SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES UNITED STATES,) Petitioner,) v.) No. 20-443 DZHOKHAR A. TSARNAEV,) Respondent.)

Pages: 1 through 99
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1 IN THE SUPREME COURT OF THE UNITED STATES 2 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 3 UNITED STATES,) 4 Petitioner,) 5) No. 20-443 v. 6 DZHOKHAR A. TSARNAEV,) 7 Respondent.) 8 9 10 Washington, D.C. 11 Wednesday, October 13, 2021 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 10:00 a.m. 16 APPEARANCES: 17 18 19 ERIC J. FEIGIN, Deputy Solicitor General, Department 20 of Justice, Washington, D.C.; on behalf of the 21 Petitioner. GINGER D. ANDERS, ESQUIRE, Washington, D.C.; on behalf 22 23 of the Respondent. 24 25

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1 PROCEEDINGS 2 (10:00 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 20-443, 4 Tsarnaev versus -- United States versus 5 6 Tsarnaev. 7 Mr. Feigin. ORAL ARGUMENT OF ERIC J. FEIGIN 8 ON BEHALF OF THE PETITIONER 9 10 MR. FEIGIN: Thank you, Mr. Chief 11 Justice, and may it please the Court: 12 After watching video of Respondent by 13 himself personally placing a shrapnel bomb 14 behind a group of children at the Boston 15 Marathon, the jury in this case returned a 16 nuanced verdict unanimously recommending capital 17 punishment for that specific deliberate act. 18 The court of appeals should have let 19 that verdict stand. Instead, it unearthed a 20 previously unmentioned supervisory rule to 21 invalidate a careful and lengthy jury selection 22 process that a prior panel had praised. 23 That process reasonably favored 24 individualized voir dire over focusing every 25 prospective juror on pretrial publicity through

rote content questioning that would have been
 unhelpful.

3 The court of appeals then again usurped the district court's discretion by 4 insisting that the jury had to hear unreliable 5 6 hearsay accusations against Respondent's brother 7 by a dead man with a powerful motive to lie. We'll never know how or why three drug 8 dealers were killed in Waltham in 2011, and none 9 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 2.2 judgment against a motivated terrorist who 23 willingly maimed and murdered innocents, including an eight-year-old boy, in furtherance 24 25 of jihad.

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1 One point I --2 JUSTICE THOMAS: Mr. Feigin, one question before you get too deep into your 3 argument. What test should we use? The -- the 4 First Circuit said that it was exercising its 5 supervisory authority. What test would --6 7 should we use to review that exercise of authority or to limit that authority? 8 MR. FEIGIN: Well, I think there are 9 two separate questions there, Justice Thomas, 10 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 harmless error would result in a judgment in the 14 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 its own supervisory power, would find that rule 20 21 reasonable. 2.2 As to the first question, I think the 23 fundamental problem with this rule is that it divests district courts of discretion that this 24 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

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1 Rosales-Lopez. It's why the court of appeals 2 left the quilt verdict in place here. 3 And I think the same analysis ought to apply to the penalty phase verdict. You had a 4 two-year gap between the events and the trial. 5 6 Most of the publicity, as the court of appeals 7 acknowledged, was factual. Most of it related to guilt, which Respondent, in fact, conceded. 8 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 predisposition to impose a capital sentence --21 2.2 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 you accept to some extent the supervisory 3 authority of the First Circuit, what would be 4 your rule for reviewing the exercise of that 5 6 authority? 7 MR. FEIGIN: Your Honor, I think, if the -- if the Court accepts that the court of 8 9 this, I -- I think this Court ought to just be

appeals can dictate to district courts how to do 10 11 reviewing the rule to see whether that was a 12 sound and reasonable exercise of the rule, bearing in mind that it is an exercise of 13 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 supervisory authority in the sense that normally 21 2.2 that authority is exercised, say, on local 23 procedures or something like that? Or are you saying that we should review it in this area for 24 25 something like reasonableness?

MR. FEIGIN: Well, Your Honor, I -- I 1 2 think you could do, frankly, either. I think, 3 at the threshold, the Court ought to ask whether the court of appeals exceeded its authority in 4 even enacting such a rule. 5 If you look at the Court's decision in 6 7 Payner, it -- it is a clear expression by this Court that courts of appeals shouldn't invoke 8 9 their supervisory power as an end-around to the reasoning of this Court, which is, I think, what 10 11 the court of appeals had -- has done here. 12 The second way you could look at it, Justice Thomas, is more of a whether assuming it 13 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 had the authority to enact some rules in this 18 19 area, enacting a hard-and-fast rule like this 20 that would at least be rigid enough to divest the experienced district judge in this case of 21 2.2 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

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1 individualized voir dire and that the questions 2 might even be counterproductive by focusing the prospective jurors on something that the judge 3 was at the same time instructing them that they 4 should disregard, to the extent the rule is that 5 6 wooden and that rigid, it is an unreasonable 7 supervisory rule, Justice Thomas. JUSTICE ALITO: Well, to go back to 8 9 the beginning of your answer to Justice Thomas, do you dispute the authority of the courts of 10 11 appeals to issue some requirements under its 12 super -- under their supervisory power? MR. FEIGIN: Not as a -- certainly not 13 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 2.2 following this Court's cases, which appear to presume that this Court has some supervisory 23 24 power and have an especially --25 JUSTICE BARRETT: Well, our

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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 assumed in some cases that courts of appeals 4 have it, relying on our precedents? 5 6 MR. FEIGIN: Yeah. Your Honor, we --7 we haven't questioned whether courts of appeals generally have supervisory power. I suppose one 8 9 other way to decide this case in the government's favor would be to take issue with 10 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

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1 that talk about what courts are thinking about as adequate process, and they're not changing 2 3 outcomes. They're just saying to courts, before you exercise your discretion, make sure that 4 5 these things have happened. MR. FEIGIN: Well --6 7 JUSTICE SOTOMAYOR: So are you taking 8 -- are -- are you suggesting that we should take aim at those local rules? 9 10 MR. FEIGIN: No, Your Honor. Let me 11 just emphasize two quick points. As I 12 emphasized to Justice Barrett, we haven't questioned the court of appeals supervisory --13 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, I said -- it's said -- did we spend, I think, two or three paragraphs 19 20 talking about local rules? 21 MR. FEIGIN: Well, Your Honor, the --2.2 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. However, in Mu'Min, the Court did note 4 the existence of some supervisory rules in this 5 context. There might be a question as to how 6 7 far each of those rules at the time of Mu'Min would have extended --8 9 JUSTICE SOTOMAYOR: May --10 MR. FEIGIN: -- and whether they --11 JUSTICE SOTOMAYOR: -- may I change --12 MR. FEIGIN: -- would have covered this case. But I think the reasoning of Mu'Min 13 14 -- again, I'd point the Court back to page 424 15 of that decision -- makes clear that in exercising its own supervisory power, this Court 16 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. 21 I think it was inappropriate for the 2.2 court of appeals here to have a rigid, wooden 23 rule that dictates specific questioning --24 JUSTICE SOTOMAYOR: It wasn't --25 MR. FEIGIN: -- on pretrial --

1 JUSTICE SOTOMAYOR: -- all that rigid. 2 The rule was very simply stated in -- in 3 Patriarca, which was ask them questions about the kind and degree of publicity that's out 4 there, and the Court permitted degree, it 5 6 permitted people to tell how much they had read, 7 a little, a lot, or a moderate amount. But it didn't permit questioning as to 8 9 what kind of publicity, because there was a whole lot of different publicity here. 10 There 11 was publicity on the day of the event. There 12 was publicity the days after. There was 13 publicity about what major politicians and 14 others were suggesting the punishment should be. 15 There were interviews of victims. 16 There was a whole lot of different 17 kinds of publicity, and the district court -and the government objected when counsel 18 19 attempted to elicit that kind of information. That seems like an extreme control 20 over trying to figure out what someone --21 2.2 whether someone could have been influenced by that publicity. 23 MR. FEIGIN: Well, a -- a few points, 24 25 Justice Sotomayor. First of all, the government

did not always object, and if you look at pages 1 2 733 to 735 of the court of appeals appendix in 3 this case, you'll see the district court emphasizing that these questions would be 4 5 allowable on a juror-specific basis depending on 6 the kinds of answers the juror had previously 7 given. As to the different kinds of 8 9 publicity, Justice Sotomayor, they didn't 10 request any questions asking whether jurors had 11 seen specific types of publicity. And I think 12 the reason they didn't do that is because they 13 didn't want to focus the jurors on those kinds 14 of things, like what opinions people might have 15 expressed about the death penalty --16 JUSTICE SOTOMAYOR: So what was --17 MR. FEIGIN: -- in the case. 18 JUSTICE SOTOMAYOR: -- wrong with the 19 one question they wanted to ask, what stands out 20 in your mind about all that publicity? It seems 21 to me that that's not asking for details of 2.2 everything you've read but what has influenced 23 you or affected you enough for you to remember 24 it. 25 MR. FEIGIN: Well, I think, as --

1 JUSTICE SOTOMAYOR: That seems like a 2 totally appropriate question to me. 3 MR. FEIGIN: I think, as Respondent's own counsel pointed out -- and this is at page 4 480 of the joint appendix -- a question like 5 6 that is unlikely to be particularly useful in a 7 case like this because everyone saw the same 8 coverage, so they were all going to say the same 9 things: the carnage at the finish line, the chase in Watertown, the killing of Officer 10 11 Collier, the boat manifesto --12 JUSTICE SOTOMAYOR: Well, doesn't it 13 14 MR. FEIGIN: -- that Respondent wrote. 15 JUSTICE SOTOMAYOR: -- tell you 16 something someone who says something else? 17 MR. FEIGIN: Well --18 JUSTICE SOTOMAYOR: How about if a 19 juror -- if you ask a juror that and the juror 20 says, I listened to Victim X and that has haunted me, that certainly would be information 21 2.2 relevant to a defense attorney and even to the 23 prosecution. MR. FEIGIN: Well, Your Honor, I -- I 24 25 think I'd -- I'd push back a little bit on

whether there -- on the idea that there wasn't
 questioning that got at the kinds of publicity
 that the jurors had seen.

