to have  
4 led the bombings. I think Tamerlan's commission  
5 of a previous jihadist murder was directly  
6 relevant to that theory, and that's so for a  
7 couple reasons.

8           And I think the first is that this was  
9 the key indoctrinating event, right? Everything  
10 else in the admitted evidence was just talk. It  
11 was just Tamerlan sent Dzhokhar a few -- a few  
12 articles. This was the event by which Tamerlan  
13 demonstrated his absolute commitment to violent  
14 jihad. We already know that Tamerlan was  
15 enthralled to -- to -- sorry, that Dzhokhar was  
16 enthralled to Tamerlan, that he was -- occupied  
17 a subordinate position in the family hierarchy.  
18 In light of that, he would have felt tremendous  
19 pressure to accept Tamerlan's violence as  
20 justified.

21           And I think we know that that was  
22 really important here, that -- that the murder  
23 was the key indoctrinating event because of the  
24 arguments that the government was able to make  
25 in the absence of this evidence.

1           So, as I -- the whole dispute here  
2           between the government and -- and the defense  
3           was how did Dzhokhar radicalize, why did he  
4           radicalize? The admitted evidence, as I said,  
5           was simply that -- that in terms of actual  
6           persuasion, the only actual persuasion was that  
7           Tamerlan had sent Dzhokhar a few articles.

8           JUSTICE KAVANAUGH: Well, I thought  
9           the evidence on how he radicalized was that he  
10          read Inspire, Al Qaeda's magazine; he read Anwar  
11          al-Awlaki's messages, and he became influenced  
12          by those and decided that he wanted to wage war  
13          against America.

14          MS. ANDERS: Right. And all of those  
15          articles were given to him by Tamerlan. And so  
16          what the government was able to argue was, you  
17          know, look, Dzhokhar must have radicalized on  
18          his own by reading those articles because  
19          nothing about the fact that Tamerlan gave him  
20          articles would exert any kind of influence.

21          So, in other words, if you're a  
22          younger brother under your older brother's sway,  
23          you won't feel any particular need to -- to  
24          accede to persuasion if the form the persuasion  
25          takes is a few e-mails that say, hey, here's an

1 article I thought you might be interested in.

2           The Waltham murders would have proven  
3 that that's not all that was going on between  
4 the brothers. Tamerlan, at the time that --  
5 that Dzhokhar was attending freshman  
6 orientation, Tamerlan was committing jihadist  
7 murder. He demonstrated through that that he  
8 was absolutely committed, that he was  
9 irrevocably committed to the point of murdering  
10 his friend. And at that point, Dzhokhar would  
11 have faced a choice, does he follow, does he  
12 not. We already know that he was under  
13 Tamerlan's sway, and so there would have been  
14 tremendous pressure there. That's what the jury  
15 could have found.

16           And with respect to leadership, I also  
17 think that the murder is incredibly probative  
18 here. So the admitted evidence showed that  
19 Tamerlan was older, that he occupied a superior  
20 position in -- in the hierarchy, but there was  
21 nothing in the admitted evidence that showed  
22 that Tamerlan had the ability to carry out a  
23 jihadist offense, that he had done it before and  
24 that he had -- he had the experience to do that.

25           So the government was able to argue,

1 look, Tamerlan never actually succeeded in  
2 anything. He's ineffectual. He's merely bossy.  
3 And so, you know, whatever you think about his  
4 being older and having influence on his brother,  
5 that doesn't matter. The brothers must have  
6 been equal partners because Dzhokhar was not  
7 able to go into action -- that's at page 873 of  
8 the JA -- he was not able to go into action  
9 until Dzhokhar joined him.

10 That suggests --

11 JUSTICE GORSUCH: Just -- just to  
12 follow up on -- on -- on -- on this question  
13 from Justice Kavanaugh, as I understood it,  
14 your -- your primary theory below on the  
15 relevance of -- of this evidence at Waltham was  
16 to show that the brother had leadership, had  
17 taken leadership of other crimes before, similar  
18 crimes. Is -- is that right?

19 MS. ANDERS: I think we made all of  
20 these arguments below. I think that's one thing  
21 about this evidence. It -- it supports a  
22 variety of inferences, so if you look at JA 6 --

23 JUSTICE GORSUCH: That certainly seems  
24 to be what the district court understood your  
25 argument to be, though, would you agree?



1 MS. ANDERS: I think the -- I think  
2 the district court concluded, as we've been  
3 talking about, that there was no way to tell in  
4 its view who did what in the apartment, but I --

5 JUSTICE GORSUCH: Oh, okay. So let's  
6 deal with --

7 MS. ANDERS: -- to the extent that the  
8 --

9 JUSTICE GORSUCH: -- let -- let --  
10 let's -- let's pursue that then.

11 If the district court's theory was --  
12 the district court understood your theory to be  
13 that this evidence showed the brother's  
14 leadership capacities and roles, and if -- if  
15 the district court found that based on the  
16 evidence before it there's really no way to know  
17 who took the leadership role in the Waltham  
18 murders because the -- the -- the evidence is  
19 gone now, the witnesses are unavailable, what do  
20 we do with that?

21 MS. ANDERS: Well, I think that is  
22 error too because, if you look at what the  
23 defense said to the district court, it was a  
24 broader theory than that. So I --

25 JUSTICE GORSUCH: But let's just deal

1 with that theory. Let's assume that's the  
2 theory that -- that, you know, again, maybe I'm  
3 unfairly asking you to put things aside, but,  
4 with respect to that theory, what's wrong with  
5 the district court's conclusion?

6 MS. ANDERS: I think there are several  
7 things. It's not a basis for categorical  
8 exclusion. I do think, you know, the -- the  
9 first point would be that in --

10 JUSTICE GORSUCH: Again, counsel,  
11 though, I -- I -- you're fighting the  
12 hypothetical, and I understand that, but I'm --  
13 I'm -- I'm -- I don't like a lot of  
14 hypotheticals either sometimes, but, if the  
15 theory was it shows leadership because he's done  
16 leadership in the past and if the evidence is  
17 impossible to determine who -- who led the  
18 Waltham murders, then what?

19 MS. ANDERS: Well, again, I think that  
20 would still be error because, even if that's the  
21 theory, the district court, there was  
22 corroborating evidence, I think, that suggested  
23 a leadership role here and both parties pointed  
24 out to the district court that you could  
25 analogize to the Federal Rules of Evidence that

1 you might have a situation in which some things  
2 come in but some things don't. And so I think  
3 that's why the Court erred in categorically  
4 excluding this.

5 And I think the corroborating evidence  
6 that would have suggested a leadership role  
7 here, again, Tamerlan was the one who's steeped  
8 in jihadist materials, Tamerlan was the one who  
9 knows Brendan Mess, Todashev says, and -- and  
10 this is something that the government credited  
11 in -- in the search warrant, that -- that --  
12 that Tamerlan was the one who came up with this.  
13 Tamerlan is the one who -- he's the only one who  
14 knew the victims. Tamerlan --

15 CHIEF JUSTICE ROBERTS: Well, and  
16 Todashev also was in the course of writing his  
17 confession to the crime when he attempted to  
18 overcome the law enforcement officers.

19 MS. ANDERS: That's correct. And  
20 that's something certainly the government could  
21 have pointed out, but, again, I think the test  
22 for reliability here is, is the statement  
23 corroborated by other evidence?

24 We think there's ample evidence to  
25 corroborate it. And that's before we even get

1 to the search warrant in which the government  
2 itself credited at least some of Todashev's  
3 statements, said these are appropriately  
4 accepted as true for Fourth Amendment purposes.  
5 That is what the government represented in that  
6 warrant.

7           And so we think that ought -- too  
8 ought to be compelling evidence in thinking  
9 about reliability, that this was certainly  
10 reliable enough to go to the jury because, of  
11 course, it is the jury, again, that is the  
12 ultimate arbiter of reliability in -- at the  
13 penalty phase.

14           JUSTICE KAGAN: Ms. Anders --

15           JUSTICE BREYER: So what is your  
16 response precisely to the claim, and the  
17 government makes it, look, thinks the judge, if  
18 I let in this Todashev affidavit, I -- there are  
19 about seven issues here about whether I'm going  
20 to have to have a trial, I mean, about whether  
21 Todashev is lying about what the defendant  
22 actually knew, about, about, about.