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

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

15 JUSTICE SOTOMAYOR: Mr. Feigin --16 CHIEF JUSTICE ROBERTS: Counsel, 17 the -- we call this or it's been called a 18 supervisory rule. Now, if I'm going to argue a 19 case in a circuit court of appeal, you look at 20 the rules. There's usually a little pamphlet 21 tell you these are the circuit rules. They --2.2 they may be supplemental to the court of appeals 23 rules.

24 What -- what makes this a rule? It 25 seems to me that it's really nothing more or

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less than a -- a precedent. I mean, is there a 1 2 collection of these supervisory rules somewhere? 3 This is Rule 22? What? MR. FEIGIN: Well, Your Honor, I --4 I -- I don't think I'm going to really dispute 5 6 what you just said. I think everyone was 7 actually taken by surprise that there even was such a thing as the Patriarca rule given that no 8 one had cited it in the district court, 9 10 including the court of appeals itself. When it 11 was reviewing jury selection procedures in a 12 mandamus petition about venue, it praised the 13 jury selection procedures and never once 14 mentioned --15 CHIEF JUSTICE ROBERTS: Is there --16 should we consider this requirement in any way 17 different from the way we consider any precedent because it's labeled a supervisory rule? 18 19 MR. FEIGIN: If anything, Your Honor, 20 I would give it less weight because it was dictum in Patriarca itself, which simply 21 2.2 affirmed the denial of a -- of a venue change. 23 So I really don't think --24 CHIEF JUSTICE ROBERTS: You know, if -- if -- if we issue an opinion and we write it 25

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1	and it has a particular holding, I think the
2	author would probably be very happy to say: You
3	know, our rule going forward is this. But
4	that's just saying it's it's a precedent. I
5	don't know attaching a label to it.
6	I mean, Justice Sotomayor is right,
7	there are are circuit rules governing a lot
8	of things and from minor, you know, file your
9	application on 8-and-a-half-by-11 paper, to
10	to more significant things.
11	But this is a rule of law. I don't
12	see what's gained by calling it a rule
13	MR. FEIGIN: Yeah.
14	CHIEF JUSTICE ROBERTS: a
15	supervisory rule.
16	MR. FEIGIN: I I agree with that,
17	Your Honor. And I think the reason for labeling
18	it such and the reason certain things are
19	labeled supervisory rules is they're advisories
20	going forward to district in this instance,
21	district courts to tell them that if they do not
22	do something in the future, they will be
23	reversed for
24	CHIEF JUSTICE ROBERTS: Well, we
25	MR. FEIGIN: not doing it.

1 CHIEF JUSTICE ROBERTS: -- tell them 2 that too, that if they don't follow this 3 particular rule of law in the future, they'll be reversed. I don't know that every one of our 4 cases governing district court practice is a 5 6 supervisory rule. 7 MR. FEIGIN: Yeah, I think it is particularly geared toward areas like case 8 9 management, where they're just trying to put 10 district courts on notice. I think that is a -- actually a fairly 11 12 poor characterization of Patriarca itself, which, as I said, kind of renders this as 13 14 something of an advisory note at the end of 15 deciding something else. So I'm not even sure 16 _ _ 17 JUSTICE ALITO: Well, isn't the --18 isn't the distinction that it's not based on the 19 Constitution and it's not based on a statute or a regulation? It is a prophylactic rule that is 20 21 adopted by the court for the purpose of 2.2 protecting a constitutional right, but it isn't 23 -- there is no -- there's no -- the proposition is not that this is required by the 24 25 Constitution. Is that the distinction?

MR. FEIGIN: Well, it's not -- I think 1 2 that is one distinction. It's not required by the Constitution. The Court's drawn that 3 distinction in this particular line of cases 4 where it's been somewhat stricter in reviewing 5 federal courts than it has been in reviewing 6 7 state courts. That's quite clear from -- from, for example, Mu'Min. 8 9 And if one accepts that courts of 10 appeals can impose their own supervisory rules 11 in this context, I think what they're labeling a 12 supervisory rule is just -- as I was telling the Chief Justice, just an advisement to district 13 14 courts that this is how you should do it. 15 But I think it definitely exceeds his

16 -- a court of appeals' authority to impose such 17 a rule that contradicts the way that this Court 18 has handled similar situations.

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

1 murders. 2 So I just thought I'd give you a 3 little bit of a hypothetical -- or maybe it's not a hypothetical, maybe it's just asking you 4 to assume something that you contest -- which is 5 assume for me that the evidence was very strong 6 7 that Tamerlan participated in and indeed had a leading role in the Waltham murders, all right? 8 So assume that the evidence is strong with 9 10 respect to that. 11 In that case, would the court have 12 committed reversible error by refusing to participate -- to admit that evidence? 13 14 MR. FEIGIN: Your Honor, I think that 15 would be a much more difficult case for us. 16 JUSTICE KAGAN: Yes. I'm just asking, 17 in that difficult case, would the court have 18 committed reversible error? 19 MR. FEIGIN: Well, Your Honor, 20 assuming -- and I -- one point I want to 21 emphasize is that in district court here, they did not assert -- this is pages 668 --2.2 JUSTICE KAGAN: Mr. Feigin --23 MR. FEIGIN: -- to 669 --24 25 JUSTICE KAGAN: -- could you just --

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1 MR. FEIGIN: Okay. I --2 JUSTICE KAGAN: -- answer the 3 question? 4 MR. FEIGIN: Your Honor, one point I'm 5 trying to make is it would depend whether there 6 was some assertion that Respondent was aware of 7 it, which is an assertion they did not make in district court. But --8 9 JUSTICE BREYER: I'm sorry, I thought 10 they -- I thought they did, but it was earlier 11 in the case. 12 JUSTICE KAGAN: Let's just assume --13 yes, I'm saying, you know, the -- the defendant was aware of it. Now answer the question. 14 15 MR. FEIGIN: If the defendant was 16 aware of it and there was strong evidence of it, 17 I think the district court should have let it 18 in. 19 JUSTICE KAGAN: Okay. And -- and --MR. FEIGIN: Neither of those was true 20 21 here. 2.2 JUSTICE GORSUCH: Then why --23 JUSTICE KAGAN: -- and I assume that 24 you say that because the evidence -- assuming it 25 was strong, the evidence clearly is -- you know,

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1	goes to a mitigating factor. The entire point
2	of the defendant's mitigation case was that he
3	was, you know, dominated by, unduly influenced
4	by his older brother, and that would have gone
5	to exactly that point. Is is that right?
б	MR. FEIGIN: Your Honor, if you had
7	the knowledge combined with the strong evidence,
8	I think that might have might well have done
9	it, particularly if it could have been done in a
10	streamlined fashion. But if you look at
11	JUSTICE KAGAN: Okay. So
12	MR. FEIGIN: pages 668
13	JUSTICE KAGAN: if that's true
14	MR. FEIGIN: to 669
15	JUSTICE KAGAN: Mr. Feigin if
16	that's true, Mr. Feigin
17	MR. FEIGIN: Yeah.
18	JUSTICE KAGAN: then your entire
19	case rests on the notion that this evidence just
20	wasn't strong enough, that it was too I don't
21	know what else to call it it it didn't
22	establish that Tamerlan had played a leading
23	role in the Waltham murders. That's what your
24	case is.
25	But how is that the job of a district

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1 court to evaluate, much less decide, that 2 question? I would have thought that once the 3 district court says this is obviously related to his sentencing defense, in other words, it goes 4 to his own culpability, it essentially confirms, 5 6 if it were true, the mitigating factor that he 7 was unduly influenced by his brother, at that 8 point, it's the job of the jury, isn't it, to 9 decide on the reliability of the evidence, to 10 decide whether it's strong evidence or weak 11 evidence that Tamerlan, in fact, played a 12 leading role in those other gruesome murders? 13 MR. FEIGIN: Well, Your Honor, just a 14 very quick threshold point. Again, there is the 15 knowledge issue here. And if you look at pages 16 668 to --17 JUSTICE KAGAN: I'm just --18 MR. FEIGIN: -- 669, you'll see they 19 didn't assert knowledge --JUSTICE KAGAN: -- I'm assuming the 20 21 knowledge issue. 2.2 MR. FEIGIN: -- in the district court. 23 Assuming knowledge, then --24 JUSTICE KAGAN: I mean, I --25 MR. FEIGIN: -- I think we --

1	JUSTICE KAGAN: I don't even know
2	that knowledge is all that important because,
3	even if he didn't know, the fact that his
4	brother was the kind of person who played this
5	leading role in these gruesome murders tells you
6	something about this the role he might have
7	played in this murder, irrespective of
8	knowledge.
9	But, at any rate, let's just assume
10	that he had knowledge.
11	MR. FEIGIN: So let me just say a
12	couple things directly responsive to your
13	question. One is everyone agrees that
14	reliability is an important consideration here.
15	If you look at pages 16 to 17 of their brief,
16	page 30 of their brief, they agree with that.
17	Then you have to balance that against
18	the probative value of this evidence. And I
19	don't think the evidence really would have added
20	much to the mix of information we already had
21	about, for example, who planned the Boston
22	Marathon bombing
23	JUSTICE KAGAN: I mean, think about
24	MR. FEIGIN: which was
25	JUSTICE KAGAN: what you're just