23           Now your response to that -- this  
24 trial has already gone on a long time, it'll go  
25 on for another year. Now what's your response

1 to that?

2 MS. ANDERS: So I have several  
3 responses to that. The first is that as -- as  
4 we've said in our brief, that not all of the  
5 Todashev statements would have had to be  
6 admitted. I don't think that the jury needed to  
7 reach definitive conclusions about who slit the  
8 throats in order to determine that Todashev  
9 played a major role here and did so for jihadist  
10 purposes, so the Court would have had discretion  
11 to -- to -- to -- to limit the presentation of  
12 evidence in that respect.

13 The second thing I would say is that  
14 just because evidence is contested by the  
15 government doesn't make it unreliable. I  
16 mentioned before unadjudicated crimes evidence  
17 comes in all the time and the defendant contests  
18 it. And -- and that is never thought to be a  
19 mini-trial in any other circumstance.

20 And, certainly, in this case, there  
21 were other forms of -- of hearsay, there were  
22 other FBI reports that came in where witnesses  
23 described to the FBI their interactions with  
24 Tamerlan, and -- and -- and nobody thought that  
25 the jury was going to get all tied up and it was

1 going to take years to figure out exactly what  
2 Tamerlan said, whether he said what the  
3 witnesses said he said.

4           Everybody understood that what could  
5 happen was that the jury would evaluate those  
6 reports in conjunction with an instruction from  
7 the judge about how to evaluate them, the fact  
8 that they're hearsay, and then any corroborating  
9 evidence. That's what juries do.

10           And then the final thing I would say  
11 is that although the government has -- has said  
12 that there would be a, you know, extensive  
13 mini-trial here, it has never really said what  
14 that evidence would be.

15           I mean, as far as we can tell, this  
16 would more naturally be attorney argument.  
17 This -- this would be just as it actually  
18 happened at trial, the government would get up  
19 in its opening and closings and tell the jury  
20 what it thought the jury should take from --  
21 from this information. That would not be a  
22 mini-trial. That -- that's just a little bit  
23 more in an opening or a closing. And --

24           JUSTICE SOTOMAYOR: Ms. Anderson, in  
25 your brief, I thought that you were arguing that

1     there is no real balancing test under this rule,  
2     under 3593, with respect to mitigation, that it  
3     has to be, as I think some of your amici argue,  
4     that the balancing has to be with respect to  
5     aggravating evidence, that there is a different  
6     standard of -- applicable to mitigating  
7     evidence.

8             It sort of doesn't make any sense to  
9     have a pure 50/50 balancing test with respect to  
10    mitigation because it's a constitutional right.

11            MS. ANDERS: I -- I think, certainly,  
12    in the case of mitigating evidence, the Eighth  
13    Amendment does come into play and -- and -- and  
14    imposes an independent constraint on the  
15    district court's discretion. And the way I  
16    think that works is that once evidence is  
17    relevant and reliable, the Eighth Amendment  
18    creates a strong presumption that the evidence  
19    should be admitted in some form.

20            And -- and -- and so I think it would  
21    take some extraordinary concern on the other  
22    side to justify categorically excluding  
23    evidence, especially when there are case  
24    presentation ways, there are narrow ways for a  
25    district court to address whatever case

1 presentation concerns it has.

2           And I think, in this case, none of the  
3 countervailing concerns the government has  
4 identified come close to satisfying that high  
5 standard to justify categorical exclusion.  
6 We've been talking about confusion. I think,  
7 again, the government's confusion arguments, I  
8 don't think, provide on their own terms a basis  
9 for categorical exclusion here.

10           And -- and the government would not  
11 have to do anything more, I think, than -- than  
12 make these arguments. And we've also talked  
13 about reliability. I think, again, the -- the  
14 statements here were amply corroborated by  
15 analogy to the Federal Rules. I think there was  
16 ample reason that they should come in before we  
17 even talk about the search warrant.

18           And -- and I just want to -- I just  
19 want to make clear something here about the  
20 extent to which this exclusion distorted the  
21 entire penalty proceeding, and I think the way  
22 that this unfolded is particularly important.

23           The government moved in limine before  
24 the penalty phase began to have this information  
25 categorically excluded. That freed the



1 government to tell the jury in its opening and  
2 then again in its closing that influence was the  
3 "centerpiece" of the defense's case and that the  
4 government -- and that the defense had -- had  
5 presented "no evidence" -- that's another quote  
6 from 816 -- of -- of influence.

7           Then, throughout the penalty phase and  
8 in its rebuttal, the government was able to  
9 argue that Tamerlan was merely bossy, that he  
10 merely sent Dzhokhar a few articles, that's  
11 all -- that's all the influence that happened,  
12 that Tamerlan couldn't go into action until  
13 Dzhokhar joined him. The Waltham evidence would  
14 have changed the terms of the -- the debate.

15           The government could not have made  
16 those arguments. If it had, the defense would  
17 have said: Tamerlan is not just bossy, he's  
18 violent. He's already committed violent jihad.  
19 Dzhokhar knows about it. There's no question  
20 that that would have a profound effect.

21           CHIEF JUSTICE ROBERTS: Well, it would  
22 change the -- assuming it would change the terms  
23 of the debate, it would focus debate on  
24 something that the district court determined  
25 really just couldn't be resolved. There were no

1 witnesses available. They were both dead. And  
2 he concluded that that would require -- I don't  
3 know if he used the term or not, but a  
4 mini-trial, certainly a detour into something  
5 that, at the end of the day, there was no basis  
6 for resolving.

7           It isn't a question of, you know, who  
8 do you believe. It's -- they're both dead, and  
9 -- and they're not there. And -- and you -- the  
10 determination is whether that -- whether that  
11 was an abuse of discretion.

12           MS. ANDERS: Well, I think the  
13 district court committed legal error in making  
14 that conclusion because, again, it's a question  
15 of sort of minimal indicia of reliability. And  
16 so I think the jury would have evaluated this  
17 evidence the way it would evaluate any hearsay  
18 evidence. It would put the statement next to  
19 the corroborating evidence, and it would decide  
20 what it thought.

21           And I think here we're not just  
22 talking about Todashev's statement. I think  
23 that's critical. We're talking about  
24 corroborating documentary evidence, Dzhokhar's  
25 own statement that -- that -- that Tamerlan did

1 this.

2           The jury could have evaluated all of  
3 that. I don't think it would have taken a  
4 mini-trial because, again, we're talking about a  
5 fairly limited -- a fairly limited universe of  
6 -- of evidence here that could have been  
7 presented quickly.

8           And, again, this goes to a central  
9 aspect of the penalty phase. This was the  
10 mitigation case. So I don't think this could be  
11 an improper mini-trial here. It's the trial.  
12 Right? This is the issue, as to whether  
13 Dzhokhar is going to get the death sentence or  
14 not. It's whether -- it's whether he was  
15 indoctrinated at Tamerlan's instigation and  
16 whether Tamerlan was more likely to lead.  
17 That's the only argument that the defense has.

18           And so I think the idea that it would  
19 be an improper mini-trial to put on some hearsay  
20 evidence when many other pieces of hearsay  
21 evidence came in throughout this penalty phase,  
22 from both sides, and -- and have the jury  
23 evaluate that in the context of corroborating  
24 evidence, I just don't think that could be a  
25 mini-trial.

1                   JUSTICE ALITO: Just to be clear, what  
2 is your argument about the standard under the  
3 federal death penalty statute? Do you argue  
4 that the -- the balancing applies only to the  
5 aggravating evidence and not the mitigating  
6 evidence?

7                   If it applies to the mitigating  
8 evidence, do you argue that it's inconsistent  
9 with the Eighth Amendment?

10                  MS. ANDERS: No, I think -- I think  
11 the way that this works is that the FDPA sets a  
12 very broad standard. And what the courts of  
13 appeals have recognized is that -- you know,  
14 constitutional prohibitions on admitting  
15 aggravating evidence and then, of course, the  
16 Eighth Amendment concerns about admitting  
17 evidence. Those also operate on the district  
18 courts' discretion.