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1	saying, Mr. Feigin. This court let in evidence
2	about Tamerlan poking somebody in the chest,
3	this court let in evidence about Tamerlan
4	shouting at people, this court let in evidence
5	about Tamerlan assaulting a former student a
6	a a fellow student, all because that
7	showed what kind of person Tamerlan was and what
8	kind of influence he might have had over his
9	brother.
10	And yet, this court kept out evidence
11	that Tamerlan led a a a crime that that
12	resulted in three murders?
13	MR. FEIGIN: May I respond, Mr. Chief
14	Justice?
15	CHIEF JUSTICE ROBERTS: Certainly.
16	MR. FEIGIN: Your Honor, I think the
17	one thing to bear in mind is these crimes are
18	extremely different. They have the Waltham
19	crime, everyone agrees, did not involve
20	Respondent. It was very differently motivated.
21	It was even if you accept everything Todashev
22	said, it was a financial crime where the murder
23	was committed by knife in order to cover up who
24	had committed the robbery of three drug dealers.
25	That is a far cry from a sophisticated

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1 public spectacle that required reading 2 directions in a jihadist magazine on how to 3 build and construct bombs and deliberately placing them --4 JUSTICE KAGAN: I mean, it's different 5 6 7 MR. FEIGIN: -- at the finish line of the Boston Marathon. 8 JUSTICE KAGAN: -- it's different that 9 Tamerlan yelled in a mosque, and it's different 10 11 that Tamerlan assaulted a fellow student, and 12 it's different that Tamerlan yelled at people, but all of this was admitted to show what kind 13 14 of person Tamerlan was and what kind of 15 influence he had over his brother. And yet, the court, again, you know, 16 17 refuses to admit evidence of a gruesome 18 murderous crime in which, according to the 19 evidence that was kept out, Tamerlan had extraordinary influence over a co-felon in 20 getting him to -- you know, to murder three 21 22 people. 23 MR. FEIGIN: Your Honor, Todashev 24 denied murdering. He says he was out by the CRV 25 when all of this happened. And this is very

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1 unreliable evidence because Todashev had every 2 incentive to pin this entire thing on Tamerlan, who at that point was already dead and they knew 3 they were looking for him. I'd encourage the 4 Court to read the transcript of the interview. 5 According to Todashev -- and I think 6 7 this is page 947 of the joint appendix --Tamerlan says to him, okay, if you will not kill 8 them, I will do it. 9 10 JUSTICE KAGAN: Isn't that exactly the 11 kind of thing that the -- that the prosecutor 12 would have said to the jury about why they shouldn't believe that evidence? But isn't this 13 a classic case in which the evidence understood 14 15 one way is highly relevant to a mitigation defense, and the evidence understood in the way 16 17 you just suggested, you know, just says that's -- that -- that -- you know, that's -- that's 18 crazy, it didn't happen that way? But that's 19 20 what a jury is supposed to do, isn't it? 21 MR. FEIGIN: Your Honor, unlike the 2.2 other evidence that you have cited, there was 23 going to be no cross-examination here. The only 24 people who might have known what happened in 25 Waltham were Todashev, who admitted to some

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1 participation, and possibly Tamerlan, and both 2 of them were dead. 3 This investigation had hit the end of the road. There was no -- there was no way to 4 figure out what happened. The district court 5 6 reasonably determined that. We're here on abuse 7 of discretion review. 8 And, moreover, I think everyone agrees 9 that this is subject to harmless error analysis. 10 And if you look at all the other details that 11 the jury heard -- and I'm happy to list them all 12 _ _ JUSTICE SOTOMAYOR: Mr. Feigin, how --13 14 CHIEF JUSTICE ROBERTS: Mr. Feigin --15 MR. FEIGIN: Yeah. 16 CHIEF JUSTICE ROBERTS: -- along the 17 same lines, the -- you say on page 39 of your brief that under the Federal Death Penalty Act, 18 19 the countervailing interests that would justify 20 excluding evidence, you can do that if they 21 outweigh the information's probative value. 2.2 And you note that, on the other hand, 23 under the Federal Rule of Evidence, if the 24 countervailing interests substantially outweigh, do you really think that's a difference in 25

1 practice? 2 I thought that we err the other way, 3 that under the Federal Death Penalty Act, we want the countervailing evidence that would 4 affect the sentence to come in more easily than 5 6 we would with respect to general Rules of 7 Evidence? MR. FEIGIN: If I -- if I could, two 8 9 -- two points in response to that, Your Honor. 10 First, I actually think it does make a 11 difference because Rule 403, which has the word "substantially" in it, exists as a backstop to 12 bolster other Rules of Evidence that already 13 14 ensure reliability, like the hearsay rule and 15 the best evidence rule, whereas Section 3593(c) 16 substantially lowers the bar for the admission 17 of evidence in the penalty phase of a capital 18 trial but nevertheless leaves the district court 19 with some tools to ensure fundamental 20 reliability and ensuring that the -- the evidence is going to be appropriate for the 21 2.2 case. 23 And the second point I would -- I 24 would make is just what negative effect, I 25 think, introducing the evidence here would have

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1 had. It would have sidetracked the proceedings 2 and consumed a disproportionate amount of it 3 focusing on Tamerlan, not Respondent. 4 And everyone agrees -- and, again, 5 this is at page 668 of the joint appendix, which 6 is their response to the government's motion in limine to seek to exclude this -- that there 7 isn't -- this isn't just a comparison game where 8 9 the jury's invited to decide whether Tamerlan or Respondent is a worse person and decide that 10 11 capital punishment is only appropriate for that 12 person. 13 CHIEF JUSTICE ROBERTS: Thank you. 14 Thank you, counsel. 15 MR. FEIGIN: Okay. Thank you. 16 CHIEF JUSTICE ROBERTS: Justice 17 Thomas, anything further? 18 JUSTICE THOMAS: Nothing. 19 CHIEF JUSTICE ROBERTS: Justice 20 Breyer? JUSTICE BREYER: Consider everything 21 Justice Kagan asked, a -- a question. This was 22 23 their defense. They had no other defense. They agreed he was quilty. Their only claim was, 24 25 don't give me the death penalty because it's my

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1 brother who is the moving force. 2 And isn't there a -- one, I think she's pointed out a certain difference between 3 evidence that was introduced about the brother, 4 i.e., he shouted at the barber or the butcher --5 6 I think it was the butcher -- et cetera, and 7 this evidence, which happens to be an affidavit 8 which says he murdered three people, including 9 one of his closest friends, by slitting their 10 throats. Okay? 11 Now it seems to me there's a 12 difference. Does the government think there's a difference? Well, the government took 13 Todashev's affidavit and used it to show 14 15 probable cause to search a car. Now, if the government thinks it 16 17 stands up enough to show probable cause at 18 least, isn't it enough to get into a death case? 19 When was the last time there was an execution in 20 Massachusetts? I mean, and as far as his knowing 21 2.2 about it, the lawyer, what's his name, 23 Kadyrbayev, all right, that's a complicated 24 name, but it's a simple point. There was 25 evidence in this trial, though introduced

1 before, where he said that -- that is, he was 2 the friend, and the lawyer said, Kadyrbayev, the 3 friend, says that he did know about it. Nobody denied that he knew about it. 4 All right. So -- so those, I think, 5 6 were the points that Justice Kagan was trying to 7 make. And unless there's a much tougher rule of mitigating evidence in a death case than there 8 9 is to show probable cause to search a car, why doesn't this come in? 10 11 MR. FEIGIN: Well, Your Honor, there 12 were a couple of questions packed in there. Let 13 me respond to the warrant affidavit question and 14 also the Kadyrbayev proffer question. 15 On the warrant affidavit question, if 16 you look at page 996 of the joint appendix, 17 which is the warrant affidavit, the agent 18 doesn't endorse any of the details of Todashev's 19 story. He says that he believes there's 20 probable cause to believe that Tamerlan and 21 Todashev planned and committed the Waltham crime 2.2 but without saying that Tamerlan necessarily 23 played a lead role. And this Court made clear in Franks 24 25 that simply quoting a third-party's statements

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1 doesn't necessarily endorse them in the context 2 of an affidavit. And, moreover, as a more general matter, a warrant affidavit is a very 3 different inquiry into a very different thing. 4 The Court has emphasized, for example, 5 in Illinois against Gates, that there's a 6 7 qualitative difference between probable cause and proof by a preponderance -- even by a 8 9 preponderance of the evidence. And we're just 10 looking at reliability in that context for 11 reliability to investigate further, not 12 reliability to prove anything at trial. 13 On the Kadyrbayev proffer, I think 14 there's a very artificial aspect to the way that 15 this inquiry is -- is coming in at the appellate 16 stage because, at trial, I think the reason they 17 didn't focus on the Kadyrbayev proffer, which 18 they mentioned in the course of their discovery 19 motions but not as a reason to admit this 20 evidence, not as a basis for opposing the 21 government's motion in limine, is because they 2.2 never wanted Kadyrbayev on the stand probably because, to the extent anything in the 23 Kadyrbayev proffer was true, Kadyrbayev was 24 25 offering it to the government, so who knows how

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1	it would have come in.
2	And if you look a couple bullet points
3	down on JA 584, you will see that Kadyrbayev
4	also offered to testify that one month before
5	the bombing he had a conversation with
6	Respondent in which Respondent admitted that
7	he'd learned how to make bombs and was speaking
8	glowingly of martyrdom.
9	CHIEF JUSTICE ROBERTS: Justice Alito,
10	anything further?
11	Justice Sotomayor?
12	JUSTICE SOTOMAYOR: I do. Counsel,
13	this is a constitutional right to present
14	mitigating evidence. It seems to me that I'm
15	not sure how we would ever have an abuse of
16	discretion review of a solely on a district
17	court's decision not to permit a defendant to
18	put on a defense. It it has to be something
19	else because I don't know of any other situation
20	where you can deny a defendant a constitutional
21	right on a simple weighing.
22	But putting that aside, I'm also
23	unsure what the reliability of this information
24	is about when although you're saying that
25	they wouldn't have put in the evidence that the

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

10 The only issue would have been, what 11 did defendant think? And so I'm not sure 12 whether the relevancy issue that the district 13 court ruled on made any sense to me, but please 14 explain to me how we -- what would -- what 15 should be the standard of review, assuming a 16 constitutional right to present mitigating 17 evidence and assuming, as Justice Kagan showed, 18 this evidence was relevant to -- to how this 19 young brother might have reacted to the entreaties of an older brother who had already 20 21 committed jihad? 2.2 MR. FEIGIN: Well, Your Honor, the

22 court of appeals expressly found that abuse of 23 discretion review was the appropriate standard 25 of review, and Respondent hasn't taken issue

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1 with that in this Court.

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

In response, on page 669 of the joint 9 appendix, he says that the evidence should come 10 11 in even assuming arguendo he didn't know about 12 it. And that's the basis on which the district court decided to exclude the evidence. At page 13 14 650 of the joint appendix, the district court 15 says, I'm not letting this evidence in because 16 we fundamentally cannot tell what happened.

17 The district court did not understand 18 this to be a knowledge -- a question of 19 Respondent's knowledge, and I think that's one reason to review this with some deference to the 20 21 district court's rulings because, to require an 2.2 entire new penalty phase in this case, to force 23 all the victims to come back and testify, and have to reassess the -- the same sentence is, I 24 25 -- I think --

1	JUSTICE SOTOMAYOR: Mr. Feigin, part
2	
3	MR. FEIGIN: a less reasonable
4	JUSTICE SOTOMAYOR: part of the
5	problem is that the district court withheld
б	information, and so the defense attorney could
7	not proffer everything at once because it didn't
8	have full knowledge of what was there.
9	Now that they do, they can show us, A,
10	how pertinent that information was and, B, how
11	it could have dovetailed easily with what they
12	already had.
13	MR. FEIGIN: Well, Your Honor
14	JUSTICE SOTOMAYOR: You can't put the
15	
16	MR. FEIGIN: first of all
17	JUSTICE SOTOMAYOR: you can't put
18	the cart before the horse here. And the cart
19	before the horse was the denial of discovery.
20	MR. FEIGIN: Well, first of all, Your
21	Honor, I don't think that Respondent is alleging
22	that the government didn't disclose something
23	related to Respondent's own knowledge.
24	Second, to the extent that they want
25	to pursue further discovery, I think it just

emphasizes how this is really going to sidetrack
 the proceedings into investigation of a
 different crime.

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

9 Some of that evidence was disputed, but I think what is quite clear and what we put 10 11 into the record is that Respondent -- there was 12 evidence that Respondent told a friend he was 13 planning something with Tamerlan, there was 14 evidence that Respondent had sent messages and 15 tweets touting jihad, there was evidence that he 16 bought the gun from his drug dealer, there was 17 evidence he went to a firing range to practice 18 something -- excuse me, I -- I -- I meant to say 19 he told a friend he was doing something with 20 Tamerlan, not necessarily planning something 21 with Tamerlan. 2.2 CHIEF JUSTICE ROBERTS: Justice Kagan,

23 anything further?

24JUSTICE KAGAN: I do. I mean, here25are the mitigating factors that the court itself

1 put to the jury. The court was very well aware 2 of, as Justice Breyer said, the only argument that the defendant was making in this case, 3 which was an argument about undue influence and 4 an argument that although he did it and he was 5 6 guilty, that he should not get the death penalty 7 because he was unduly influenced by his brother. 8 And so the court put the following to 9 the jury: Here are the mitigating factors. The defendant acted under the influence of his older 10 11 brother. Whether because of the brother's age, 12 size, aggressiveness, domineering personality, 13 traditional authority as the eldest brother, or 14 other reasons, the defendant was particularly 15 susceptible to his older brother's influence. 16 The defendant's brother planned, led, and 17 directed the bombing. The defendant wouldn't have committed the crimes but for his older 18 19 brother. Now all of those -- that was the 20 21 entire case. Were those mitigating factors 2.2 sufficient to give him life in prison rather 23 than the death penalty? And yet, the court 24 keeps out evidence that the older brother

25 committed three murders in the way that Justice

1 Breyer explained? 2 MR. FEIGIN: Well, Your Honor, I -- I 3 think I've already gone through the way this came into the district court, but the other 4 thing I'd emphasize is I don't think their 5 theory on probative value is particularly 6 7 strong. I think, if this jury heard that 8 9 Respondent was aware or thought that Tamerlan 10 had committed a murderous act of jihad, it would 11 have expected him to be horrified, not to view 12 that as an affirmative reason to not only follow 13 him in jihad but to take an even more murderous 14 act by planting a bomb --15 JUSTICE KAGAN: Mr. Feigin, as your --16 MR. FEIGIN: -- at the Boston 17 Marathon. 18 JUSTICE KAGAN: -- as your brief says 19 multiple times in the voir dire context, this 20 jury actually produced a very nuanced verdict. 21 It said anything in any -- as to any acts that 2.2 the two brothers were together, that there --23 there were mitigating factors and death was not 24 the appropriate sentence. It was only the acts 25 where the older brother was not on the scene in

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1 which death was appropriate.

2	Now do you think it's possible and
3	that's all that has to be shown in such a case
4	that if all of this evidence about these
5	murders were produced, a jury that was obviously
6	sensitive to the issue of the relationship
7	between the two brothers and how that
8	relationship affected the defendant's actions,
9	do you do you think it's possible that that
10	jury would have said, you know, even when
11	Tamerlan was off the scene, the older brother,
12	he continued to exert an enormous influence
13	because this is a guy who walks into places and
14	murders three people?
15	MR. FEIGIN: Your Honor, there was no
16	evidence that Tamerlan physically intimidated
17	Respondent into doing anything. He he was,
18	in fact, physically separate when he planted his
19	bomb.
20	And as for the influence evidence, as
21	I've just said, I think the jury is much more
22	likely to have found this weighed against
23	Respondent, not as a mitigating factor in his
24	favor.
25	And lot a book in mind that this is a

25 And let's bear in mind that this is a

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1	jury who heard evidence about the boat manifesto
2	that Respondent wrote after he ran over Tamerlan
3	in which he justified his actions on the basis
4	of jihad and showed how proud he was of them,
5	and that's after he needn't worry about Tamerlan
6	at all. In fact, he thought he was dying.
7	JUSTICE KAGAN: Thank you, Mr. Feigin.
8	CHIEF JUSTICE ROBERTS: Justice Alito?
9	JUSTICE ALITO: Mr. Feigin, there's
10	really an interesting sort of evidentiary
11	question here, and I'd like your explanation of
12	the standard that applies.
13	This evidence is inadmissible many
14	times over in a regular trial, where we have
15	Rules of Evidence, but, at the mitigation phase
16	of a penalty of a capital case, maybe the
17	rule is anything goes.
18	And if that is the case well,
19	that's what I want to know. Is it really
20	anything goes? So suppose you there what
21	we had in this case was quintuple hearsay about
22	something that Tamerlan supposedly did years ago
23	in Russia. One person in Russia told another
24	person in Russia, who told another person in
25	Russia, down the line, that he did certain

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1 things. And that is admitted. 2 Then what can you do in response? Can 3 you then introduce evidence to show that it actually didn't happen? Or can you introduce 4 evidence to impeach the credibility of some of 5 these hearsay declarants? What -- what is --6 7 how is all this to be handled? MR. FEIGIN: Well, Your Honor, I think 8 those would be options. I -- I think one way to 9 10 look at this is, if you look at, for example, 11 the Court's decision in Green against Georgia, 12 that -- Georgia there maintained its hearsay 13 rules in the penalty phase of a capital trial. 14 And it had imposed the hearsay rule, and this 15 Court found that it had violated the defendant's 16 Eighth Amendment right in doing so. But, before it was -- before it was able to reach that 17 18 conclusion, it assured itself that the evidence 19 was reliable. 20 And I think that is a -- at least a 21 minimum floor that even the Eighth Amendment 2.2 would require. And at some point, some sort of 23 quadruple hearsay hypothetical that presumably 24 requires some translation from the original

25 Russian would -- might well exceed reliability.

1 And, here, what you had was evidence that nobody who is still alive would have been 2 3 able to attest to, unlike the other evidence that was heard in this case. 4 CHIEF JUSTICE ROBERTS: 5 Justice 6 Gorsuch. 7 JUSTICE GORSUCH: So, Mr. Feigin, on -- on the Waltham murders, we have to review the 8 district court's decision, maybe for abuse of 9 10 discretion, maybe for something else. And he 11 had to weigh, though, in his mind, on the one 12 hand, the relevance and, on the other hand, the potential for confusion under the statute. 13 14 And if you could just, putting all --15 aside all the hypotheticals, actually give me 16 the government's best argument on why it wasn't 17 relevant on the one hand and why it would have 18 caused confusion on the other? 19 MR. FEIGIN: Certainly, Justice I think there are -- now it has boiled 20 Gorsuch. down to a couple of theories of relevance. 21 2.2 One -- and I'll try and be as succinct as I can. 23 One is that it made it more likely that Tamerlan planned the crime. And as I said 24 earlier -- and I'm happy to expand on this if 25

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1 you want me to --2 JUSTICE GORSUCH: I understand their 3 theory. 4 MR. FEIGIN: Yeah. 5 JUSTICE GORSUCH: I just want to know 6 7 MR. FEIGIN: Okay. JUSTICE GORSUCH: -- your best 8 9 arguments on why it wasn't that relevant and why 10 it would have caused confusion. Those are the 11 two things you'd have to show. 12 MR. FEIGIN: Sure. I -- I -- I think 13 our theory on why it wasn't relevant necessarily 14 responds to their theories of why it was, which 15 is why I'm identifying their theory. 16 JUSTICE GORSUCH: I -- I -- let's spot 17 them that. Just --18 MR. FEIGIN: Yeah. 19 JUSTICE GORSUCH: -- as succinctly as 20 you can. 21 MR. FEIGIN: So we -- we don't think 22 it -- the -- even if Tamerlan had participated 23 in a separate crime, that, you know, assuming we had some reliable evidence of that, that it 24 25 really shows that he is more likely to have

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1 planned this different crime.