19                  And so I think under the Eighth  
20 Amendment, which would -- would control in the  
21 case of mitigating evidence, the court has  
22 discretion, but once evidence is relevant and  
23 reliable, that discretion is limited. The  
24 Eighth Amendment creates a strong presumption  
25 that the evidence should come in in some form.

1 And I think that principle comes from Skipper  
2 versus South Carolina and Green versus Georgia.

3 JUSTICE ALITO: Well, I -- I'm not  
4 sure I really understand your answer. The  
5 statute says that the evidence may be excluded  
6 if the probative value is outweighed by the  
7 danger of creating unfair prejudice, confusing  
8 the issues, or misleading the jury.

9 Is that the standard for the exclusion  
10 of mitigating evidence?

11 MS. ANDERS: I think the Eighth  
12 Amendment will control when the -- when the  
13 mitigating evidence is relevant and reliable,  
14 and it will limit the discretion further. I  
15 think that the courts of appeals have said the  
16 exact same thing in the context of the Fifth --

17 JUSTICE ALITO: I -- I --

18 MS. ANDERS: -- and Sixth  
19 Amendments --

20 JUSTICE ALITO: -- still -- I don't  
21 understand.

22 MS. ANDERS: -- aggravating evidence.

23 JUSTICE ALITO: Either that's the test  
24 or the Eighth Amendment supersedes it to some  
25 degree. I gather it's the latter. You think

1 the Eighth Amendment supersedes this to some  
2 degree. This is to some degree  
3 unconstitutional?

4 MS. ANDERS: I think the Eighth  
5 Amendment, yes, provides a superseding limit on  
6 discretion, just the way that other amendments  
7 provide a superseding limit on discretion when  
8 we're talking about admitting aggravating  
9 evidence. That's what the Second Circuit said  
10 in *Fell*; it's what many of the other courts of  
11 appeals have concluded, that -- that when there  
12 is a constitutional concern, that the court of  
13 course has to exercise --

14 JUSTICE BARRETT: But just to get a  
15 straight answer to Justice Alito's question, so  
16 you are saying that that last phrase when we're  
17 talking about mitigating evidence is  
18 inapplicable or inconsistent with the Eighth  
19 Amendment because once evidence passes the  
20 threshold of reliable and probative, the court  
21 can't consider prejudice, confusion of the  
22 issues, et cetera, as a reason for excluding it?

23 MS. ANDERS: No, to be very clear, it  
24 can consider those issues. I just think that  
25 the Eighth Amendment creates a strong

1 presumption that those issues would have to be  
2 extraordinarily weighty before they could --

3 JUSTICE BARRETT: But it --

4 MS. ANDERS -- justify --

5 JUSTICE BARRETT: -- doesn't say  
6 "substantially outweigh" like 403 does. It just  
7 says "outweighs."

8 MS. ANDERS: Right, but I think the  
9 Eighth Amendment imposes a constraint here, and,  
10 again, this comes from Skipper versus South  
11 Carolina, that where the evidence is relevant  
12 and reliable, countervailing concerns would have  
13 to be extraordinary. They would have to be  
14 extremely weighty.

15 JUSTICE BARRETT: So the answer then  
16 to Justice Alito's question would be that it's  
17 unconstitutional when applied to mitigating  
18 evidence, at least to some degree under the  
19 Eighth Amendment?

20 MS. ANDERS: I think you could think  
21 about it that way, but I don't think that's how  
22 --

23 JUSTICE BARRETT: But that's what --

24 MS. ANDERS: -- the courts of appeals  
25 --

1 JUSTICE BARRETT: -- you're saying --

2 MS. ANDERS: -- have thought about it  
3 that way.

4 JUSTICE BARRETT: But -- but that's  
5 your position, right?

6 MS. ANDERS: Right.

7 JUSTICE BARRETT: Because the last  
8 sentence just says "outweighs," and it tells the  
9 district court unless it's only applicable, as  
10 Justice Sotomayor suggested, to aggravating  
11 evidence --

12 MS. ANDERS: Right. I think the  
13 Eighth Amendment -- the discretion under the  
14 Eighth Amendment is in some circumstances more  
15 limited than the discretion under the FDPA, yes.  
16 And the courts have said the same thing with  
17 respect to aggravating evidence.