2	And as for influence, it really
3	doesn't show any physical influence because, of
4	course, Todashev opted out. And it, I don't
5	think, shows psychological influence because, in
6	order to conclude that, the jury would have to
7	infer that Tamerlan was actually involved, that
8	he did so as an act of jihad, which is not what
9	Todashev said, that Respondent knew about it,
10	that Respondent viewed that as essentially a
11	plus factor for following Tamerlan, not as a
12	significant detractor, finding out that his
13	government his brother is a jihadist
14	murderer, and that that would lead him to take
15	his own deliberate acts, of which there were
16	many, separate physically separate acts in
17	carrying out the Boston Marathon.
18	As to confusion, I think unreliability
19	of evidence is itself part baked into the the
20	confusion inquiry, and I think the jury would
21	this would have consumed a disproportionate
22	amount of the penalty phase proceeding, focusing
23	on Tamerlan, and it's supposed to be a

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proceeding that focuses on the individual

25 culpability and history of this particular

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1 defendant. 2 And I think it really would invite 3 precisely the kind of comparison game that everyone agrees would be inappropriate. The 4 jury was supposed to be focused on Respondent, 5 6 not on something Tamerlan might have done two 7 years earlier that was a quite different crime. 8 JUSTICE GORSUCH: Thank you. CHIEF JUSTICE ROBERTS: Justice 9 10 Kavanaugh. 11 JUSTICE KAVANAUGH: Mr. Feigin, at the 12 beginning of this entire line of questioning, 13 you were asked to assume away something, and I'm 14 confused because you were asked to assume away 15 what I think was the district court's reasoning 16 here, because the district court said, and I'm 17 quoting, there was "insufficient evidence to 18 describe what participation Tamerlan may have 19 had in those events." And "it is as plausible 20 that Todashev was the bad guy and Tamerlan was 21 the minor actor. There's just no way of telling 2.2 who played what role if they played roles." 23 Now what do we -- we review that analysis for abuse of discretion, correct? 24 25 MR. FEIGIN: I -- I agree, Your Honor.

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1	And I would just emphasize to the extent we're
2	looking at something different now, they've
3	suggested in their brief that maybe they wanted
4	to produce a more streamlined version of the
5	evidence where they just introduce knowledge and
6	the fact that Tamerlan was involved in some way,
7	that that itself is not what the district
8	court was
9	JUSTICE KAVANAUGH: But the district
10	court here
11	MR. FEIGIN: considering either.
12	JUSTICE KAVANAUGH: the district
13	court here was presented with this theory, and
14	the district court said, we don't know what
15	happened. There's been insufficient evidence of
16	who did what. And, therefore, the theory that
17	Tamerlan was the lead player in that is entirely
18	well, is unreliable because we don't know,
19	and Todashev had all the motive in the world to
20	point the finger at the dead guy to say that he
21	was the ringleader of slitting the throats of
22	the three drug dealers, right?
23	MR. FEIGIN: That's exactly right,
24	Your Honor. And one other thing I'd emphasize
25	is this wasn't even any sort of final confession

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1 from Todashev. This was basically interrupted 2 midstream when Todashev, after having talked to the officers, went back into, I believe it was 3 his kitchen, got a pole and tried to attack 4 them, and that's why Todashev was killed. 5 6 So I think it's just inherently 7 unreliable midpoint statement from someone who 8 was at least clearly somewhat unhinged and had 9 every reason to pin this on the person who had 10 committed the Boston Marathon bombing, along with his brother, the Respondent here. 11 12 JUSTICE KAVANAUGH: Right. So that's 13 the district court's theory. And then your 14 answers to the line of questioning were even 15 assuming that Tamerlan did play the lead role, 16 which we don't have evidence of, the district 17 court concluded, even assuming that, that still 18 gets into the comparison game that you said the 19 district court could conclude that's not the 20 right role -- the right analysis for the jury to take in a case like this? 21 2.2 MR. FEIGIN: That's correct, Your 23 Honor. I -- I -- I --24 JUSTICE KAVANAUGH: I just want to 25 make sure the premise -- I mean, the premise --

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1 MR. FEIGIN: Yes. 2 JUSTICE KAVANAUGH: -- was assumed 3 away --4 JUSTICE KAGAN: The premise was assumed away because that's the role of the 5 6 jury. JUSTICE KAVANAUGH: Well, I think it's 7 important to discuss the district court's 8 9 reasoning, and the district court said, we don't 10 know what happened. 11 And the district court -- I mean, 12 maybe to answer Justice Kagan's question, does the district court have a gatekeeping role here 13 or not? And maybe that's Justice Alito's 14 15 question too. 16 MR. FEIGIN: Well, just to be clear on 17 -- on, I think, the couple points you've raised, I -- I don't concede the premise. I -- I agree 18 19 with the way Your Honor, Justice Kavanaugh, 20 has -- has analyzed it. 21 And I also do believe, as I was 2.2 discussing most in depth probably with Justice Alito and a little bit with the Chief Justice 23 24 with respect to the statutory requirements in 25 3593(c), the district court does have a very

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1 important gatekeeping role here. 2 And I -- I don't really think that's 3 disputed. It's not really an anything goes regime, even in the penalty phase of a capital 4 5 trial. It is a much, much lower evidentiary 6 standard, everyone agrees, and the Eighth Amendment requires, but it's not -- it's not 7 8 anything goes. 9 And the district court reasonably 10 exercised its discretion here to keep out 11 inherently unreliable evidence that wasn't 12 especially probative and had a substantial risk of confusing the jurors, as I was just 13 14 explaining to Justice Gorsuch. 15 CHIEF JUSTICE ROBERTS: Justice 16 Barrett, anything further? 17 JUSTICE BARRETT: Mr. Feigin, I'm 18 wondering what the government's end game is 19 here? So the government has declared a 20 moratorium on executions, but you're here 21 defending his death sentences. 2.2 And if you win, presumably, that means 23 that he is relegated to living under threat of a 24 death sentence that the government doesn't plan 25 to carry out. So I'm just having trouble

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1 following the point. 2 MR. FEIGIN: Well, Your Honor, the administration continues to believe the jury 3 imposed a sound verdict and that the court of 4 appeals was wrong to upset that verdict. 5 If the verdict were to be reinstated 6 7 eventually, which will require some further proceedings on remand, there would then be a 8 round of collateral review, some time for 9 10 reviewing any clemency petitions. 11 Within that time, the Attorney General 12 presumably can review the matters that are currently under review, such as the current 13 14 execution protocol, and what we are asking here 15 is that the sound judgment of 12 of Respondent's 16 peers that he warrants capital punishment for 17 his personal acts in murdering and maiming 18 scores of innocents, and along with his brother, 19 hundreds of innocents at the finish line of the 20 Boston Marathon should be respected. 21 JUSTICE BARRETT: Thank you. 2.2 CHIEF JUSTICE ROBERTS: Ms. Anders? 23 ORAL ARGUMENT OF GINGER D. ANDERS 24 ON BEHALF OF THE RESPONDENT 25 MS. ANDERS: Mr. Chief Justice, and

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1 may it please the Court: 2 Under the Constitution, a death sentence is lawful only if it reflects a 3 reliable and reasoned moral judgment to the 4 offense and the defendant's culpability. That 5 6 bedrock principle was violated in two ways here. 7 First, the district court violated the First Circuit's longstanding voir dire 8 9 supervisory rule by refusing to learn whether 10 jurors had been exposed to inadmissible and 11 inflammatory publicity that could prejudice 12 their consideration of the death penalty. 13 Second and more fundamentally, the 14 district court violated the Eighth Amendment by 15 categorically excluding evidence that Tamerlan 16 robbed and murdered three people as an act of 17 jihad. That evidence was central to the 18 mitigation case. 19 The -- the defense's entire argument 20 was that Dzhokhar was less culpable because 21 Tamerlan indoctrinated him and then led the 2.2 bombings. Tamerlan's commission of the murders 23 supplied the key indoctrinating event by 24 demonstrating to Dzhokhar that Tamerlan had 25 irrevocably committed himself to violent jihad.

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1 That would have had a profound effect on 2 Dzhokhar, who was already enthralled to his brother and therefore would have felt intense 3 pressure to follow Tamerlan's chosen path and to 4 accept extremist violence as justified, and 5 6 Tamerlan's prior experience carrying out violent 7 jihad made him more likely to have led the bombings. 8 9 The evidence's exclusion distorted the 10 penalty phase here by enabling the government to 11 present a deeply misleading account of the key 12 issues of influence and leadership. 13 The government argued that Tamerlan was merely bossy. The Waltham evidence showed 14 15 that wasn't true. 16 The government argued that Tamerlan 17 did no more than send Dzhokhar a few extremist 18 articles. The Waltham evidence showed that 19 wasn't true. 20 The government argued that the brothers were equal partners because Tamerlan 21 2.2 had not succeeded in jihad until Dzhokhar joined 23 him. The Waltham evidence showed that wasn't true either. 24 25 But the defense couldn't make any of

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1 those points. A sentencing proceeding where the 2 defense is not permitted to make its fundamental mitigation argument and to rebut the 3 government's aggravation arguments cannot result 4 in a reliable and constitutional death sentence. 5 Now I'd just like to start where the 6 7 Court left off with my friend, Mr. Feigin, with the government's acknowledgment that this 8 evidence should have come in. 9 10 If -- if -- if Dzhokhar knew about it 11 and if there was evidence that Tamerlan did it, 12 I think that's exactly right. But the key point here is that the test for relevance is the 13 14 permissible inferences that the jury can draw 15 from this evidence. 16 And so I think the district court 17 committed legal error here by saying that --18 that the evidence lacked any probative value at 19 all, and I don't understand the government to 20 defend that position. 21 I think the far stronger inference 2.2 here from the evidence was that, in fact, 23 Tamerlan had a significant role in these 24 murders. We know that because not only did 25 Todashev say that, but there's ample

1 corroborating evidence which we've gone through 2 in our brief that starts with Dzhokhar's own statement to his friend that Tamerlan committed 3 these murders and committed them as an act of 4 iihad. He would not have said that if this had 5 been a minor role. 6 7 We know that Tamerlan was the one to review just a few weeks before the murders the 8 extremist teachings of Anwar al-Awlaki, 9 advocating robbing non-believers as a form of 10 11 jihad. That provided the extremist motivation 12 for this offense. We know that Tamerlan was the one who 13 14 knew Brendan Mess, the primary victim here. 15 There was no evidence that Todashev did. And, 16 of course, Tamerlan's involvement is 17 corroborated by a computer search history which shows that either Tamerlan or his wife within a 18 19 few days of the murders searched for Tamerlan's name in connection with the murders. 20 21 I think there's ample corroborating 2.2 evidence here the far more likely inference, the 23 far more plausible inference for a juror to draw 24 would be that Tamerlan was involved in these crimes, that he played a significant role, and 25

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1	and that Dzhokhar knew about that. We know
2	that from
3	JUSTICE ALITO: Can a
4	MS. ANDERS: Dzhokhar's post
5	JUSTICE ALITO: can a a trial
б	judge at the penalty phase of a capital trial
7	ever exclude mitigating evidence that meets the
8	very low standard of relevance on the ground
9	that it is highly unreliable?
10	MS. ANDERS: Yes. I believe the
11	Eighth Amendment would permit a district court
12	to do that. I think the the way the way
13	the framework works, I think, is that once
14	evidence is relevant and reliable, then the
15	Eighth Amendment constrains the district court's
16	discretion to exclude it on on other grounds.
17	JUSTICE ALITO: So the
18	MS. ANDERS: But I think
19	JUSTICE ALITO: the judge can make
20	a determination of reliability?
21	MS. ANDERS: Absolutely. And the test
22	for reliability is minimal indicia of
23	reliability. That's what all of the lower
24	courts have used in determining whether evidence
25	should come in in a capital sentencing, minimal

1 indicia of reliability.

2	And I think whether evidence satisfies
3	that is a mixed question of law and fact. I
4	think it turns on whether the evidence has
5	corroboration or other indicia of reliability.
6	And I think, here, the district court committed
7	legal error by because the corroborating
8	evidence, the government has not disputed,
9	right these other these other evidence
10	that we talk about in our brief, the government
11	has not disputed the reliability of it because
12	this
13	JUSTICE ALITO: All right. Let
14	where the minimum evidence of reliability
15	minimum standard of reliability is met and what
16	is at issue is a a a another crime,
17	another event, different from the one that's on
18	trial, to what degree can the prosecution then
19	respond by introducing evidence that disputes
20	the version of the other event that is that
21	is proffered by the defense, and to what degree
22	can the prosecution respond by impeaching the
23	reliability of the hearsay declarants who
24	provide the mitigating evidence?
25	In other words, at a trial, you you

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1 don't have these mini-trials. If -- if a 2 person's on trial for murder X, you don't have a 3 trial about murder Y and murder Z. But to what degree can a -- a trial judge in -- in -- at the 4 penalty phase say, we're not going to do this 5 6 because what would happen then is another trial 7 within this trial about what happened at -- at Waltham? 8 MS. ANDERS: Well, I quess I would 9 10 push back against Your Honor's point that -that this sort of evidence of another crime 11 12 never comes in, and I think that will enable me 13 to answer the rest of your question. 14 So I think, actually, unadjudicated 15 crimes evidence is a staple of capital 16 sentencing proceedings and often comes in in 17 aggravation. The prosecution --18 JUSTICE ALITO: No, well, I'm --19 MS. ANDERS: -- offers it and at that 20 point --21 JUSTICE ALITO: -- I was talking about 2.2 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 the case that if the defense puts in anything 3 that's relevant and it has minimum evidence of 4 reliability, then you -- you're off to the races 5 and you have a mini-trial about this other 6 7 event? Or is it one-sided? The defense gets to put in this minimally reliable evidence, but the 8 9 prosecution cannot respond? 10 MS. ANDERS: Well, two -- two points 11 in response to that. I think the first would

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

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.

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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 more evidence should come in at the capital 4 sentencing phase, not less. And that's because 5 6 we think the jury will make a more reliable 7 sentencing determination if the jury gets to see the evidence. The Fourth Circuit said this in 8 Runyon -- it's cited in our brief -- that the 9 jury, not the judge, is the primary arbiter of 10 11 reliability at the sentencing phase. 12 So while --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 be excluded if its probative value is outweighed 21 2.2 by the danger of creating unfair prejudice, 23 confusing the issues, or misleading the jury -jury -- the jury. 24 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 Evidence as a statement against interest or, I 3 guess put differently, the hearsay rules 4 wouldn't keep it out doesn't mean that the 5 district court wouldn't have discretion under 6 7 403, under a very similar standard as this, to keep it out. 8

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 18 the way to think about reliability here is that 19 the district court committed legal error by 20 finding that the corroborating evidence here 21 didn't rise to the level of the minimal indicia 2.2 of 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,

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1 of course, the hearsay rules are designed to reflect what we think of as more reliable 2 statements that should come in. 3 JUSTICE BARRETT: But, regardless of 4 reliability and -- and reliability under the 5 6 hearsay rules, we still have 403 and, in -- and, 7 in fact, you know, the court was weighing -- it was weighing, you know, the risk of prejudice, 8 9 unfair prejudice, against its probative value, which the district court thought was nil. 10 11 So put aside reliability for a minute. 12 And I want to know -- because this seems to be, you know, the -- the gravamen of Justice Alito's 13 14 question and of what the district court did. Tt. 15 was saying this would spin off into a 16 mini-trial. Its probative value was low. Ιt 17 would confuse the jury and it wouldn't add much. 18 Are those legitimate grounds for excluding the evidence under the Federal --19 20 Federal Death Penalty Act and the Eighth 21 Amendment? 2.2 MS. ANDERS: Well, those are obviously 23 the grounds that the Federal Death Penalty Act allows district courts to -- to consider. 24 But 25 let me just sort of break down how I think that

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1 that works here.

2	So, with respect to confusion, I think
3	that ordinarily one would review a district
4	court's conclusion that evidence might be
5	confusing deferentially, but I don't think
6	that's the case here, and the reason for that is
7	that the court first said this evidence has no
8	probative value, it is completely irrelevant.
9	So I think the confusion ruling that
10	the district court reached is bound up, follows
11	directly from, its relevance ruling. And so the
12	you can't separate the two. And because of
13	that, the district court never did any weighing
14	here under the FDPA. It said the evidence is
15	completely irrelevant. That that's all it
16	really needed to find, right? There was no
17	weighing of countervailing considerations.
18	JUSTICE KAVANAUGH: I I think there
19	are two different theories here, though, for why
20	it should come in that you have, and correct me
21	if I'm wrong. One, emphasized more at trial,
22	was that Tamerlan had played a lead role in the
23	Waltham murders and, therefore, that was
24	relevant to show a lead role here. And the
25	district court said, as I quoted earlier, there

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1 was insufficient evidence to show or establish 2 or be probative of that theory at all. 3 A second theory, which I think you're emphasizing more here, is the mere fact that 4 Tamerlan committed another murder is itself 5 6 relevant. So suppose Tamerlan had committed the 7 Waltham murders by himself and it was undisputed. Would that be something that has to 8 9 come in in the death penalty trial here or the penalty phase of -- of his brother? 10 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 that he committed, he, the defendant, committed 17 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 2.2 theory, because that's not registering 23 completely with me. MS. ANDERS: Sure. So that's not the 24 25 -- the theory. The theory is that Tamerlan

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

And I think the first is that this was 8 9 the key indoctrinating event, right? Everything 10 else in the admitted evidence was just talk. Ιt 11 was just Tamerlan sent Dzhokhar a few -- a few 12 articles. This was the event by which Tamerlan demonstrated his absolute commitment to violent 13 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. In light of that, he would have felt tremendous 18 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.

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1 So, as I -- the whole dispute here between the government and -- and the defense 2 3 was, how did Dzhokhar radicalize, why did he radicalize? The admitted evidence, as I said, 4 was simply that -- that in terms of actual 5 persuasion, the only actual persuasion was that 6 7 Tamerlan had sent Dzhokhar a few articles. JUSTICE KAVANAUGH: Well, I thought 8 the evidence on how he radicalized was that he 9 read Inspire, Al Qaeda's magazine; he read Anwar 10 al-Awlaki's messages, and he became influenced 11 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 articles would exert any kind of influence. 20 21 So, in other words, if you're a 2.2 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

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1 article I thought you might be interested in. 2 The Waltham murders would have proven that that's not all that was going on between 3 the brothers. Tamerlan, at the time that --4 that Dzhokhar was attending freshman 5 6 orientation, Tamerlan was committing jihadist 7 murder. He demonstrated through that that he was absolutely committed, that he was 8 9 irrevocably committed to the point of murdering 10 his friend. And at that point, Dzhokhar would have faced a choice, does he follow, does he 11 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 here. So the admitted evidence showed that 18 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 2.2 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.