18 JUSTICE GORSUCH: Did you make --

19 MS. ANDERS: We have one --

20 JUSTICE GORSUCH: Did you make this  
21 argument below that the -- the Federal Death  
22 Penalty Act is unconstitutional? It -- it  
23 strikes me as kind of a -- a new thing here  
24 today.

25 MS. ANDERS: No, again, I don't think



1 --

2 JUSTICE GORSUCH: Am I missing --

3 MS. ANDERS: -- I don't think we have  
4 to establish that the -- that the Eighth -- that  
5 FDPA is unconstitutional because the Eighth  
6 Amendment just provides another constraint on  
7 discretion. That's what we said below, that  
8 this was both an FDPA claim and it was an Eighth  
9 Amendment claim.

10 I think another way to think about  
11 this, actually, is that, you know, what the --  
12 in some ways, you don't have to -- you don't  
13 have to get to it here because what the district  
14 court actually said here was this evidence is  
15 completely irrelevant and, therefore, confusing.  
16 So the district court never got to any weighing  
17 under the FDPA. So we're in a situation in  
18 which there really isn't any discretionary  
19 determination to review under the FDPA.

20 And just to make one more point with  
21 respect to something my friend on the other side  
22 said, which was the -- that point that this  
23 evidence somehow is -- is double-edged. I just  
24 don't think, again, that that would be a basis  
25 for exclusion here.

1                   This is powerful mitigating evidence  
2                   that showed that Dzhokhar was indoctrinated at  
3                   the instigation of his brother. I think we know  
4                   that influence and leadership are incredibly  
5                   powerful mitigating concerns because of what  
6                   happened in the D.C. sniper case. We know that  
7                   that was a situation similar to here, where Lee  
8                   Malvo was a teenager at the time he committed  
9                   the offense, and -- and he was radicalized at  
10                  the behest of an older man. He believed those  
11                  crimes were religiously justified all the way  
12                  through. And yet, the evidence of influence  
13                  that he radicalized at someone else's  
14                  instigation was enough to warrant a life  
15                  sentence. I think that is what could have  
16                  happened to Dzhokhar here if this evidence had  
17                  been permitted in.

18                  CHIEF JUSTICE ROBERTS: Ms. Anders,  
19                  you're welcome to take a more time if you'd  
20                  like.

21                  MS. ANDERS: If the Court has further  
22                  questions.

23                  CHIEF JUSTICE ROBERTS: Justice  
24                  Thomas?

25                  JUSTICE THOMAS: If the government had

1 testimony that was almost exactly what you have,  
2 but it occurred in, let's say, Roxbury or  
3 Dorchester, and Respondent was shown to be the  
4 leader there, and the government attempted to  
5 introduce that as an aggravator, what would your  
6 response be to the government or what would your  
7 reaction be to that?

8 MS. ANDERS: I think it would be very  
9 difficult to keep that evidence out for exactly  
10 the same reasons, that it would be -- it would  
11 be relevant. And -- and, of course, the  
12 government often argue -- often offers evidence  
13 just like this, right? Or evidence just like  
14 Your Honor is -- is positing, evidence where we  
15 think that the defendant has committed some  
16 other offense and there's no way -- there's no  
17 way to know with 100 percent forensic certainty  
18 what actually happened. I think this is a --

19 JUSTICE THOMAS: Even --

20 MS. ANDERS: -- a common theme --

21 JUSTICE THOMAS: -- even though the  
22 individual who disclosed it is -- has done  
23 exactly what this individual did to the FBI,  
24 where he's dead now, but he -- and he's dead  
25 because he attempted to attack them? I mean,

1 you would think that would still be admissible?

2 MS. ANDERS: I think certainly the  
3 defense could make those arguments, but, yes, I  
4 think it would be difficult to keep it out for  
5 exactly the same reasons, that the jury is the  
6 primary arbiter of -- of reliability here. And  
7 so the jury ought to hear that evidence. I  
8 think that's what the lower courts have  
9 generally held in the case of aggravating  
10 evidence of unadjudicated crimes.

11 JUSTICE THOMAS: And I'd like to --  
12 excuse me -- ask you one question about the jury  
13 selection. You said that this supervisory room  
14 had been in place for quite some time, and --  
15 and did you suggest -- at least I got the sense  
16 that you thought it was a regularly applied.  
17 How often has it been applied?

18 MS. ANDERS: Well, as far as we can  
19 tell, the district courts for 50 years have  
20 consistently complied with this rule. So when  
21 one or the other party has requested content  
22 questioning, the district courts have -- have  
23 done it. So it has not come up as an appellate  
24 issue very much from what we can tell because --

25 JUSTICE THOMAS: Is it -- is it

1 published any place other than the one opinion?

2 MS. ANDERS: Yes, the -- the First  
3 Circuit has -- has relied on -- on the Patriarca  
4 rule a couple of times. It has said that it is  
5 the standards of the circuit, standards of the  
6 circuit in a case called Medina, and more  
7 recently, it has reviewed voir dire against  
8 Patriarca and has concluded that the voir dire  
9 complied with Patriarca. So, yes, this is  
10 something that the First Circuit has applied  
11 when it has come to it.

12 But as I say, as far as we can tell,  
13 generally, courts -- the district courts are --  
14 they are complying with this rule. And I think  
15 that just reflects, you know, this is a routine  
16 question that --- that's often asked and helps  
17 the government as well --

18 JUSTICE THOMAS: And we have --

19 MS. ANDERS: -- as the defense.

20 JUSTICE THOMAS: -- it -- we've  
21 generally given the district judges -- district  
22 courts quite a bit of discretion in -- at the  
23 jury selection stage.

24 Could the court of appeals displace  
25 that with a list of mandatory questions that it

1 thinks should be asked in every single  
2 complicated or widely publicized case?

3 MS. ANDERS: Well, I think that  
4 would -- that would present a -- a closer  
5 question because the district court does have  
6 discretion, but I think what the district court  
7 did here was -- was well within this Court's  
8 precedents both in the racial bias context in  
9 Rosales-Lopez and also the Mu'Min decision,  
10 where the Court said that this kind of  
11 questioning is helpful.

12 And I guess I would just make the  
13 point that, you know, this isn't a wooden rule.  
14 This is -- this is a rule that the district  
15 court has discretion to decide applies at the  
16 outset and then it has discretion to decide how  
17 to apply it. And --

18 JUSTICE THOMAS: So how do we know how  
19 far the court of appeals could go with  
20 displacing discretion? I mean, how do you know  
21 whether a rule is too detailed or there are too  
22 many rules or too wooden?

23 MS. ANDERS: Well, I suspect it would  
24 -- it would turn on something of a -- of a  
25 functional analysis. I think the reason for

1 district court discretion is that generally we  
2 think of the district court as more -- better  
3 placed, you know, to -- to decide what questions  
4 to ask in the moment.

5 What the Court said in Rosales-Lopez  
6 is that there's nothing inconsistent about that  
7 recognition and having, you know, some narrow  
8 rules where eliciting more information is both a  
9 good idea and also serves judicial integrity.

10 So I do think there would probably be  
11 some point at which we would think that -- that  
12 no longer is this serving the purpose it was  
13 supposed to serve, but I think we're very far  
14 from that here because, you know, this again is  
15 a very narrow rule that follows directly from  
16 Mu'Min and it's within the framework that the  
17 Court announced in Rosales-Lopez.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21 JUSTICE BREYER: No.

22 CHIEF JUSTICE ROBERTS: Justice Alito?  
23 Justice Sotomayor?  
24 Justice Kagan? Any further?  
25 Justice Barrett?

1 Thank you, counsel.

2 MS. ANDERS: Thank you.

3 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
4 Feigin.

5 REBUTTAL ARGUMENT OF ERIC J. FEIGIN  
6 ON BEHALF OF THE PETITIONER

7 MR. FEIGIN: Thank you, Mr. Chief  
8 Justice. The Court's been quite generous with  
9 its time, and I just want to make three points.