So the government was able to argue,

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1	look, Tamerlan's 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
б	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 from Justice Kavanaugh, as I understood
14	it, 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 its view who did what in the apartment, but I --4 JUSTICE GORSUCH: Oh, okay. So let's 5 deal with --6 7 MS. ANDERS: -- to the extent that the 8 9 JUSTICE GORSUCH: -- let -- let -let's -- let's pursue that then. 10 11 If the district court's theory was --12 the district court understood your theory to be that this evidence showed the brother's 13 14 leadership capacities and roles, and if -- if 15 the district court found that based on the evidence before it there's really no way to know 16 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

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1 with that theory. Let's assume that's the theory that -- that, you know, again, maybe I'm 2 3 unfairly asking you to put things aside, but, with respect to that theory, what's wrong with 4 the district court's conclusion? 5 MS. ANDERS: I think there are several 6 7 things. It's not a basis for categorical exclusion. I do think, you know, the -- the 8 9 first point would be that in --10 JUSTICE GORSUCH: Again, counsel, though, I -- I -- you're fighting the 11 12 hypothetical, and I understand that, but I'm --I'm -- I'm -- I don't like a lot of 13 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 would still be error because, even if that's the 20 21 theory, the district court, there was 2.2 corroborating evidence, I think, that suggested 23 a leadership role here and both parties pointed out to the district court that you could 24 25 analogize to the Federal Rules of Evidence that

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1 you might have a situation in which some things 2 come in but some things don't. And so I think that's why the Court erred in categorically 3 excluding this. 4 And I think the corroborating evidence 5 6 that would have suggested a leadership role 7 here, again, Tamerlan was the one who's steeped in jihadist materials, Tamerlan was the one who 8 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. Tamerlan is the one who -- he's the only one who 13 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 overcome the law enforcement officers. 18 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 2.2 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

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to the search warrant in which the government itself credited at least some of Todashev's statements, said these are appropriately accepted as true for Fourth Amendment purposes. That is what the government represented in that warrant. 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 SOTOMAYOR: 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 to have to have a trial, I mean, about whether 20 21 Todashev is lying about what the defendant 2.2 actually knew, about, about, about. Now your response to that -- this 23 24 trial has already gone on a long time. It'll go

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on for another year. Now what's your response

1 to that? 2 MS. ANDERS: So I have several responses to that. The first is that as -- as 3 we've said in our brief, that not all of those 4 Todashev statements would have had to be 5 admitted. I don't think that the jury needed to 6 7 reach definitive conclusions about who slit the throats in order to determine that Todashev 8 9 played a major role here and did so for jihadist purposes, so the Court would have had discretion 10 11 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. And, certainly, in this case, there 20 were other forms of -- of hearsay, there were 21 2.2 other FBI reports that came in where witnesses 23 described to the FBI their interactions with Tamerlan, and -- and -- and nobody thought that 24 25 the jury was going to get all tied up and it was

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

Everybody understood that what could happen was that the jury would evaluate those reports in conjunction with an instruction from the judge about how to evaluate them, the fact that they're hearsay, and then any corroborating 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. This -- this would be just as it actually 17 18 happened at trial, the government would get up 19 in its opening and closings and tell the jury what it thought the jury should take from --20 21 from this information. That would not be a 2.2 mini-trial. That -- that's just a little bit 23 more in an opening or a closing. JUSTICE SOTOMAYOR: Ms. Anderson, in 24

24 JUSTICE SOTOMAYOR: Ms. Anderson, in25 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 has to be, as I think some of your amici argue, 3 that the balancing has to be with respect to 4 aggravating evidence, that there is a different 5 standard of -- applicable to mitigating 6 7 evidence. It sort of doesn't make any sense to 8 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 creates a strong presumption that the evidence 18 19 should be admitted in some form. And -- and -- and so I think it would 20 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 narrower ways for a 25 district court to address whatever case

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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 just been talking about confusion. I
7	think, again, the government's confusion
8	arguments, I don't think, provide on their own
9	terms a basis 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

government to tell the jury in its opening and then again in its closing that influence was the "centerpiece" of the defense's case and that the government -- and that the defense had -- had presented "no evidence" -- that's another quote 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 term -- assuming it would change the 23 terms 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 know if he used the term or not -- but a 3 mini-trial, certainly, a -- a -- a detour into 4 something that, at the end of the day, there was 5 6 no basis 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 the determination is whether that -- whether that 10 was an abuse of discretion. 11 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 evidence. It would put the statement next to 18 the corroborating evidence, and it would decide 19 20 what it thought. And I think, here, we're not just 21 2.2 talking about Todashev's statement. I think 23 that's critical. We're talking about 24 corroborating documentary evidence, Dzhokhar's own statement that -- that Tamerlan did this. 25

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

7 And, again, this goes to a central aspect of the penalty phase. I mean, this was 8 the mitigation case. So I don't think this 9 could be an improper mini-trial here. It's the 10 11 trial, Right? This is the issue as to whether 12 Dzhokhar is going to get the death sentence or It's whether -- it's whether he was 13 not. 14 indoctrinated at Tamerlan's instigation and 15 whether Tamerlan was more likely to lead. 16 That's the only argument that the defense has. 17 And so I think the idea that it would 18 be an improper mini-trial to put on some hearsay 19 evidence when many other pieces of hearsay 20 evidence came in throughout this penalty phase from both sides and -- and have the jury 21 2.2 evaluate that in the context of corroborating 23 evidence, I just don't think that could be a mini-trial. 24

25 JUSTICE ALITO: Just to be clear, what

is your argument about the standard under the federal death penalty statute? Do you argue that the -- the balancing applies only to the aggravating evidence and not the mitigating evidence? If it applies to the mitigating evidence, do you argue that it's inconsistent with the Eighth Amendment?

MS. ANDERS: No, I think -- I think 8 the way that this works is that the FDPA sets a 9 10 very broad standard. And what the courts of 11 appeals have recognized is that, you know, 12 constitutional prohibitions on admitting aggravating evidence and then, of course, the 13 14 Eighth Amendment concerns about admitting 15 evidence, those also operate on the district 16 courts' discretion.

17 And so I think, under the Eighth 18 Amendment, which would -- would control in the 19 case of mitigating evidence, the court has 20 discretion, but, once evidence is relevant and 21 reliable, that discretion is limited. The 2.2 Eighth Amendment creates a strong presumption 23 that the evidence should come in in some form. 24 And I think that principle comes from both 25 Skipper versus South Carolina and Green versus

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1 Georgia. JUSTICE ALITO: Well, I -- I'm not 2 3 sure I really understand your answer. The statute says that the evidence may be excluded 4 5 if the probative value is outweighed by the 6 danger of creating unfair prejudice, confusing 7 the issues, or misleading the jury. Is that the standard for the exclusion 8 9 of mitigating evidence? 10 MS. ANDERS: I think the Eighth 11 Amendment will control when the -- when the 12 mitigating evidence is relevant and reliable, 13 and it will limit the discretion further. I 14 think that the courts of appeals have said the 15 exact same thing in the context of the Fifth --16 JUSTICE ALITO: I -- I --17 MS. ANDERS: -- and Sixth 18 Amendments --19 JUSTICE ALITO: -- still -- I don't 20 understand. 21 MS. ANDERS: -- when we're talking 22 about 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?

MS. ANDERS: I think the Eighth 4 Amendment, yes, provides a superseding limit on 5 6 discretion, just the way that other amendments 7 provide a superseding limit on discretion when 8 we're talking about admitting aggravating evidence. That's what the Second Circuit said 9 in Fell; it's what many of the other courts of 10 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 you are saying that that last phrase when we're 16 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 2.2 issues, et cetera, as a reason for excluding it? 23 MS. ANDERS: No, to be very clear, it can consider those issues. I just think that 24 25 the Eighth Amendment creates a strong

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1 presumption that those issues would have to be 2 extraordinarily weighty before they could --3 JUSTICE BARRETT: But it --MS. ANDERS -- justify --4 JUSTICE BARRETT: -- doesn't even say 5 6 "substantially outweigh" like 403 does. It just 7 says "outweighs." MS. ANDERS: Right, but I think the 8 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 to be extraordinary. They would have to be 13 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 about it that way, but I don't think that's how 21 2.2 _ _ JUSTICE BARRETT: But that is what --23 24 MS. ANDERS: -- the courts of appeals 25

JUSTICE BARRETT: -- you're saying? 1 2 MS. ANDERS: -- have thought about it 3 that way because --4 JUSTICE BARRETT: But -- but that's 5 your position, right? MS. ANDERS: I --6 7 JUSTICE BARRETT: Because the last sentence just says "outweighs," and it tells the 8 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 argument below that the -- the Federal Death 21 22 Penalty Act is unconstitutional? It -- it strikes me as kind of a -- a -- a new thing here 23 24 today. 25 MS. ANDERS: No. Again, I don't think

1 2 JUSTICE GORSUCH: Am I missing --MS. ANDERS: -- I don't think we have 3 to establish that the -- that the Eighth -- that 4 the FDPA is unconstitutional because the Eighth 5 6 Amendment just provides another constraint on 7 discretion. That's what we said below, that this was both an FDPA claim and it was an Eighth 8 Amendment claim. 9 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 have to get to it here because what the district 13 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 2.2 said, which was the point that this evidence 23 somehow is -- is double-edged. I just don't think, again, that that would be a basis for 24 25 exclusion here.