10 One -- and they're all focused on  
11 Waltham because I think that's really the only  
12 thing that Respondent's focused on at this  
13 point.

14 One is that my friend on the other  
15 side analogized this Todashev statement to a  
16 statement against interest. I don't think it  
17 would come in under that rule because his own  
18 admission to involvement in the crime would be,  
19 but his attempt to pin it all on the dead man,  
20 Tamerlan, the Boston bombing suspect, would not  
21 be.

22 Second, they've -- and as far as  
23 admissibility, they've really focused on this  
24 indoctrination theory, and I think that is  
25 really not especially probative of anything that



1 is mitigating here.

2 I mean, essentially, what they'd be  
3 arguing to the jury is, yeah, Tamerlan sent all  
4 this jihadist literature, but what really got me  
5 into the jihadist literature was learning that  
6 what the end of the road in jihad is committing  
7 murder, and, moreover, I want to amp that up by  
8 committing murder at the finish line of the  
9 Boston Marathon.

10 I -- I don't think that is  
11 particularly helpful or particularly probative  
12 for -- as -- as far as mitigation goes.

13 And I think that dovetails with the  
14 third point I want to make here, which is it's  
15 in some ways easy to view all this from an  
16 appellate remove, which is what we're doing  
17 here, but the easiest way to resolve this case  
18 is simply on harmless error principles and think  
19 about what the jury actually heard.

20 I don't think this comes through as  
21 much in the briefs as if the Court takes a  
22 little bit of time, it'll only take a little bit  
23 of time to review some of the video evidence  
24 that's included in the joint appendix.

25 I particularly recommend Exhibits 22,

1 23, and 1304C, and what those exhibits show --  
2 I've already gone through some of the evidence  
3 about Respondent being involved in the planning  
4 of the offense. But what those exhibits are  
5 going to show is Respondent physically  
6 separating from his brother near the finish line  
7 of the Boston Marathon, positioning himself  
8 behind a group of children, putting down his  
9 backpack -- you can't really quite see that  
10 part, but rest assured that he did it -- putting  
11 down his backpack, contemplating for about three  
12 minutes, taking out his phone and calling his  
13 brother, after which the first bomb goes off.

14           So Tamerlan's clearly waiting for a  
15 signal from Respondent. Respondent then, while  
16 everyone in the Forum restaurant patio is  
17 panicking and wondering what just happened --  
18 actually, they don't even know enough to panic  
19 yet. Respondent walks off at a normal rate of  
20 speed, it's not a very wide-angle camera on the  
21 Forum patio, so he barely gets off screen before  
22 20 seconds later the second bomb explodes,  
23 killing and maiming people that were minutes  
24 ago -- seconds ago, I'm sorry, wondering what  
25 had just happened.

1           If that's not someone who set off the  
2 bomb himself or at least knew exactly when it  
3 was going to go off and what its blast radius  
4 was going to be, I -- I don't know what is.

5           Then, after the bombing, Respondent,  
6 who lives 60 miles away from Tamerlan, joins up  
7 with Tamerlan for a daring escape in which they  
8 kill and -- a police officer in cold blood in a  
9 failed attempt to steal his firearm. They  
10 carjack and kidnap an innocent graduate student.  
11 And then they engage in a violent shootout with  
12 police officers in Watertown during which  
13 Respondent is lighting pipe bombs and throwing  
14 them at the police.

15           Then, when Tamerlan rushes the police,  
16 Respondent gets back in the stolen SUV and,  
17 instead of just driving away, he does a  
18 three-point turn, he comes back at the  
19 confrontation, the police officers get -- manage  
20 to get out of the way, but he runs over  
21 Tamerlan.

22           He then destroys his phone so that he  
23 can't be located and hides out in the --  
24 someone's backyard in a boat, where he writes a  
25 manifesto justifying his jihadist acts. That's

1 all the evidence that the jury heard that was  
2 admissible evidence that came in in this case.

3 And the jury's nuanced verdict in this  
4 case was based on that evidence, not anything  
5 about pretrial publicity or anything about  
6 Waltham.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 11:34 a.m., the case in  
11 the above-entitled matter was submitted.)

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