1 This is powerful mitigating evidence 2 that showed that Dzhokhar was indoctrinated at the instigation of his brother. I think we know 3 that influence and leadership are incredibly 4 powerful mitigating concerns because of what 5 happened in the D.C. sniper case. We know that 6 7 that was a situation similar to here, where Lee Malvo was a teenager at the time he committed 8 the offense, and -- and he was radicalized at 9 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 that he radicalized at someone else's 13 instigation was enough to warrant a life 14 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 more time if you'd like. MS. ANDERS: If the Court has further 20 21 questions. 2.2 CHIEF JUSTICE ROBERTS: Justice 23 Thomas? 24 JUSTICE THOMAS: If the government had 25 testimony that was almost exactly what you have,

but it occurred in, let's say, Roxbury or Dorchester, and Respondent was shown to be the leader there, and the government attempted to introduce that as an aggravator, what would your response be to the government? What would your reaction be to that?

7 MS. ANDERS: I think it would be very difficult to keep that evidence out for exactly 8 the same reasons, that it would be -- it would 9 be relevant. And -- and, of course, the 10 11 government often argue -- often offers evidence 12 just like this, right, or evidence just like Your Honor is -- is positing, evidence where we 13 think that the defendant has committed some 14 15 other offense and there's no way -- there's no 16 way to know with 100 percent forensic certainty 17 what actually happened. I think this is a --18 JUSTICE THOMAS: Even --19 MS. ANDERS: -- commonly --20 JUSTICE THOMAS: -- even though the 21 individual who disclosed it is -- has done 2.2 exactly what this individual did to the FBI, 23 where he's dead now, but he -- and he's dead 24 because he attempted to attack them? I mean, 25 you would think that would still be admissible?

1	MS. ANDERS: I think, certainly, the
2	defense could make those arguments, but, yes, I
3	think it would be difficult to keep it out for
4	exactly the same reasons, that the jury is the
5	primary arbiter of of reliability here, and
6	so the jury ought to hear that evidence. I
7	think that's what the lower courts have
8	generally held in the case of aggravating
9	evidence of unadjudicated crimes.
10	JUSTICE THOMAS: And I'd like to
11	excuse me ask you one question about the jury
12	selection. You said that this supervisory rule
13	had been in place for quite some time, and did
14	you suggest at least I got the sense that you
15	thought it was regularly applied. How often has
16	it been applied?
17	MS. ANDERS: Well, as far as we can
18	tell, the district courts for 50 years have
19	consistently complied with this rule. So, when
20	one or the other party has requested content
21	questioning, the district courts have have
22	done it. So it has not come up as an appellate
23	issue very much from what we can tell because
24	JUSTICE THOMAS: Is it is it
25	published any place other than the one opinion?

1 MS. ANDERS: Yes, the -- the First 2 Circuit has -- has relied on -- on the Patriarca rule a couple of times. It has said that it is 3 the standards of the circuit -- the standards of 4 the circuit in a case called Medina, and more 5 recently, it has reviewed voir dire against 6 7 Patriarca and has concluded that the voir dire complied with Patriarca. So, yes, this is 8 9 something that the First Circuit has applied 10 when it has come to it. 11 But, as I say, as far as we can tell, 12 generally, courts -- the district courts are --13 they are complying with this rule. And I think 14 that just reflects, you know, this is a routine 15 question that --- that's often asked and helps 16 the government, as well --17 JUSTICE THOMAS: And we have --18 MS. ANDERS: -- as the defense. 19 JUSTICE THOMAS: -- it -- we've 20 generally given the district judges -- district courts quite a bit of discretion in -- at the 21 2.2 jury selection stage. 23 Could the court of appeals displace 24 that with a list of mandatory questions that it 25 thinks should be asked in every single

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1	complicated or widely publicized case?
2	MS. ANDERS: Well, I think that
3	would that would present a a closer
4	question because the district court does have
5	discretion. But I think what the district court
6	did here was was well within this Court's
7	precedents both in the racial bias context in
8	Rosales-Lopez and also the Mu'Min decision,
9	where the Court said that this kind of
10	questioning is helpful.
11	And I guess I would just make the
12	point that, you know, this isn't a wooden rule.
13	This is this is a rule that the district
14	court has discretion to decide applies at the
15	outset, and then it has discretion to decide how
16	to apply it.
17	JUSTICE THOMAS: So how do we know how
18	far the court of appeals could go with
19	displacing discretion? I mean, how do you know
20	whether a rule is too detailed or there are too
21	many rules or too wooden?
22	MS. ANDERS: Well, I suspect it would
23	it would turn on something of a of a
24	functional analysis. I think the reason for
25	district court discretion is that generally we

think of a district court as a more -- better 1 2 placed, you know, to -- to decide what questions 3 to ask in the moment. What the Court said in Rosales-Lopez 4 is that there's nothing inconsistent about that 5 recognition and having, you know, some narrow 6 7 rules where eliciting more information is both a good idea and also serves judicial integrity. 8 9 So I do think there would probably be some point at which we would think that -- that 10 11 no longer is this serving the purpose it was 12 supposed to serve. But I think we're very far 13 from that here because, you know, this again is 14 a very narrow rule that follows directly from 15 Mu'Min and it's within the framework that the 16 Court announced in Rosales-Lopez. 17 JUSTICE THOMAS: Thank you. 18 CHIEF JUSTICE ROBERTS: Justice 19 Breyer?

20 JUSTICE BREYER: No.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan? Any further?

24 Justice Barrett?

25 Thank you, counsel.

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1 MS. ANDERS: Thank you. 2 CHIEF JUSTICE ROBERTS: Rebuttal, Mr. 3 Feigin. 4 REBUTTAL ARGUMENT OF ERIC J. FEIGIN ON BEHALF OF THE PETITIONER 5 MR. FEIGIN: Thank you, Mr. Chief 6 7 Justice. The Court's been quite generous with its time, and I just want to make three points, 8 9 one -- and they're all focused on Waltham because I think that's really the only thing 10 11 that Respondent's focused on at this point. 12 One is that my friend on the other 13 side analogized this Todashev statement to a 14 statement against interest. I don't think it 15 would come in under that rule because his own 16 admission to involvement in the crime would be, 17 but his attempt to pin it all on the dead man, 18 Tamerlan, the Boston bombing suspect, would not 19 be. 20 Second, they've -- and as far as 21 admissibility, they've really focused on this 22 indoctrination theory, and I think that is 23 really not especially probative of anything that 24 is mitigating here. 25 I mean, essentially, what they'd be

1 arguing to the jury is, yeah, Tamerlan sent all 2 this jihadist literature, but what really got me into the jihadist literature was learning that 3 what the end of the road in jihad is committing 4 murder, and, moreover, I want to amp that up by 5 committing murder at the finish line of the 6 7 Boston Marathon. I -- I don't think that is 8 9 particularly helpful or particularly probative for -- as -- as far as mitigation goes. 10 11 And I think that dovetails with the 12 third point I want to make here, which is it's 13 in some ways easy to view all this from an 14 appellate remove, which is what we're doing 15 here, but the easiest way to resolve this case 16 is simply on harmless error principles and think 17 about what the jury actually heard. 18 I don't think this comes through as 19 much in the briefs as if the Court takes a little bit of time, it'll only take a little bit 20 of time, to review some of the video evidence 21 2.2 that's included in the joint appendix. I particularly recommend Exhibits 22, 23 24 23, and 1304C, and what those exhibits show --I've already gone through some of the evidence 25

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1 about Respondent being involved in the planning 2 of the offense. But what those exhibits are going to show is Respondent physically 3 separating from his brother near the finish line 4 of the Boston Marathon, positioning himself 5 6 behind a group of children, putting down his 7 backpack -- you can't really quite see that part, but rest assured that he did it -- putting 8 down his backpack, contemplating for about three 9 10 minutes, taking out his phone and calling his 11 brother, after which the first bomb goes off. 12 So Tamerlan's clearly waiting for a 13 signal from Respondent. Respondent then, while 14 everyone in the Forum restaurant patio is 15 panicking and wondering what just happened --16 actually, they don't even know enough to panic 17 yet. Respondent walks off at a normal rate of speed, it's not a very wide-angle camera on the 18 19 Forum patio, so he barely gets off screen before 20 20 seconds later the second bomb explodes, killing and maiming people that were minutes 21 2.2 ago -- seconds ago, I'm sorry, wondering what 23 had just happened. If that's not someone who set off the 24 25 bomb himself or at least knew exactly when it

1 was going to go off and what its blast radius 2 was going to be, I -- I don't know what is. 3 Then, after the bombing, Respondent, who lives 60 miles away from Tamerlan, joins up 4 with Tamerlan for a daring escape in which they 5 kill an -- a police officer in cold blood in a 6 7 failed attempt to steal his firearm. They carjack and kidnap an innocent graduate student. 8 9 And then they engage in a violent shootout with police officers in Watertown during which 10 11 Respondent is lighting pipe bombs and throwing 12 them at the police. 13 Then, when Tamerlan rushes the police, 14 Respondent gets back in the stolen SUV and, 15 instead of just driving away, he does a 16 three-point turn, he comes back at the 17 confrontation, the police officers get -- manage 18 to get out of the way, but he runs over 19 Tamerlan. 20 He then destroys his phone so that he can't be located and hides out in the --21 2.2 someone's backyard in a boat, where he writes a 23 manifesto justifying his jihadist acts. 24 That's all the evidence that the jury 25 heard that was admissible evidence that came in

in this case. And the jury's nuanced verdict in this case was based on that evidence, not anything about pretrial publicity or anything about Waltham. Thank you. б CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted. (Whereupon, at 11:34 a.m., the case in the above-entitled matter was submitted.)

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